

ENABLE NETWORKS LIMITED SUBMISSION ON MBIE POST 2020 REGULATORY FRAMEWORK FOR FIXED LINE SERVICES CONSULTATION PAPER

1. Introduction

- 1.1 This submission is made on behalf of Enable Networks Limited (**Enable**) in response to the consultation paper *Post-2020 Regulatory Framework for Fixed Line Services* released by the Ministry for Business, Innovation and Employment (**MBIE**) in February 2017 as part of its review of the Telecommunications Act (Consultation Paper).
- 1.2 We commend MBIE on a carefully considered and well thought-out Consultation Paper, which builds on the September 2015 Discussion Paper and the July 2016 Options Paper. We are pleased to see that many of the issues we have raised during the consultation process to date have been recognised and addressed.
- 1.3 At a high level we agree with the regulatory approach proposed by the Consultation Paper level in all but one respect: the application of an efficiency test to past investments made in accordance with the UFB contracts.
- 1.4 In this submission we explain (in section 2) why it is inappropriate to apply an efficiency qualification to past UFB investments, and then focus on some matters of detail which we believe require further consideration.

2. Setting the initial RAB

- 2.1 The paper proposes that the Commission sets the valuation methodology, subject to a policy statement that the opening RAB be determined on unrecovered historic costs “*but only to the extent those costs have been efficiently incurred*”, including “*efficient costs of meeting specific requirements in UFB contracts*”. Accordingly, the current proposal is that Commission would be able to disallow costs incurred by LFCs in complying with the Crown contracts on the basis those costs were not “efficient”.
- 2.2 Financial losses incurred prior to 2020 from meeting specific requirements of the Crown contract can be included in the RAB, but again subject to the requirement that those costs are “*efficiently incurred*”.
- 2.3 The Cabinet Paper explains why the efficiency requirement has been imposed:

“Given the high certainty of recovery of investments under price/quality regulation, there is a need to mitigate the risks of over-investment and inefficient spending. I propose that the Commission will have a role in considering both the prudence and efficiency of past investments when valuing the initial RAB, subject to ensuring that costs incurred as a result of specific requirements of the UFB or UFB extension contracts, including ‘standard’ and ‘non-standard’ UFB installations, are included, and that the opening RAB value recognises financial losses incurred by UFB providers prior to 2020.”
- 2.4 We think that the analysis in the cabinet paper is flawed to the extent that it is applied to past investments made by us under the UFB contract. While we can understand the policy rationale for an “*efficiently incurred*” test being applied under price/quality regulation for future investments, it should have no application to the investments we have made to comply with our contract with the Crown.
- 2.5 That contract reflected government policy to embark on an ambitious and extensive infrastructure project establishing ultra-fibre broadband capability in a relatively short period of time. It also included scope and timing requirements, such as passing 90% of businesses and 100% of

schools and health organisations by 31 December 2015, and imposed minimum network build obligations to ensure the Crown's policy objectives were achieved.

- 2.6 If Enable had had total discretion on how the network was to be deployed, it would have made different decisions, which would have resulted in lower costs than those actually incurred. The actual costs incurred reflect the policy objectives which were incorporated into the Crown contracts, and should not be put at risk.
- 2.7 As former Commerce Commissioner Pat Duigan pointed out in his submission of 2 September 2016, the s52A purpose test is not well suited to give guidance to the Commission on how to set an initial RAB; this problem is compounded in our case by the Crown contracts.
- 2.8 In addition, the Christchurch earthquake created a unique set of challenges for Enable including
- a scarcity of resources resulting in high churn and increased unit rates; and
 - continued delays caused by conflicting projects replacing Christchurch's horizontal infrastructure.
- 2.9 As we have previously submitted, it would be contrary to the compact we have with the Crown under the UFB arrangements if there is any possibility that investments that we have made in good faith to meet the requirements of the Crown contracts could be disallowed.
- 2.10 In addition, the proposal would create high transaction costs. No matter what "efficiently incurred" test the Commission decided to adopt, it would at a minimum need, in a public consultation process, to carry out an extensive analysis of all our investment choices and the reasons for them and understand what alternative choices could have been made. We know from experience that the time and cost of such a process will be significant, and will result in a long period of uncertainty, and create unnecessary and unjustified investor risk.
- 2.11 For these reasons, we repeat our earlier submission that the legislation must provide that all investments made by Enable in accordance with the Crown contracts form part of the initial RAB.

3. Information Disclosure

- 3.1 We agree with the proposal that Enable be subject to Information Disclosure regulation only, with key parameters and requirements to be set out in legislation, and implementation requirements being defined by the Commerce Commission through its Input Methodologies processes.
- 3.2 We look forward to further consultation with MBIE on the key parameters and requirements for information disclosure to be set out in legislation, and engaging with the Commission on the detailed rules for implementation in its Input Methodology consultation.

4. The Purpose Test

- 4.1 In our September 2016 submission we argued (at 42 and 43) that the purpose statement in s52A was difficult to apply as the sub-clauses describe different purposes, some of which are contradictory. We invited consideration of a simpler purpose statement which replicated the stem of the existing s52A test, but did not carry over the sub-clauses.
- 4.2 While the Consultation Paper states that the new purpose statement will be "*based on the purpose statement in s52A of the Commerce Act*", it is unclear whether it is proposed to simply replicate the existing s52A with all its shortcomings.

We accordingly repeat our submission that consideration be given to a simpler purpose statement based on s52A, namely "*to promote the long-term benefit of end-users in telecommunications markets by promoting outcomes that are consistent with outcomes produced in competitive markets*".

5. The Intervention Test

5.1 Enable agrees with the proposal that, being subject to Information Disclosure, it should only have price/quality regulation imposed upon it “*should evidence emerge that ID regulation is not effective in deterring monopoly behaviour*”.

5.2 We also agree that an intervention test equivalent to that in s54H(2)(b) of the Act which applies to consumer-owned electricity business (that “*the Commission has recommended to the Minister that the purpose of this part would be better met if price-quality regulation were imposed on the supplier.*”) is an appropriate test for this purpose.

6. **Cooper Withdrawal Code**

6.1 Enable agrees with the proposal that a regulated code be implemented which sets out the basis upon which Chorus will have the option of withdrawing service and removing the copper network.

6.2 An essential element of the code should be a non-discrimination obligation, to ensure that the approach taken by Chorus in non LFC areas is applied equally in LFC areas.

6.3 The Government has stated that it “*believes that faster and better broadband services are critical to improving productivity in the economy, New Zealand’s global competitiveness and the lives of New Zealanders.*”¹ The expansion and development of broadband coverage is “*a vital component of New Zealand’s economic growth... and the government’s wider strategy to increase New Zealand’s global competitiveness, particularly compared to other OECD countries.*”²

6.4 To that end, the Government put in place the UFB Broadband Initiative with the following objective:³

To accelerate the roll-out of ultra-fast broadband to 75 percent of New Zealanders over ten years, concentrating in the first six years on ‘priority users’ such as businesses, schools and health services, plus greenfield developments and certain tranches of residential areas.

6.5 In order to ensure that this policy objective is achieved, it is essential that all New Zealanders have the same opportunity to benefit from the “*world of opportunities*”⁴ which high-speed broadband delivers, irrespective of whether they live in a Chorus or other LFC UFB area.

7. **Layer 1 Unbundling**

7.1 We agree with the proposal that the existing unbundling obligations on UFB providers set out in the existing Deeds be retained, with any regulatory intervention deferred until 2004, and then subject to further tests including UFB fibre uptake in excess of 65%.

7.2 We also agree with the proposal that unbundling cannot be subjected to regulation unless the Commission is satisfied, after investigation, there are reasonable grounds to do so, and the Minister accepts the Commission’s recommendation to this effect.

8. **Regulation of Copper Services**

¹ “Statement to the Commerce Commission Concerning Incentives for Businesses to Invest in Ultra-fast Broadband Infrastructure” (13 October 2011) 155 *New Zealand Gazette* 4440 at 4440.

² MBIE “Broadband and mobile initiatives” (2 June 2016) <<http://www.mbie.govt.nz/info-services/sectors-industries/technology-communications/communications/broadband-mobile-initiatives/?searchterm=ultra-fast%20broadband%2A>>.

³ MED *Regulatory Impact Statement – Ultra-fast broadband regulatory regime: Amendment to Model* (29 July 2010) <<http://www.mbie.govt.nz/info-services/sectors-industries/technology-communications/communications/broadband-mobile-initiatives/documents-image-library/ufb-regulatory-regime.pdf>>.

⁴ MBIE “The Ultra-Fast Broadband Initiative and getting connected” (26 January 2017) <<http://www.mbie.govt.nz/info-services/sectors-industries/technology-communications/fast-broadband/the-ufb-initiative-and-getting-connected>>.

- 8.1 Enable agrees with the proposal that Chorus' copper network not be subjected to price regulation in areas where UFB or other fibre is available, and that the Commission is provided with fast-track review powers in this regard.

2 March 2017

A handwritten signature in blue ink, appearing to read 'S Fuller', is positioned above a horizontal line.

Steve Fuller
Chief Executive
Enable Networks Limited