## Section 6 Public

## Section 6: Governance settings in other local fibre company constitutions consultation.

Enable welcomes the opportunity to submit on changes to our constitution.

On 23 February 2023 Enable, together with Northpower Fibre and Tuatahi First Fibre (**LFC**s) met with MBIE to confirm an agreement with MBIE to amend the LFC constitutions to remove the coverage area controls and references to expired CIP contracts. We also repeated our requests for more extensive changes which was confirmed in a joint LFC letter on 7 March 2023:

> We have presented MBIE with our views regarding the extent to which the controls in our constitutions extend beyond the scope of the Crown UFB contracts and Telecommunications Act 2001 (Parts 4AA and 6) (the **Act**) which were created to regulate the LFCs at the start of the UFB initiative. As a result, our constitutions prevent us from investing in growth, new technologies and complementary services unless we obtain the prior consent of the Government Shareholder (Minister of Finance).
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> The process for obtaining Government Shareholder consent is complicated, and time and resource consuming, despite the best efforts of everyone involved. For that reason, we believe the proposed consultation must also consider the removal of the government share controls in the LFC constitutions on the basis that there are proportionate controls in our Part 4AA undertakings and Part 6 regulatory framework to regulate our business line activities.

The specific changes Enable had in mind, and the reasons for the changes. are set out in the table below:

### Table: Schedule of Relevant Provisions in ENL Constitution

| Provision in Constitution | Reason for removal |
|---|---|
| ***Objectives*** | It is not common practice to define a company's objectives in a Constitution. With the network build being completed, and Crown funding repaid paragraph 3.1 should be removed from the Constitution for reasons set out below: |
| **3.1(a)** to roll out the fibre to the premises network in ENL's UFB coverage area to be completed by 31 December 2019 | **Obsolete**: Roll out has been completed and time period has expired |
| **3.1(b)** to generate uptake by building the network at a cost that can allow pricing of services that are competitive with alternative technologies | **Obsolete**: Network build has been completed |
| **3.1(c)** to maximize availability of layer 1 and layer 2 services within the UFB coverage area | **Unnecessary**. Obligation to provide layer 1 services is set out in the Undertakings. Having made the investment to build the network, there is an economic incentive to maximise the delivery of services. |
| **3.1(d)** to offer at a minimum specified layer 1 and 2, NBAP and colocation services | **Unnecessary**. Obligation to provide layer 1 services and co-location is set out in the Undertakings. Having made the investment to build the network, there is an economic |

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| | incentive to provide layer 2 and NBAP services. All services are subject to the WSA. |
| **3.1(e)** to provide the layer 2 services in the coverage area | **Unnecessary**: Having made the investment to build the network, there is an economic incentive to provide layer 2 services. Layer 2 services are subject to the WSA. |
| **3.1(f)** Objective to otherwise operate on a purely commercial basis | **Unnecessary:** Goes without saying. |
| ***Permitted scope of activities*** | |
| **3.2(a)(i)** deploy and make fibre available in the UFB coverage area | **Unnecessary**. Fibre has already been deployed. |
| **3.2(a)(ii)** provide services on an Open Access basis | **Unnecessary**. This obligation is set out in the Undertakings. |
| **3.2(a)(iii**) provide specified layer 1, layer 2, co-location and NBAP services to access seekers on request | **Unnecessary**. The layer 1 obligations are set out in the Undertakings. Having made the investment to build the network, there is an economic incentive to provide layer 2 and NBAP services, which are also subject to the WSA. |
| **3.2(a)(iv)** ENL may with CIPs consent provide other layer 1 and 2 services and any other services in relation to the Network which are not layer 1 or 2 services, subject to having obtained the prior approval of the Minister of Communications in the case to layer 3 or layer 4 services. | **Obsolete**. This provision was inserted to ensure that ENL focussed its sole attention of building the fibre network in its UFB area and was not distracted into other activities. With the network build having been completed and Crown funding repaid the restriction is no longer justified. |
| **3.2(b)(i)** ENL must, in conducting its business, comply with the Undertakings | **Unnecessary.** This obligation is set out in Part 4AA of the Act and the Undertakings. |
| **3.2(b))(ii)** ENL must, in conducting its business, comply with the CIP Deed | **Unnecessary and obsolete**. The CIP Deed obligations have expired. |
| **3.2(b)(iii)** ENL must, in conducting its business, comply with any Wholesale Services Agreement (**WSA**) to which it is a party | **Unnecessary**. ENL's WSA obligations are set out in the Undertakings (clause 8) and the WSA itself. |
| ***Restricted Activities*** | |
| **3.3** ENL must not provide any services other than those set out above. | **Obsolete**. This provision was inserted to ensure that ENL focussed its sole attention of building the fibre network in its UFB area and was not distracted into other activities. **Unnecessary** with the network build having been completed and Crown funding repaid. |
| **3.3** ENL must not provide services to an end user | **Unnecessary**. This obligation is set out in clause 7.4 of the Undertakings. |
| ***Limitations on ownership*** | |
| **4.9** No person who operates a Vertically Integrated Telecommunications Business (VITB) or has a direct or indirect retail presence in the New Zealand telecommunications market (nor a related or associated person) | **Unnecessary**: The Open Access provisions in the Undertakings address vertical integration issues, as any supply by Enable of telecommunications services to a person with a direct or indirect retail presence must be made on an equivalence basis. In addition, clause 7.4 |

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| may own shares in ENL without the prior written consent of the Minister of Finance | of the Undertakings prohibits Enable from suppling telecommunications services to end users. |
| ***Limitation on restructure*** | |
| **4.10** ENL may not become a VITB or have a direct or indirect retail presence in the New Zealand telecommunications market without the prior written consent of the Minister of Finance | As above |
| ***Government Share*** | |
| **4.7** The Government Share shall be registered in the name of a nominated Minister. A number of provisions in the Constitution (including those discussed above) cannot be amended, removed or altered in effect without the written consent of the Government Shareholder. | **Unnecessary:** No remaining restrictions requiring the consent of the Minister. |

On 28 April 2023 the Minister for the Digital Economy and Communications advised she and the Minister of Finance had agreed to an amendment to clause 3.2 of our constitution to remove the prohibition on our deploying fibre in other UFB LFC areas. The Minister also advised us that:

> In regard to the other changes that you are seeking, **particularly the alignment of the scope of the constitutions with the Deeds of Undertaking**, the Minister of Finance and I have decided to reserve decisions on these changes until officials have undertaken further work, including consultation, to inform their recommendations.
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> These requests will be considered alongside other telecommunications regulatory matters in a high-level issues paper that MBIE intends to release this year. Given that these issues, including the changes you have sought, are likely to have implications for other parts of the telecommunications sector, it is important that stakeholders have an opportunity to share their insights before we make final decisions on any changes to our regulatory settings.
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> I encourage you and your team to participate in this engagement process so that the views and experiences of the local fibre companies may be reflected in this important work.

Whilst we are pleased to see that some aspects are being considered, the current consultation on changes to our Constitution does not consider all the changes requested by LFCs. Many have not been touched upon, while others have been ruled "out of scope". In particular "*the alignment of the scope of the constitutions with the Deed of Undertaking*' is not discussed.

The reasons for change are now even more important, given the explosion of wholesale broadband competition from alternative unregulated alternative technologies, which puts us at an even greater competitive disadvantage than when we made our request.

We therefore invite MBIE to allow cross-submissions in this consultation process, noting the Minister's statement that "*it is important that stakeholders have an opportunity to share their insights before we make final decisions on any changes to our regulatory settings*."

## Issue 1: Governance of permitted business activities

**[27]** ***Do you agree that it is appropriate to consider changes to the constitutional settings that govern the other LFCs? Why or why not?***

Yes.

Our participation in the UFB initiative required specific restrictions be included in our Constitution to ensure we used the Crown (and our own) funding to focus solely on the build and operation of our UFB network. We have now completed the network build and we have repaid all the Crown funding, so the Constitutional restrictions have no further work to do.

Our activities are now governed by Part 6 of the Telecommunications Act 2001 (**Act**), which came into force on 1 January 2022, together with our undertakings to the Crown enforceable by the Commerce Commission under Part 4AA of the Act (**Undertakings**) which continue to apply.

Part 6 was intended to replace the contractual obligations between us and the Crown. Our other contracts with the Crown contained sunset provisions, but this was overlooked in the case of the contract with the Crown contained within our constitution.

In addition, the competitive forces present in broadband markets today have materially changed since 2010 and the restrictions put us a significant competitive disadvantage when confronting the challenge from unregulated alternative broadband technologies.

**[28]** ***Do you agree with MBIE's preferred option (option 2), which would allow the other LFCs to operate in any market, with a restriction on supplying telecommunications services to end users? Why or why not?***

We agree that there should be no constitutional restrictions on our ability to operate in other markets if our directors deemed it appropriate to do so but do not agree that the restriction in clause 4.3(b) of our Constitution which provides that we "*must not provide retail Services (using the Network) or Services directly to an end-user*" should remain in our Constitution.

The Discussion Document rules out any changes to clause 4.3(b) on the basis that this is "*a restriction that Chorus is also subject to*" but the rationale for this is incorrect. We are already subject to the same restriction as Chorus by virtue of Part 4AA of the Act and the Deeds of Undertaking (enforceable by the Commerce Commission) we gave to the Crown in 2011. Accordingly, there is no policy reason for repeating that restriction in a contract between us and the Crown as the Deeds of Undertakings take precedence over all other contracts entered into by us.

The Discussion Document rules this change out of scope because of "*the importance of the split between wholesaling and retailing fibre services to the regulatory regime*". This demonstrates a misunderstanding of the reasons for our request. As our letter to the Minister made clear, clause 4.3(b) of our Constitution was unnecessary because "*this obligation is set out in clause 7.4 of the Undertakings*". The removal of the clause will therefore not remove "*the split between wholesaling and retailing fibre services*" as the Discussion Document suggests.

Clause 4.3(b) of our Constitution is not in the interests of end-users. As drafted the restriction means that Enable cannot provide a service to an end user even though that service does not involve access to its fibre network (which is the restriction in the Act). Examples of services we would like to provide, but which are prohibited under our constitution include [ ].

If contrary to our submission the Minister is not prepared to agree to the removal of clause 4.3(b), we request that the clause must be amended to correct a drafting error that extends the prohibition beyond that contemplated by the Act. The Discussion Document is correct that the wholesale/retail split relates to fibre services, but the drafting of clause 4.3(b) extends this prohibition beyond fibre services, and the Discussion Document is not correct when it says that Chorus is subject to the same restriction as that in our constitution.

Enable's Part 4AA Undertakings contained the same drafting error as that in the constitution (both documents were drafted for the Crown by the same legal firm). S156AN of the Act provided a mechanism for the Commission to clarify the Undertakings and Enable sought and obtained an amendment of its Undertaking to correct this error. The Commission's reasoning was:

> [30] The definition of "Network" contained in the Deeds refers to "the fibre-optic communications network", and the definition of "LFC fibre network" contained in the Act refers to a "fibre-to-the-premises access network".
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> [31] We consider that "fibre-optic communications network" could be interpreted to be wider in scope than "fibre-to-the-premises access network". This interpretation is different to that provided for by Part 4AA of the Act.
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> [32] We consider that there is clearly some ambiguity in the definition of "Network" contained in the Deeds and that it is likely that the difference in terminology between "the fibre-optic communications network" and "fibre-to-the-premises access network" is inadvertent.
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> [33] We agree with the arguments made by the Applicants that the ambiguity in the Deeds gives rise to the potential for them to be read inconsistently with the Act, and this creates uncertainty.
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> [34] Accordingly, we consider that the Deeds require clarification to remove this potential ambiguity.

At a minimum therefore, it is imperative that if the clause is to be retained it be amended to replicate the revised wording of clause 7.4 of the Undertakings and associated definitional changes and additions.

**[29]** ***What impact would there be on competition in other markets if the other LFCs were able to operate in those markets? Do you consider that this needs to be mitigated in some way?***

Competition would be enhanced with wider options for consumers if the restrictions were removed. [ ]

There are no potential adverse impacts that require mitigation – Part 4AA and Part 6 of the Act continue to apply to services that use Enable's fibre network.

## Issue 2: Process to seek agreement to operate at layer 3 or 4

> ***Option 1: Status quo – no change to the process***
> ***Option 2: Shift the mechanism for other LFCs to seek consent to operate at layer 3 and 4 into the Act (to align with Chorus' process) (no MBIE preferred option)***

**[30]** ***If you are one of the three 'other' local fibre companies, do you have any feedback about the current process? How does the process impact your decisions to seek consent (or not) to operate at layer 3 or 4?***

While the constitution imposes a requirement for us to obtain Ministerial approval to provide layer 3 or 4 services it does not set out any "process" to do so, nor list any criteria to be applied by the Minister. As outlined below, we sought the Minister's approval to provide limited layer 3 & 4 services to social hosing tenants in Christchurch in 2020. It took more than a year for approval to be obtained, and the conditions of the approval were such that we could not proceed with the project.

We sought clarification of the test and criteria that needed to be satisfied for approval to be granted. We set out in detail in our submission our view of the applicable legal test. No such clarity was provided in this process, other than that all decisions were at the Minister's sole discretion.

As discussed below, Enable was forced to abandon its social housing initiative and has not sought any other approvals because of the lack of transparent criteria, and the unpredictability of the process.

**Case study: Otautahi Community Housing Trust (OCHT) Digital Inclusion Pilot Programme**

On 14 December 2020, Enable sought the approval of the Minister of Telecommunications for a period of ten years to provide Layer 3 & 4 services to OCHT for delivering broadband services to residents of 2,500 social housing properties.

On 6 April 2021 the Minister advised he intended to consult stakeholders on Enable's proposal. One issue we asked officials to consult on was the test the Minister should apply as our Constitution does not set out the factors the Minister must take into account when considering a request for approval. We drafted a section setting out Enable's view of the relevant test for inclusion in the consultation document. MBIE was not prepared to include our view in the consultation document on the basis that if it were included MBIE would need to include their analysis of the test and criteria to be applied which would take their legal team at least a month to draft. We were invited as primary interested stakeholder to make our point clear in our submission.

On 26 May 2021 MBIE issues a consultation paper on Enable's proposal, with submissions due on 16 June 2021. In relation to the test to be applied we submitted:[1]

> The provision of Layer 3 and Layer 4 services are defined as Permitted Activities under Enable's Constitution, subject to the prior approval of the Minister. The regulatory regime therefore contemplates the provision of these services by Enable.
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> Enable's Constitution does not set out the factors the Minister must take into account when considering a request for approval, but guidance can be found in provisions of the Telecommunications Act 2001 (**Act**) related to the UFB initiative; namely the definition of non-discrimination in Part 4AA of the Act, and the exemption regime for Chorus in s69R of the Act.
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> Non-discrimination is defined in the Act as treating access seekers differently "except to the extent that a particular difference in treatment is objectively justifiable and does not harm, and is unlikely to arm, competition in any telecommunications market".
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> Chorus is prohibited by the Act from participating in services above Layer 2 services. The Commission can grant an exemption to this prohibition under S69SA of the Act if it is satisfied the exemption will facilitate the promotion of competition for the long-term benefits of end-users of telecommunications services, facilitate efficient investment in telecommunications infrastructure and services, and will not harm, or be likely to harm, competition in any telecommunications market.
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> The common theme in these provisions is that what is proposed must not be likely to harm competition in any telecommunications market. The Commission's guidance on non-discrimination explains how the harm to competition test is to be applied. In essence, there must be more than a minimal impact on competition. Harm to competition requires a finding that the conduct will result in higher prices, few choices or reduced quality of service.

[1] Enable, Submission on MBIE Proposal for a local fibre company to provide layer 3 and 4 services to a social housing provider, 16 June 2021 [3.1] – [3.7]

It is important to note the difference between Chorus and Enable in this context. Enable's Constitution defines Layer 3 and 4 services as permitted activities, whereas for Chorus they are prohibited activities. It follows that the approval criteria to be applied for Enable must be a lower threshold than that applied to Chorus.

The ŌCHT Partnership does not, and is not likely to, harm competition in any telecommunications market. It is limited to a very small subset of residential premises who, by definition, cannot afford to purchase good internet connectivity services offered by the market. To the contrary, the ŌCHT Partnership is designed to fill a gap the market cannot meet and will deliver long-term benefits to end-users of telecommunications services.

On 21 December 2021 the Minister of Telecommunications and the Minister of Finance granted conditional approval of Enable's proposal on the basis that Enable's proposal accorded well with the Government's intent in relation to digital inclusion. The approval was granted on conditions that made the project untenable and Enable accordingly did not provide layer 3 & 4 services to OCHT. We are unable in this public submission to discuss the conditions imposed as we require the prior written approval of both the Minister of Finance and the Minister of Telecommunications to do so.

[ ].

**]31]** ***Do you support any of the options described above? Why or why not? Are there any other options that we should consider?***

We do not support either Option. As discussed above, we do not believe Option 1 is "fit for purpose". While Option 2 would be an improvement, the public consultation process which is involved would require us to disclose to our competitors the layer 3 and 4 initiatives we are considering, giving them ample time to bring competing products to market.

In our view clause 3.2(a)(iv) should be removed altogether. This would be consistent with the promotion of competition in telecommunications markets for the long-term benefit of end-users of telecommunications services, facilitate efficient investment in telecommunications infrastructure and services and will not harm or be likely to harm competition in any telecommunications market.

The Discussion Document notes that "*'retail service providers typically operate at level 3 and above*"[99], and that *"these parts of the fibre network are typically provided by internet service providers*"[112]. This is the case in NZ only because Chorus and the other LFCs are not permitted to provide L3 or L4 services but is not the case elsewhere. According to Juniper, the two most common wholesale broadband services are based on either Layer 2 or layer 3 information. *"In a Layer 3 wholesale configuration, you partition the wholesale access network at the network layer on the subscriber IP component by associating the IP component with a distinct layer 3 domain*".

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Layer 3 is the network level responsible for the forwarding routing and addressing of data packets while layer 4 is the transport level coordinating data transfer and including error checking and data recovery. This additional functionality is incorporated into the network switches. Providing network routing or transport services for smaller RSPs would make it easier for them to enter the market. Similarly, other entities who may wish to provide telecommunications services but where its core business is another service, ie bundling telecommunications services with their existing services. We could provide the wholesale support to enable them to provide retail services themselves.

A key advantage is that we could manage/assure the service and service performance. In the case of a wholesale internet service, we could directly control the end user device (modem, router or residential gateway) and set things up as required. In addition, we could monitor the end user service and advise their retailer if there were any issues (packet loss, latency and jitter). We could ensure there was no contention of IP transit bandwidth (wholesale access to the internet) to ensure good service performance.

There is no policy reason for retaining the prohibition. Any layer 3 or 4 service we provided over our fibre network would be subject to our non-discrimination and equivalence obligations which would ensure a level playing field for all market participants.

We had anticipated providing a wholesale layer 3 (internet service) for OCHT. We would have owned and operated the network including all of the L3 internet service provisioning and assurance while OCHT would have provided a service desk to take enquiries from OCHT customers. We planned to provide the internet gateway (modem) as part of this service.

In addition, we don't believe that a technological model (the OSI layer model) is appropriate to delineate the services we can deliver. The OSI model was developed in 1978 and became an international standard in 1984. Technology has evolved significantly over the following 40 years. The nature of aggregation is such that we now use L3 to support L2 wholesale services – the technology has moved on.

The traditional OSI seven-layer model was required when layer 3 networking protocols relied heavily upon the underlying layer 2 node-node communication being very standardised with a strong focus on error correction. Increased computing capability and dramatic improvements in access technology throughput and reliability have resulted in several of these layers merging together. Metro and Wide Area Networks no longer use traditional layer 3 network protocols to connect offices or branches of a business or organisation. Layer 2 Carrier Ethernet and even very high bandwidth layer 1 transport technologies are used to provide WAN services. Developments in networking routing protocols such as MPLS and Segment Routing means that what previously would have been considered to be a layer 3 protocol can be used to transport layer 2 traffic in a very efficient manner. Additionally, new approaches to operating and controlling networks such as Software Defined Networking means that we are naturally operating at levels higher than layer 2 of the original OSI seven-layer model.

Adopting these newer technologies allows us to develop scalable, flexible and more cost-effective ways of developing and operating our network. In turn it means we can offer more innovative services to our RSPs.

In summary, modern network protocols, architectures and control mechanisms have blurred the layers of the OSI seven-layer model, which means it is no longer relevant in classifying a type of service or defining network topology or determining what is a wholesale vs retail service.

## Out of scope: Removing the Government Share is out of scope. The Government made a significant investment in LFCs and has an ongoing interest in ensuring fibre networks are maintained.

As our November 2021 letter to the Minister of Finance sought his approval to remove the Government Share, and the letter to us from the Minister of Telecommunications dated 28 April 2023 promised a public consultation "on the other changes you are seeking", we were disappointed to see that this issue has been ruled out of scope, and we ask the consultation be extended (by way of cross-submission) to ensure "*stakeholders have an opportunity to share their insights" on this issue.*

It is common ground that the restrictions were put in place to ensure that government funding was used appropriately to ensure the UFB network was built to plan. That is why the decision maker for changes to our constitution is the Minister of Finance and not the Minister of Telecommunications.

The network build has been completed successfully. Private sector investment has replaced the Government's investment. The incentive to ensure the fibre network is maintain now lies with the LFCs shareholders who have funded the refinancing of the Government's investment.

Just as a mortgagor's obligations to its mortgagee are discharged on repayment of the mortgage, there is no basis for the Government Share to continue to apply now the government's investment has been repaid.

## Section 7: Other minor changes and clarifications: An issue MBIE may seek to include is ensuring the pathway between information disclosure and price-quality regulation is clear.

The Discussion Paper suggests a minor change or clarification to the Act is needed to avoid "*confusion that the Commission can recommend only a lower level of regulation to the Minister, which is not the case. The Commission can recommend both regulation and deregulation*" [133]

There is no confusion in the drafting – s210 does not allow the Commission to recommend an increase in regulation from ID to PQR. This drafting reflects the recommendation of the Select Committee in 2018 which adopted a deregulatory approach because it accepted submissions made by parties including ourselves about fixed wireless competition:

> Deregulation review.
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> The bill would insert new Subpart 7 in the Act, providing for the Commission to undertake reviews of various aspects of the new regulatory framework. New section 208 provides for the Commission to review whether fibre fixed line access services **should be deregulated.** This is designed to take into account **the changing nature of telecommunications technologies that are possible substitutes for fibre.**

MBIE is correct that the Act does not reflect the 2017 departmental disclosure statement that *"any LFC may later become subject to price-quality regulation, should the Minister accept a recommendation from the Commission that price-quality regulation is necessary*". This is because a different approach was recommended by the Select Committee on 4 May 2018, having heard submissions from Enable and others, and adopted by Parliament.

We believe MBIE is therefore incorrect to suggest the heading "Deregulation review" is confusing and the Commission can recommend increased regulation (because this is not the case). The "small drafting edits" proposed would not be a clarification of confusing drafting as MBIE suggests, but a significant change to the regulatory framework to implement a recommendation made by MBIE in 2017 in preference to the Select Committee 2018 recommendation following an extensive consultation process.