

# Access Agreement

**Attachment B of Access Undertaking  
pursuant to Part 3.3, Division 4B, Subdivision B of the  
Radiocommunications Act 1992 (Cth)**

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## Parties

- 1 Digital Radio Broadcasting [State] Pty Ltd [(ACN xxx xxx xxx)] of Level 5, 88 Foveaux Street, Surry Hills NSW 2010 (Multiplex Licensee)
- 2 [Insert name of Access Seeker] (ACN xxx xxx xxx) of [insert address] (Access Seeker)

The parties agree

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## Background

- A The Multiplex Licensee is the holder of a Foundation Category 1 Digital Radio Multiplex Transmitter Licence under the Radiocommunications Act and a supplier of the Multiplex Transmission Service in the Designated BSA Radio Area.
- B This Agreement sets out the prices, terms and conditions on which the Multiplex Licensee will supply the Multiplex Transmission Service to Access Seekers to enable: (i) an Incumbent Commercial Broadcaster to obtain the Standard Access Entitlement to which it is entitled; (ii) a Digital Community Broadcaster to obtain, ~~through the Digital Community Radio Representative Company,~~ the Standard Access Entitlement nominated for allocation to that Digital Community Broadcaster by the Digital Community Radio Broadcasting Representative Company; and (iii) a Qualified Content Service Provider to obtain an Excess-Capacity Access Entitlement that it [has acquired or](#) may acquire ~~pursuant to the Access Agreement~~.

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## 1 Defined terms and interpretation

### 1.1 Definitions in the Dictionary

A term or expression starting with a capital letter:

- (a) which is defined in the Dictionary in Schedule 1 (**Dictionary**), has the meaning given to it in the Dictionary;
- (b) which is defined in the Corporations Act, but is not defined in the Dictionary, has the meaning given to it in the Corporations Act; and
- (c) which is defined in the GST Law, but is not defined in the Dictionary or the Corporations Act, has the meaning given to it in the GST Law.

### 1.2 Interpretation

The interpretation clause in Schedule 1 (**Dictionary**) sets out rules of interpretation for this Agreement.

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## 2 Structure of this Agreement

### 2.1 General

- (a) This Agreement comprises:
  - (i) this main body, which sets out the general terms and conditions that apply to the supply of the Multiplex Transmission Service;
  - (ii) Schedules, which include:
    - (A) Schedule 1 – Dictionary;
    - (B) Schedule 2 – Pricing Principles; and
    - (C) Schedule 3 – Dispute Resolution Procedures;
  - (iii) Attachment A – Conditions Precedent;
  - (iv) any Operational Manual developed in accordance with clause 2.2; and
  - (v) any other document agreed to by the parties from time to time.
- (b) If any of these documents is inconsistent with the others, then the documents will prevail in the order set out in clause 2.1(a).

## 2.2 Operational Manual

- (a) The Multiplex Licensee agrees to develop an operational manual in consultation with all Access Seekers to deal with technical and operational matters that arise under or in connection with this Agreement, or the supply of the Multiplex Transmission Service (**Operational Manual**).
- (b) The Multiplex Licensee must:
  - (i) establish a process for the development of the Operational Manual, which includes a process for consultation with all Access Seekers;
  - (ii) undertake consultation with all Access Seekers in good faith;
  - (iii) use its reasonable endeavours to accommodate any reasonable requests that may be made by an Access Seeker during the consultation process in respect of the development or contents of the Operational Manual; and
  - (iv) ensure that the Operational Manual is consistent with this Agreement, including clause 9.
- (c) Subject to clause 9, the Access Seeker acknowledges and agrees that the Operational Manual may include provisions that are necessary for, or reasonably required by, the Multiplex Licensee to comply with technical or operational obligations imposed by suppliers or vendors under third party

supply agreements on which the supply of the Multiplex Transmission Service is dependent.

- (d) Any Operational Manual developed by the Multiplex Licensee:
  - (i) forms part of this Agreement and is binding on the Parties; and
  - (ii) may be amended by the Multiplex Licensee from time to time, subject to clauses 2.2(b) and 2.2(c).

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### 3 ~~Not used~~**Simplified Outline**

#### ~~3.1~~ **Entry into Access Agreement**

~~The Access Seeker must comply with the conditions precedent set out in clause 4 prior to entry into, and execution of, this Agreement.~~

#### ~~3.2~~ **Allocation of Standard Access Entitlement and/or Excess Capacity Access Entitlement**

~~The Multiplex Licensee will allocate Standard Access Entitlements and/or Excess Capacity Access Entitlements in accordance with clauses 6 and 7 respectively.~~

#### ~~3.3~~ **Supply of Multiplex Transmission Service**

~~The Multiplex Licensee will supply the Multiplex Transmission Service to Access Seekers in accordance with this Agreement to enable:~~

- ~~(a) an Incumbent Commercial Broadcaster to obtain the Standard Access Entitlement to which it is entitled;~~
- ~~(b) a Digital Community Broadcaster to obtain, through the Digital Community Radio Broadcasting Representative Company, the Standard Access Entitlement nominated for allocation to that Digital Community Broadcaster by the Digital Community Radio Broadcasting Representative Company; and~~
- ~~(c) a Qualified Content Service Provider to obtain an Excess Capacity Access Entitlement that it may acquire pursuant to clause 7.~~

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### 4 **Conditions Precedent**

The Multiplex Licensee has no obligation to supply the Multiplex Transmission Service, unless and until the Access Seeker satisfies all the conditions precedent set out in Attachment A (**Conditions Precedent**).

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### 5 **Term**

#### **5.1 Commencement**

~~Subject to clause 5.2, +~~This Agreement commences on the Effective Date and continues in full force and effect ~~until 31 December 2012~~for the term of the Access Undertaking (Term), unless terminated earlier by a Party in accordance with the terms of this Agreement or by operation of law.

#### ~~5.2~~ **Renewal**

- ~~(a) — Prior to expiry of this Agreement, the Parties may agree to extend the Term, or replace or re-negotiate this Agreement.~~
- ~~(b) — The Parties must undertake any negotiations envisaged under this clause 5.2 in good faith and must use their best endeavours to finalise those negotiations before the expiry of the Term.~~
- ~~(c) — If the Parties cannot finalise their negotiations before the expiry of the Term, the Term will be extended and this Agreement will continue in full force and effect until another agreement is entered into by the Parties.~~

## **6 Standard Access Entitlements**

### **6.1 General**

This clause 6 sets out the manner in which the Multiplex Licensee is to provide access to Standard Access Entitlements.

### **6.2 Standard Access Obligation**

The Multiplex Licensee must provide each Digital Broadcaster with access to the fraction of Multiplex Capacity to which it is entitled as a Standard Access Entitlement, ~~as determined in accordance with clauses 6.3 and 6.4.~~

### **6.3 Standard Access Entitlement for Incumbent Commercial Broadcasters**

- (a) This clause 6.3 only applies to Incumbent Commercial Broadcasters.
- ~~(b) — An Incumbent Commercial Broadcaster must provide the Multiplex Licensee with written notice of its intention to claim access to one ninth of Multiplex Capacity within 30 days after the issuance of a Digital Radio Multiplex Transmitter Licence to the Multiplex Licensee (**Multiplex Capacity Request**).~~
- ~~(c) — The Multiplex Licensee must provide the ACCC with a copy of the Multiplex Capacity Request within 7 days after receipt.~~
- ~~(d) — The Multiplex Licensee may only reject a Multiplex Capacity Request in the following circumstances:~~
  - ~~(i) — where the Incumbent Commercial Broadcaster:~~

- ~~(A) lodges an Multiplex Capacity Request with the Multiplex Licensee in respect of a Designated BSA Radio Area more than once;~~
- ~~(B) has lodged a request to access Multiplex Capacity through the holder of another Digital Radio Multiplex Transmitter Licence within the Designated BSA Radio Area; or~~
- ~~(C) fails to lodge a Multiplex Capacity Request within the timeframe specified in clause 6.3(b); or~~
- ~~(ii) where the applicant is not an Incumbent Commercial Broadcaster, or is otherwise ineligible to lodge a Multiplex Capacity Request under this Agreement or the Radiocommunications Act.~~
- ~~(e) The Multiplex Licensee must write to the Incumbent Commercial Broadcaster within 7 days after receipt of a Multiplex Capacity Request stating:~~
  - ~~(i) whether the Multiplex Capacity Request is accepted or rejected;~~
  - ~~(ii) where the Multiplex Capacity Request is rejected in accordance with clause 6.3(d), the reason(s) for the rejection; and~~
  - ~~(iii) where there is insufficient Multiplex Capacity to accommodate the Incumbent Commercial Broadcaster, that the Multiplex Capacity Request has been referred to the ACCC pursuant to clause 6.3(f).~~
- ~~(f) If the provision of Multiplex Capacity to an Incumbent Commercial Broadcaster would result in demand for Multiplex Capacity that is greater than the Multiplex Capacity that is available, the Multiplex Licensee will request that the ACCC issue a notice to the Incumbent Commercial Broadcaster that:~~
  - ~~(i) repudiates the Multiplex Capacity Request; and~~
  - ~~(ii) transfers the Multiplex Capacity Request to the holder of another Digital Radio Multiplex Transmitter Licence within the Designated BSA Radio Area.~~
- ~~(g)(b) Subject to clause 6.3(c)6.3(h), an Incumbent Commercial Broadcaster:~~
  - (i) may only use the Standard Access Entitlement for the purpose of providing Digital Commercial Radio Broadcasting Services in the Designated BSA Radio Area; and
  - (ii) may not transfer a Standard Access Entitlement to another entity.
- ~~(h) For the avoidance of doubt:~~

(c) ~~Nothing prevents an Incumbent Commercial Broadcaster from granting a third party the right to:~~

~~(i) provide outsourced transmission services on behalf of that Incumbent Commercial Broadcaster in the Designated BSA Radio Area; or~~

~~(ii) manage the digital spectrum on behalf of that Incumbent Commercial Broadcaster in the Designated BSA Radio Area; and~~

~~(d) The granting of such rights to a third party in accordance with clause 6.3(c) does not constitute a transfer of a Standard Access Entitlement to another entity for the purposes of clause 6.3(b)(ii), 6.3(b)(iii), 6.3(g)(ii).~~

~~(f) If:~~

~~(i) a Digital Commercial Radio Broadcasting Licensee that holds a Standard Access Entitlement is required to transfer that Standard Access Entitlement to ACMA pursuant to section 35D(2) of the Broadcasting Services Act; and~~

~~(ii) ACMA subsequently allocates the licence held by the Digital Commercial Radio Broadcasting Licensee to another entity,~~

~~(iii) the Standard Access Entitlement is to be transferred to the new entity that is allocated the relevant licence in accordance with section 118NQ(7) of the Radiocommunications Act.~~

#### 6.4 Allocation of Standard Access Entitlement to Digital Community Broadcasters

- (a) This clause 6.4 only applies to Digital Community Broadcasters who are or may be nominated by a Representative Company for a Designated BSA Radio Area.
- (b) The Multiplex Licensee must, in relation to a Digital Radio Multiplex Transmitter Licence, reserve two-ninths of the Multiplex Capacity for Digital Community Broadcasters who are nominated by the Representative Company.
- (c) The Multiplex Licensee must allocate Multiplex Capacity (and revoke the allocation of Multiplex Capacity) to Digital Community Broadcasters nominated by the Representative Company based on the fractions that are notified to the Multiplex Licensee by the Representative Company to be made available to each Digital Community Broadcaster, subject to the total allocation not exceeding two-ninths of the total Multiplex Capacity for a Digital Radio Multiplex Transmitter Licence.



- (d) Subject to clause 6.4(e), a Digital Community Broadcaster nominated by the Representative Company:
  - (i) may only use the Standard Access Entitlement for the purpose of providing Digital Community Radio Broadcasting Services; and
  - (ii) may not transfer a Standard Access Entitlement to another entity.

~~(e) For the avoidance of doubt:~~

~~(e) Nothing prevents a Representative Company or a Digital Community Broadcaster from granting a third party the right to:~~

- ~~(i) provide outsourced transmission services on behalf of a Digital Community Broadcaster in the Designated BSA Radio Area; or~~
- ~~(ii) manage the digital spectrum on behalf of a Digital Community Broadcaster in the Designated BSA Radio Area; and~~
- (f) ~~The granting of such~~ rights to a third party ~~in accordance with clause 6.4(e)~~ does not constitute a transfer of a Standard Access Entitlement to another entity for the purposes of clause 6.4(d)(ii).
- (g) The ~~Digital Community Broadcaster~~ ~~Access Seeker~~ acknowledges that:
  - (i) the Representative Company is responsible for determining the allocation of Multiplex Capacity made available to each Digital Community Broadcaster (**Digital Community Broadcaster Allocations**);
  - (ii) Digital Community Broadcaster Allocations are determined in accordance with criteria set out in section 118NR of the Radiocommunications Act; and
  - (iii) the Multiplex Licensee is not responsible (and bears no liability) for Digital Community Broadcaster Allocations that are notified by the Representative Company and implemented by the Multiplex Licensee.

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## 7 Excess-Capacity Access Entitlements

### 7.1 General

This clause 7 sets out the manner in which the Multiplex Licensee is to provide access to Excess-Capacity Access Entitlements.

### 7.2 Excess-Capacity Access Obligation

The Multiplex Licensee must provide each Qualified Content Service Provider with access to the fraction of Multiplex Capacity to which it may be entitled as an Excess-Capacity Access Entitlement, ~~as determined in accordance with clauses 7.3, 7.5 and 7.6.~~

### 7.3 Excess Multiplex Capacity

For the purposes of this clause 7, the Multiplex Licensee is considered to have Excess Multiplex Capacity if, at any time after the end of the 12 month period beginning on the Digital Radio Start Up Day for a Designated BSA Radio Area, the Multiplex Capacity available under a Digital Radio Multiplex Transmitter Licence exceeds the aggregate of:

- ~~(a) — on the Digital Radio Start Up Day for a Designated BSA Radio Area, the Multiplex Capacity available under a Digital Radio Multiplex Transmitter Licence exceeds the aggregate of:
  - ~~(i) — the fractions of Multiplex Capacity relating to Standard Access Entitlements granted in accordance with clause 6; and~~
  - ~~(ii) — two-ninths of Multiplex Capacity reserved for Digital Community Broadcasters in accordance with clause 6.4(b); or~~~~
- ~~(b) — at any time after the end of the 12 month period beginning on the Digital Radio Start Up Day for a Designated BSA Radio Area, the Multiplex Capacity available under a Digital Radio Multiplex Transmitter Licence exceeds the aggregate of:~~
- ~~(c)(a) — the fraction of Multiplex Capacity relating to Standard Access Entitlements granted in accordance with clause 6; and~~
- ~~(d)(b) — two-ninths of Multiplex Capacity reserved for Digital Community Broadcasters in accordance with clause 6.4(b).~~

### 7.4 Consultation with industry where there is Excess Multiplex Capacity

- ~~(a) — If Excess Multiplex Capacity exists pursuant to clause 7.3(a), the Multiplex Licensee must:
  - ~~(i) — within 90 days after the Digital Radio Start Up Day for the Designated BSA Radio Area, ascertain the level of demand for access to that Excess Multiplex Capacity from Qualified Content Service Providers who are entitled to provide one or more Content Services in the Designated BSA Radio Area; and~~
  - ~~(ii) — by way of notice on its website (and through such other form of communication as it considers appropriate);~~~~

- ~~(A) — set out the amount of Excess Multiplex Capacity that is available;~~
- ~~(B) — give at least 30 days notice of its intention to ascertain the level of demand for Excess Multiplex Capacity; and~~
- ~~(C) — invite Qualified Content Service Providers to express an interest in having access to the Excess Multiplex Capacity.~~

~~(b)~~(a) If Excess Multiplex Capacity exists pursuant to clause ~~7.3~~7.3(b):

- (i) the Multiplex Licensee may ascertain the level of demand for access to that Excess Multiplex Capacity from Qualified Content Service Providers who are entitled to provide one or more Content Services in the Designated BSA Radio Area; and
- (ii) if the Multiplex Licensee proposes to ascertain the level of demand in accordance with clause ~~7.4(a)(i)~~7.3(b)(i), the Multiplex Licensee must, by way of notice on its website (and through such other form of communication as it considers appropriate):
  - (A) set out the amount of Excess Multiplex Capacity that is available;
  - (B) give at least 30 days' notice of its intention to ascertain the level of demand for Excess Multiplex Capacity; and
  - (C) invite Qualified Content Service Providers to express an interest in having access to the Excess Multiplex Capacity.

~~(c)~~(b) ~~Subject to clause 7.4(d), a~~All Qualified Content Service Providers that are interested in accessing the Excess Multiplex Capacity (**Interested Party**) must provide a written response, within the period of time specified by the Multiplex Licensee on its website (and through such other form of communication it considers appropriate), specifying the amount of Excess Multiplex Capacity that it wishes to access.

~~(d) — In the event that the Interested Party is a Digital Community Broadcaster, the Digital Community Broadcaster must send any written response contemplated in clause 7.4(b) through the Representative Company (which will act on behalf of the Digital Community Broadcaster in respect of the process contemplated under this clause 7.4 and clauses 7.5 or 7.6).~~

#### 7.5 Where demand for Excess Multiplex Capacity falls short of supply

- (a) If the level of demand for access to Excess Multiplex Capacity is less than that which is available (as ascertained in accordance with clause 7.4), each

Interested Party is entitled to access the fraction of Excess Multiplex Capacity that it has specified under clause ~~7.4(b)~~7.4(e), subject to clause 7.7.

- (b) ~~Subject to clause 7.5(d), o~~On the day that immediately follows the expiry of the notice period specified by the Multiplex Licensee in accordance with clause ~~7.4(a)(ii)(B) or 7.4(a)(ii)(B)~~7.4(a)(ii)(B)7.4(b)(ii)(B) (as the case may be), the Multiplex Licensee will issue a notice to each Interested Party stating that it has been successful in obtaining an Excess-Capacity Access Entitlement. The Excess-Capacity Access Entitlement will commence on the date of such notice.
- (c) An Interested Party that acquires an Excess-Capacity Access Entitlement pursuant to this clause:
- (i) may only use the Excess-Capacity Access Entitlement for the purpose of providing Content Services; and
  - (ii) may only transfer ~~a~~n Excess-Capacity Access Entitlement to another Qualified Content Service Provider.

~~(d) — Where the Interested Party is a Digital Community Broadcaster, any notification given by the Multiplex Licensee under clause 7.5(b) will be made to the Representative Company for communication to the Digital Community Broadcaster.~~

#### 7.6 Where demand for Excess Multiplex Capacity exceeds supply

- (a) If the level of demand for access to Excess Multiplex Capacity is greater than that which is available (as ascertained in accordance with clause 7.4), the Multiplex Licensee must conduct an auction process in accordance with the Auction Rules to determine the allocation of Excess Multiplex Capacity to Interested Parties, subject to clause 7.7.
- (b) Any Auction Rules that are developed by the Multiplex Licensee must:
- (i) use an open and transparent auction process to determine which Interested Parties are to have access to the relevant fractions of Excess Multiplex Capacity within a Designated BSA Radio Area;
  - (ii) allocate Excess Multiplex Capacity using a market based allocation system;
  - (iii) treat all bids and related information received from an Interested Party as a Confidential Information; and
  - (iv) ensure that the auction is conducted within 60 days of the date of completion of consultation with Qualified Content Service Providers pursuant to clause 7.4.

- (c) ~~Subject to clause 7.6(e), u~~ Upon completion of the auction process in accordance with the Auction Rules, the Multiplex Licensee must notify all Interested Parties of the following:
- (i) whether the Interested Party was successful in the auction;
  - (ii) where the Interested Party was successful in the auction:
    - (A) the amount of any auction fees that are payable and the method of payment; and
    - (B) the fraction of Excess Multiplex Capacity to which that Interested Party is entitled as an Excess-Capacity Access Entitlement.
- (d) ~~Subject to clause 7.6(e), t~~ The Interested Parties that are successful in the auction must pay the Multiplex Licensee the applicable auction fee within 30 days of the completion of the auction process. For the avoidance of doubt, the payment of an auction fee by a successful Interested Party:
- (i) is for the purpose of securing an Excess-Capacity Access Entitlement; and
  - (ii) does not constitute a payment of any applicable Standard Charges, or alleviate the obligation to pay the Standard Charges.
- ~~(e) — Where the Interested Party is a Digital Community Broadcaster:~~
- ~~(i) — any notification given by the Multiplex Licensee under clause 7.6(c) will be made to the Representative Company for communication to the Digital Community Broadcaster; and~~
  - ~~(ii) — the payment of the applicable auction fee under clause 7.6(d) is to be made to the Multiplex Licensee by the Representative Company on behalf of the Digital Community Broadcaster.~~
- ~~(f)(e)~~ The Excess-Capacity Access Entitlement will commence on the date of the payment of the applicable auction fee.
- ~~(e)(f)~~ All funds that are received by the Multiplex Licensee from the auction process must in accordance with section 109C(2) of the Radiocommunications Act:
- (i) be set aside in a separate bank account with an ADI;
  - (ii) only be used for the following purposes:
    - (A) to promote digital radio broadcasting in Australia;

- (B) to pay for fees and charges associated with the maintenance and operation of the bank account referred to in clause [7.6\(f\)\(i\)](#)~~7.6(f)(i)~~~~7.6(g)(i)~~; and
- (C) to pay for any costs arising from, or in connection with, the auction process.

~~(h)~~~~(g)~~ An Interested Party that acquires an Excess-Capacity Access Entitlement following the completion of the auction process:

- (i) may only use the Excess-Capacity Access Entitlement for the purpose of providing Content Services; and
- (ii) may only transfer the Excess-Capacity Access Entitlement to another Qualified Content Service Provider.

#### 7.7 Capacity Cap

An Interested Party that acquires an Excess-Capacity Access Entitlement is not permitted to have more than two-ninths of the Multiplex Capacity in a Designated BSA Radio Area.

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## 8 Representations and warranties

The Access Seeker represents and warrants on the Effective Date and on each day of the Term that:

- (a) it has power to enter into and observe its obligations under this Agreement;
- (b) it has in full force and effect the corporate authorisations necessary to enter into this Agreement, observe obligations under it and allow it to be enforced;
- (c) the information provided by it to the Multiplex Licensee is complete, true and correct at the time it is given, and not deliberately misleading;
- (d) it has the technical capabilities to transmit broadcasts to the Multiplex Licensee to enable the Multiplex Licensee to supply the Multiplex Transmission Service to the Access Seeker;
- (e) it is responsible for the content of any broadcasts provided over a Digital Channel by the Access Seeker; and
- (f) the content of any broadcasts provided over a Digital Channel by the Access Seeker does not:
  - (i) infringe any Intellectual Property Rights existing at the time of such broadcast;

- (ii) contain anything obscene, indecent, defamatory or in contempt of any court, tribunal or royal commission; or
- (iii) violate any applicable law, regulation or applicable industry code of practice.

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## 9 Supply of the Multiplex Transmission Service

### 9.1 General

The Multiplex Licensee agrees to provide access to, and the Access Seeker agrees to acquire, the Multiplex Transmission Service in accordance with the prices, terms and conditions set out in this Agreement.

### 9.2 No hindering of access

The Multiplex Licensee must not prevent an Access Seeker from obtaining access to the Multiplex Transmission Service in accordance with the applicable terms of this Agreement.

### 9.3 Non-discrimination

- (a) The Multiplex Licensee must not discriminate between Access Seekers to which it provides the Multiplex Transmission Service in relation to:
  - (i) the technical and operational quality of the Multiplex Transmission Service supplied to Access Seekers; and
  - (ii) the technical and operational quality and timing of the fault detection, handling and rectification supplied to Access Seekers,
- (b) for the purposes of facilitating the use of the Multiplex Transmission Service.
- (c) For the avoidance of doubt, the Multiplex Licensee must not discriminate between Access Seekers in relation to the matters described in clauses 9.3(a)(i) and 9.3(a)(ii) on the basis that the Access Seeker is or is not a shareholder of the Multiplex Licensee.
- (d) Nothing in this clause 9.3 limits the ability of an Access Seeker to request access to the Multiplex Transmission Service at a lower bit rate than that provided to other Access Seekers.

### 9.4 Supply of Standard Access Entitlement

The Multiplex Licensee agrees to provide the Access Seeker with the Multiplex Transmission Service to enable:

- (a) an Incumbent Commercial Broadcaster to obtain the Standard Access Entitlement to which it is entitled; and

- (b) a Digital Community Broadcaster to obtain ~~through the Representative Company~~ the Standard Access Entitlement nominated for allocation to that Digital Community Broadcaster by the Representative Company.

#### 9.5 Supply of Excess-Capacity Access Entitlement

The Multiplex Licensee agrees to provide the Access Seeker with the Multiplex Transmission Service to enable a Qualified Content Service Provider to obtain an Excess-Capacity Access Entitlement that it may acquire pursuant to clause 7 of this Agreement.

#### 9.6 Safe operation of systems, equipment and facilities in connection with the Multiplex Transmission Service

- (a) Each Party is responsible for the safe operation of the systems, equipment and facilities used by that Party in connection with the Multiplex Transmission Service.
- (b) The Multiplex Licensee must take all reasonable steps to ensure that the systems, equipment and facilities used by the Multiplex Licensee in connection with the Multiplex Transmission Service do not:
  - (i) endanger the health or safety of any person; or
  - (ii) damage, threaten, interfere with, degrade or result in the deterioration of the operation or performance of the systems, equipment or facilities used by the Access Seeker in connection with the Multiplex Transmission Service.
- (c) The Access Seeker must take all reasonable steps to ensure that the systems, equipment and facilities used by that Access Seeker in connection with the Multiplex Transmission Service do not:
  - (i) endanger the health or safety of any person; or
  - (ii) damage, threaten, interfere with, degrade or cause the deterioration of the operation or performance of:
    - (A) the Multiplex Transmission Service;
    - (B) the systems, equipment or facilities used by the Multiplex Licensee to provide the Multiplex Transmission Service; and
    - ~~(A)(C)~~ the systems, equipment or facilities used by another Access Seeker in connection with the Multiplex Transmission Service.



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## 10 Access and Maintenance

The Multiplex Licensee may conduct, or engage or contract third parties to conduct, maintenance on the Multiplex Transmission Service in accordance with the terms of the Operational Manual.

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## 11 GST exclusive

- (a) Any consideration or amount payable under this Agreement, including any non-monetary consideration (as reduced in accordance with clause 11(e) if required) (**Consideration**) is exclusive of GST.
- (b) If GST is or becomes payable on a Supply made under or in connection with this Agreement, an additional amount (**Additional Amount**) is payable by the Party providing consideration for the Supply (**Recipient**) equal to the amount of GST payable on that Supply as calculated by the Party making the Supply (**Supplier**) in accordance with the GST Law.
- (c) The Additional Amount payable under clause 11(b) is payable without set off, demand or deduction at the same time and in the same manner as the Consideration for the Supply, and the Supplier must provide the Recipient with a Tax Invoice within 14 days after the time of payment of the Additional Amount.
- (d) If for any reason (including, without limitation, the occurrence of an Adjustment Event) the amount of GST payable on a Supply (taking into account any Decreasing or Increasing Adjustments in relation to the Supply) varies from the Additional Amount payable by the Recipient under clause 11(b):
  - (i) the Supplier must provide a refund or credit to the Recipient, or the Recipient must pay a further amount to the Supplier, as appropriate;
  - (ii) the refund, credit or further amount (as the case may be) will be calculated by the Supplier in accordance with the GST Law; and
  - (iii) the Supplier must notify the Recipient of the refund, credit or further amount within 14 days after becoming aware of the variation to the amount of GST payable. Any refund or credit must accompany such notification or the Recipient must pay any further amount within 7 days after receiving such notification, as appropriate. If there is an Adjustment Event in relation to the Supply, the requirement for the Supplier to notify the Recipient will be satisfied by the Supplier issuing to the Recipient an Adjustment Note within 14 days after becoming aware of the occurrence of the Adjustment Event.

- (e) Despite any other provision in this Agreement:
  - (i) if an amount payable under or in connection with this Agreement (whether by way of reimbursement, indemnity or otherwise) is calculated by reference to an amount incurred by a Party, whether by way of cost, expense, outlay, disbursement or otherwise (**Amount Incurred**), the amount payable must be reduced by the amount of any Input Tax Credit to which that Party is entitled in respect of that Amount Incurred; and
  - (ii) no Additional Amount is payable under clause 11(b) in respect of a Supply to which section 84-5 of the GST Law applies.
- (f) Any reference in this clause to an Input Tax Credit to which a Party is entitled includes an Input Tax Credit arising from a Creditable Acquisition by that Party but to which the Representative Member of a GST Group of which the Party is a member is entitled.

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## 12 Charges, invoices and payment

### 12.1 General

Clause 12 only applies to an Access Seeker which is:

- (i) an Incumbent Commercial Broadcaster;
- (ii) a Digital Community Broadcaster; or
- (iii) a Restricted Datacaster.

### 12.2 Charges

- (a) The Access Seeker must pay all amounts due in respect of the supply of the Multiplex Transmission Service (**Standard Charges**).
- (b) The Standard Charges must be calculated in accordance with the Pricing Principles in Schedule 2 of this Agreement.

### 12.3 Invoices

- (a) The Multiplex Licensee must provide the Access Seeker (or its authorised representative) with an invoice setting out the Standard Charges.
- (b) The billing period for the Standard Charges is either monthly or quarterly in advance~~arrear~~, except where otherwise ~~provided under this Agreement or~~ agreed with the Access Seeker.
- (c) All amounts in invoices are stated in Australian dollars.

#### 12.4 Payment

- (a) The Access Seeker must pay each invoice in respect of which a Billing Dispute has not been raised within 30 days of the date of the invoice (**Due Date**).
- (b) All payments must be:
  - (i) paid by electronic funds transfer directly to the nominated account of the Multiplex Licensee, or such other means as may be agreed by the Parties;
  - (ii) paid without any set-off or counter-claim and free of any withholding or deduction; and
  - (iii) accompanied by such information as is reasonably required by the Multiplex Licensee to process and properly allocate payments received.
- (c) Payments are deemed to be received on the date of receipt by the Multiplex Licensee, unless the payment is subsequently dishonoured, in which case payment is deemed not to have been received until cleared funds are received by the Multiplex Licensee together with all dishonour fees and charges that are payable.

#### 12.5 Billing and payment errors

- (a) If the Multiplex Licensee has omitted or miscalculated the Standard Charges in an invoice, the Multiplex Licensee will include or amend those Standard Charges in a later invoice, provided that the later invoice is issued within 180 days of the date that the omitted or miscalculated Standard Charge was accrued.
- (b) If the Access Seeker makes an overpayment in error, it must notify the Multiplex Licensee within 30 days of the date of the overpayment with sufficient details for the Multiplex Licensee to identify the overpayment. If the Multiplex Licensee, acting reasonably and in good faith, verifies the overpayment, the Multiplex Licensee must return the overpaid amount to the Access Seeker.

#### 12.6 Late payment

- (a) If an Access Seeker fails to pay an invoice (or part of it) by the Due Date, the Multiplex Licensee may charge the Access Seeker interest on the overdue amount for each day from the Due Date until the date of payment in full, at a rate equal to 2% per annum above the Multiplex Licensee's corporate overdraft rate (**Late Payment Charge**).
- (b) For the avoidance of doubt, a Late Payment Charge:

- (i) will be payable by the Access Seeker if an invoice (or part of it) is subject to a Billing Dispute and the disputed amount is determined to have been correctly included in the invoice; and
  - (ii) will not be payable by the Access Seeker if the invoice (or part of it) is subject to a Billing Dispute and the disputed amount is determined to have been incorrectly included in the invoice.
- (c) The Multiplex Licensee will include any Late Payment Charge in the invoice for the billing period that immediately follows the billing period that was the subject of the late payment, except where the invoice that remains unpaid is subject to a Billing Dispute, in which case the Multiplex Licensee may include the Late Payment Charge in the invoice for the period following a resolution that the disputed amount was correctly included in the disputed invoice.

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### 13 Billing disputes

- (a) If the Access Seeker, acting reasonably and in good faith, wishes to dispute an invoice, the Access Seeker must notify the Multiplex Licensee of a Billing Dispute (**Billing Dispute Notice**) within 180 days after the date of an invoice.
- (b) A Billing Dispute Notice must specify:
  - (i) the reasons why the Access Seeker has disputed an invoice, which must include a copy of any records that the Access Seeker is relying on to support its claims;
  - (ii) the amount in dispute; and
  - (iii) details required by the Multiplex Licensee to identify the disputed invoice and the Standard Charges in dispute.
- (c) The Access Seeker must pay any part of an invoice that is not subject to a Billing Dispute in accordance with clause 12.4. If the Billing Dispute is subsequently resolved against the Access Seeker and payment has not been made by the Access Seeker in respect of the disputed amount, the Access Seeker must pay the Late Payment Charge in accordance with clause 12.6.
- (d) If the Access Seeker raises a Billing Dispute in respect of an invoice that has been paid, the Multiplex Licensee is not obliged to refund the disputed amount until the Billing Dispute is resolved in the Access Seeker's favour.
- (e) The Parties must use their best endeavours to resolve a Billing Dispute within 30 days of the date of the Billing Notice, or such other period that may be agreed by the Parties.
- (f) If the Parties are unable to resolve a Billing Dispute within 30 days of the date of the Billing Notice (or such other period that has been agreed between the

Parties), the Billing Dispute may be escalated for resolution by a representative that has authority to settle the Billing Dispute, and that is at a higher level of management than the persons with direct responsibility for the billing administration. The designated representatives must meet as often as they reasonably deem necessary in order to discuss the Billing Dispute and negotiate in good faith in an effort to resolve such Billing Dispute. If a Billing Dispute is not resolved within 30 days of being escalated, either Party may refer the matter for resolution in accordance with the Dispute Resolution Procedures.

- (g) Once a Billing Dispute has been resolved, any sum to be paid or repaid must be paid within 30 days after such resolution by the relevant Party. If the Multiplex Licensee is required to repay an amount to the Access Seeker then it will do so by crediting the Access Seeker with the relevant amount in its next invoice.

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## 14 Financial security

### 14.1 Credit review

- (a) The Multiplex Licensee may conduct a review of the creditworthiness of the Access Seeker:
  - (i) by providing notice to the Access Seeker within 6 months following the Effective Date that it wishes to review the creditworthiness of the Access Seeker; or
  - (ii) if any of the following events occur:
    - (A) the Multiplex Licensee, acting reasonably, considers that there is a possibility of an Insolvency Event occurring in relation to the Access Seeker; or
    - (B) the Access Seeker has failed to pay any amounts under this Agreement by the Due Date, except where such amounts are subject of a Billing Dispute Notice.
- (b) If the Multiplex Licensee is entitled to conduct a review of the creditworthiness of the Access Seeker pursuant to clause 14.1, the Access Seeker must:
  - (i) co-operate with and provide all reasonable assistance to the Multiplex Licensee (or its nominee) for the purposes of conducting the review, which includes providing to the Multiplex Licensee (or its nominee) such financial information (such as profit and loss accounts and/or cash flow statements) and access to documents, materials and the Personnel of the Access Seeker or its Related Bodies

Corporate as is reasonably required by the Multiplex Licensee (or its nominee) to determine the ongoing creditworthiness of the Access Seeker; and

- (ii) ensure that the information it provides to the Multiplex Licensee (or its nominee) pursuant to clause 14.1(b)(i) is complete, accurate and current, and gives a true and fair view of the financial position of the Access Seeker as at the date it is provided to the Multiplex Licensee (or its nominee).
- (c) For the avoidance of doubt, any financial information disclosed by the Access Seeker to the Multiplex Licensee (or its nominee) pursuant to this clause 14.1(b) is the Confidential Information of the Access Seeker and is subject to the obligations of confidentiality set out in clause 19.

#### **14.2 Provision of Financial Security**

- (a) If, after having conducted a review of the credit worthiness of the Access Seeker, the Multiplex Licensee determines that the Access Seeker does not meet its reasonable security requirements, the Multiplex Licensee may request by way of notice that the Access Seeker provides a Financial Security or an amended Financial Security in a form and of an amount which is reasonable in all the circumstances.
- (b) The Financial Security may only be requested under clause 14.2(a) when it is reasonably necessary to protect the legitimate business interests of the Multiplex Licensee.
- (c) As a statement of general principle the amount of any Financial Security shall be calculated by reference to the aggregate value of all services likely to be provided to the Access Seeker under this Agreement over a reasonable period or the value of amounts invoiced under this Agreement but unpaid (excluding any amounts in respect of which there is a current Billing Dispute).
- (d) The Access Seeker must provide at its own cost and expense to the Multiplex Licensee the Financial Security requested within 21 days following the date of any notice received pursuant to clause 14.2(a) and must maintain that Financial Security for the duration of this Agreement or until the Multiplex Licensee requires it to amend that Financial Security pursuant to clause 14.2(a).
- (e) Where a Financial Security has been provided by the Access Seeker in accordance with clause 14.2(d), the Access Seeker may from time to time request the Multiplex Licensee to consent (in writing) to a decrease in the required Financial Security and/or alter the form of the Financial Security.

- (f) The Multiplex Licensee must, within 14 Business Days of the Access Seeker's request, comply with that request if, and to the extent, it is reasonable to do so (having regard to the factors in clause 14.2(b)).
- (g) The Access Seeker must not require the Multiplex Licensee to use any Financial Security it has provided to the Multiplex Licensee towards payment of the Standard Charges. For the avoidance of doubt, the provision of a Financial Security does not relieve the Access Seeker from its obligations to pay the Standard Charges to the Multiplex Licensee as they become due and payable, nor does it constitute a waiver of the Multiplex Licensee's right to suspend, disconnect or terminate the supply of the Multiplex Transmission Service in accordance with the terms of this Agreement.

#### 14.3 Call on Financial Security

The Multiplex Licensee may on reasonable notice in writing to the Access Seeker call on the Financial Security or use the Financial Security (or part of it) to settle any amount due or payable to the Multiplex Licensee by the Access Seeker under this Agreement if the amount has been due or payable for longer than 30 days or as otherwise agreed between the parties.

#### 14.4 Return of Financial Security

The Multiplex Licensee will terminate or return the Financial Security to the Access Seeker as soon as reasonably practicable following termination or expiry of this Agreement, or determination by the Multiplex Licensee under clause 14.2(f), that a Financial Security is no longer required in respect of the Access Seeker.

#### 14.5 Credit Limit

The Multiplex Licensee may from time to time impose or vary a credit limit upon the Access Seeker, beyond which the Multiplex Licensee is not required to supply any Multiplex Transmission Service on credit terms. The Multiplex Licensee may vary this credit limit, without limitation, by reference to the matters described above in this clause 14.

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## 15 Suspension

### 15.1 Rights of suspension

- (a) Subject to clauses 15.1(b) and 15.1(c), the Multiplex Licensee may suspend this Agreement or [power down or suspend all or part the supply](#) of the Multiplex Transmission Service (as the case may be), if in the reasonable opinion of the Multiplex Licensee:
  - (i) the supply of a Multiplex Transmission Service poses:
    - (A) a threat to the life of any person;

(B) a danger or hazard (or a threat of danger or hazard) to any person or to equipment or property of any person, including that of the Multiplex Licensee; or

(C) an imminent threat to the normal operation, access, integrity or security of the Multiplex Transmission Service;

(ii) powering down or suspension of the Multiplex Transmission Service is necessary to allow the Multiplex Licensee to repair, maintain, service or replace the Multiplex Transmission Service and it is not otherwise feasible to conduct the repair, maintenance, service or replacement of the Multiplex Transmission Service without powering down or suspending the Multiplex Transmission Service, or otherwise in accordance with the procedures and timeframes set out in the Operational Manual;

~~(iii)~~(iii) powering down or suspension of the Multiplex Transmission Service is necessary to allow the owner, operator or other tenant of a site on which all part of the Multiplex Transmission Service is supplied to access, pass through or perform works on or near, that site and it is not otherwise feasible to do so without powering down or suspending the Multiplex Transmission Service;

~~(iii)~~(iv) the Access Seeker suffers an Insolvency Event;

~~(iv)~~(v) there is an emergency that requires suspension of the supply of the Multiplex Transmission Service;

~~(v)~~(vi) the continued operation of this Agreement or the supply of the Multiplex Transmission Service would be unlawful;

~~(vi)~~(vii) to the extent necessary for the Multiplex Licensee to comply with an order, instruction or request of a Regulator, an emergency services organisation or any other competent authority;

~~(vii)~~(viii) upon the occurrence of any of the events described in clause 16.1 or 16.2(b) (as the case may be), where the Multiplex Licensee, acting reasonably and having regard to the circumstances, considers that suspension provides a more appropriate course of action than termination; or

~~(viii)~~(ix) the Access Undertaking is suspended pursuant to clause 2.3 of the Access Undertaking.

(b) The Multiplex Licensee may only suspend this Agreement, or power down or suspend the supply of a Multiplex Transmission Service, to the extent necessary to address the reason for the relevant suspension.



- (c) The Multiplex Licensee must, wherever it is reasonably possible to do so:
  - (i) notify and consult with the Access Seeker prior to the suspension of this Agreement or the [powering down or suspension of the](#) Multiplex Transmission Service (as the case may be); and
  - (ii) provide the Access Seeker with a reasonable opportunity to rectify the matter the subject of a suspension notice (or potential suspension notice) prior to suspension of this Agreement or the [powering down or suspension of the](#) Multiplex Transmission Service (as the case may be).

### 15.2 Without prejudice

The Multiplex Licensee's exercise of its right to suspend this Agreement or the Multiplex Transmission Service (as the case may be) does not prejudice any other right or remedy available to it (including any concurrent or subsequent right to terminate this Agreement).

### 15.3 Consequences of suspension

Upon suspension of this Agreement or the [suspension of the](#) Multiplex Transmission Service [in its entirety](#) (as the case may be):

- (a) the supply of the Multiplex Transmission Service will cease until the suspension is lifted in accordance with clause ~~15.415.415.3(b)~~;
- (b) the Access Seeker will not be liable to pay the Standard Charges for the duration of the suspension and until the suspension is lifted in accordance with clause ~~15.415.415.3(b)~~; and
- (c) notwithstanding anything else in this Agreement, the Multiplex Licensee will not be liable to the Access Seeker (or any other person) for any loss or damage (including Consequential Loss) that the Access Seeker (or any other person) may have suffered as a result of the suspension.

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### 15.4 [Powering up and lifting of suspension](#)

- (a) If:
  - (i) ~~The Multiplex Licensee will lift the suspension of~~ this Agreement ~~is suspended under this clause 15, the Multiplex Licensee will lift the suspension of this Agreement; or~~
  - (ii) ~~the Multiplex Transmission Service is powered down or suspended under this clause 15, the Multiplex Licensee will power up or lift the suspension of the Multiplex Transmission Service (as the case may be).~~

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and reactivate the Multiplex Transmission Service as soon as practicable after the reason for the suspension has ceased.

## 16 Termination

### 16.1 Termination with notice

A Party may terminate this Agreement by giving the other Party 30 days written notice of its intention to do so, if in the reasonable opinion of that Party:

- (a) the other Party has breached a material term of this Agreement which is capable of remedy (including non-payment of a non-disputed invoice) and has failed to remedy that breach within 30 days after receiving written notice from that Party specifying that breach and requiring it be remedied;
- (b) the other Party has breached a material term of this Agreement which is not capable of being remedied and the Parties have not agreed in writing a basis upon which this Agreement can continue within 30 days after the other Party receiving notice specifying that breach; or
- (c) the other Party's licence to supply services under this Agreement or to provide services that use or rely upon the services supplied under this Agreement (as the case may be) is terminated and is not renewed or transferred to another entity within the 30 day notice period, or is suspended for a consecutive period of 30 days or more.

### 16.2 Immediate termination

- (a) A Party may on written notice to the other Party terminate this Agreement with immediate effect if:
  - (i) this Agreement is validly suspended pursuant to clause 15 for more than 60 days and the terminating Party has provided 60 days notice that it intends to terminate this Agreement; or
  - (ii) the other Party suffers an Insolvency Event.
- (b) In addition to the rights described in clause 16.2(a), the Multiplex Licensee may on written notice to the Access Seeker terminate this Agreement with immediate effect if:
  - (i) the Multiplex Licensee reasonably suspects fraud by the Access Seeker (or any other person) in connection with the Multiplex Transmission Service;
  - (ii) the Multiplex Licensee is required to do so to comply with an order, instruction or request of a Regulator, an emergency services organisation or any other competent authority;

- (iii) a supplier or vendor terminates its agreement with the Multiplex Licensee, or ceases to supply services to the Multiplex Licensee, and the Multiplex Licensee is not able to provide the Multiplex Transmission Service using services supplied to it by an alternate supplier or vendor on terms reasonably acceptable to the Multiplex Licensee;
- (iv) a key agreement, on which the provision of the Multiplex Transmission Service is dependent or to which the provision of the Multiplex Transmission Service is connected, is terminated, and the Multiplex Licensee is not able to enter into another agreement to permit the continuation of the Multiplex Transmission Service on terms reasonably acceptable to the Multiplex Licensee; or
- (v) the Access Undertaking is terminated or ceases to have effect.

### **16.3 Termination for convenience**

An Access Seeker may terminate this Agreement at its discretion at any time by giving the Multiplex Licensee 30 days written notice of its intention to do so.

### **16.4 Consequences of termination**

On termination of this Agreement:

- (a) the supply of the Multiplex Transmission Service will cease;
- (b) the Access Seeker will not be liable to pay the Standard Charges for the Multiplex Transmission Service beyond the effective date of termination;
- (c) all sums payable to the Multiplex Licensee under this Agreement up to the date of termination become immediately due and payable;
- (d) the Multiplex Licensee must refund any amount or proportionate amount pre-paid by the Access Seeker which relates to the Multiplex Transmission Service that was to be provided after the effective date of termination;
- (e) all leases, licences and other rights conferred on a Party under this Agreement will immediately terminate;
- (f) the Access Seeker must at its own expense immediately return all of the Multiplex Licensee's property in good working condition, fair wear and tear excepted;
- (g) each Party must at its own expense and for a period of 2 years after termination of this Agreement, immediately comply with any written notice from the other Party to deliver, destroy, or erase any Confidential Information belonging to that other Party; and

- (h) the Multiplex Licensee will not be liable to the Access Seeker (or any other person) for any losses or damage that the Access Seeker (or any other person) may have suffered as a result of the termination.

#### **16.5 Changes in allocations of Multiplex Capacity**

- (a) The Access Seeker may notify the Multiplex Licensee of a change in the allocation of Multiplex Capacity or a change in the amount of Multiplex Capacity by giving the Multiplex Licensee 30 days written notice. The Multiplex Licensee will change the allocation of Multiplex Capacity in accordance with the notification and the process outlined in section 118NR of the Radiocommunications Act (where applicable).
- (b) For the avoidance of doubt, a request by an Access Seeker to change the allocation of Multiplex Capacity or to change the amount of Multiplex Capacity pursuant to clause 16.5(a) will not result in, or constitute, a termination of this Agreement.

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## **17 Liability and indemnity**

### **17.1 General**

To the extent permitted by law, the liability of each Party is limited and excluded as set out in this clause 16.5.

### **17.2 Exclusion of liability for Consequential Loss**

Neither Party is liable to the other Party in contract, tort (including claims for negligence and breach of statutory duty), statute or otherwise for any Consequential Loss suffered by the other Party arising from, or in connection with, the operation of this Agreement (other than for willful or deliberate breach of, or omission to act pursuant to, this Agreement).

### **17.3 Exclusion of implied warranties**

- (a) Nothing in this Agreement excludes, restricts or modifies any condition, warranty, right or remedy implied or imposed by any statute or regulation which cannot lawfully be excluded, restricted or modified, which may include [the Australian Consumer Law](#) ~~Part V of the Trade Practices Act 1974 (Cth)~~ and corresponding provisions of State or Territory legislation containing implied terms and warranties which operate to protect the purchasers of goods and services in various circumstances.
- (b) Subject to clause 17.3(a), all express or implied representations, conditions, warranties and provisions whether based in statute, common law or otherwise, relating to the Multiplex Transmission Service or this Agreement,

that are not contained in this Agreement, are excluded to the extent permitted by law.

#### **17.4 Limit on liability**

- (a) Subject to clause 17.4(b) and 17.5, the aggregate liability of a Party to the other Party in connection with this Agreement at any time is:
  - (i) \$100,000 for any one event or series of events arising from the same or similar facts or circumstances in any 12 month period; or
  - (ii) \$250,000 for all events in any 12 month period.
- (b) If the Multiplex Licensee is liable for loss suffered by the Access Seeker and that loss is caused by a third party, to the extent permitted by law:
  - (i) the Multiplex Licensee's liability (including under an indemnity) to the Access Seeker for such loss is limited to the amount recovered by the Multiplex Licensee from such third party; and
  - (ii) notwithstanding clause 17.4(b)(i), if the amount recovered by the Multiplex Licensee from such third party relates to the Multiplex Licensee's liability to more than one Access Seeker, then:
    - (A) the Multiplex Licensee will apportion the amount recovered between all affected Access Seekers; and
    - (B) the payment of such amount to the Access Seekers will satisfy the Multiplex Licensee's liability to the Access Seekers for such loss.

#### **17.5 Exclusion from limit**

A Party's liability under clause 17.4 is not limited in respect of any of the following:

- (a) any payments of Standard Charges required under this Agreement;
- (b) payments made or to be made to reimburse a Party for any costs, expenses or disbursements for which it is expressly liable pursuant to the terms of this Agreement; or
- (c) the indemnities specified in clause 17.7.

#### **17.6 Reduction of liability**

A liability of a Party to the other Party under this clause 16.5 is reduced to the extent that:

- (a) the other Party has not taken all reasonable steps to minimise its own liability, loss or damage in relation to an act, omission or event; or

- (b) an act or omission by the other Party has contributed to any liability, loss or damage incurred.

#### 17.7 Indemnities

- (a) Subject to clause 17.7(b) and clause 17.7(c), each Party indemnifies **(Indemnifying Party)** the other Party **(Indemnified Party)** against all Damage arising as a result of any Claim in respect of:
  - (i) injury or death to any person arising from:
    - (A) any breach of this Agreement by the Indemnifying Party or its Personnel; or
    - (B) any negligent, wilful, reckless or unlawful act or omission of the Indemnifying Party or its Personnel in connection with this Agreement;
  - (ii) loss of, or damage to, property of any person, arising from:
    - (A) any breach of this Agreement by the Indemnifying Party or its Personnel; or
    - (B) any negligent, wilful, reckless or unlawful act or omission of the Indemnifying Party or its Personnel in connection with this Agreement; or
  - (iii) where the Access Seeker is the Indemnifying Party, any negligent, wilful, reckless or unlawful act or omission of the Indemnifying Party or its Personnel in connection with this Agreement.
- (b) The Indemnifying Party's obligation to indemnify the Indemnified Party is reduced:
  - (i) to the extent that the liability the subject of the indemnity claim is the direct result of a breach of this Agreement, or a negligent act or omission, by the Indemnified Party or the Personnel of the Indemnified Party; and
  - (ii) in proportion to the contribution of the Indemnified Party or the Personnel of the Indemnified Party (including negligence) to the circumstances that give rise to the indemnity claim.
- (c) The obligations of the Indemnifying Party to indemnify the Indemnified Party under this Agreement are subject to the following conditions:
  - (i) the Indemnified Party must take reasonable steps to mitigate any loss or damage caused or suffered;

- (ii) the Indemnified Party must notify the Indemnifying Party in writing within a reasonable time after the Indemnified Party is notified or becomes aware of a Claim (except that failure to provide timely notice will not diminish the Indemnifying Party's obligation to indemnify the other party, except to the extent the other party is materially prejudiced by such failure);
  - (iii) subject to the Indemnifying Party agreeing to fully indemnify the Indemnified Party in respect of the Claim, the Indemnifying Party has sole control of the defence of the Claim (except that, if an Indemnified Party elects to do so, it may participate in the defence at its own expense) and all related monetary settlement negotiations (except that any non-monetary terms, including licensing terms, of any settlement of a Claim that directly affects the Indemnified Party, will require the prior written approval of the Indemnified Party); and
  - (iv) the Indemnified Party provides the Indemnifying Party with assistance, information, and authority reasonably necessary (at the Indemnifying Party's expense) for the Indemnifying Party to perform its obligations under this clause (except that the Indemnified Party will not be required to admit liability under any circumstance).
- (d) The Access Seeker indemnifies the Multiplex Licensee against all Damages arising from or relating to any Claim against the Multiplex Licensee by a third party in connection to, or arising in respect of, this Agreement, or the supply of the Multiplex Transmission Service.

#### **17.8 Interruption of the supply of the Multiplex Transmission Service**

- (a) The Access Seeker acknowledges that there may be Interruptions to the supply of the Multiplex Transmission Service.
- (b) If there is an Interruption to the supply of the Multiplex Transmission Service then:
  - (i) subject to clause 17.4, and to the extent permitted by law, the Multiplex Licensee is only liable for the direct loss suffered by the Access Seeker; and
  - (ii) the Multiplex Licensee is not liable to the extent that the Interruption was caused or contributed to by an Excluded Event or a Force Majeure Event (as the case may be).

#### **~~17.9 Changes to liability regime~~**

~~Subject to the approval of the ACCC, the Multiplex Licensee may propose changes to this clause 16.5 to take account of changes:~~

- ~~(a) in the Multiplex Licensee's liability to suppliers or vendors under third party supply agreements; or~~
- ~~(b) in the manner in which the Multiplex Licensee supplies the Multiplex Transmission Service.~~

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## 18 Intellectual property

### 18.1 No grant

- (a) Except as otherwise expressly provided in this Agreement, all Intellectual Property Rights remain the property of the Party that created or owns those rights.
- (b) Nothing in this Agreement may be construed, and the provision of the Multiplex Transmission Service to the Access Seeker may not be construed, as:
  - (i) an assignment of any Intellectual Property Rights by a Party to the other Party; or
  - (ii) the grant of a licence of any Intellectual Property Rights by a Party to the other Party.
- (c) Without prejudice to or limiting this clause 18.1, neither Party is entitled to use any trade marks or service marks (whether registered or not) of the other Party in any document or other medium, without the prior written consent of the other Party.

### 18.2 Jointly developed intellectual property

The Parties may negotiate arrangements (including in respect of ownership) concerning Intellectual Property Rights jointly developed in the course of performing this Agreement or otherwise arising in respect of this Agreement.

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## 19 Confidentiality

### 19.1 Obligation of Confidentiality

Except as otherwise provided in this Agreement, a Party (**Receiving Party**) must keep the Confidential Information of the other Party (**Disclosing Party**) confidential and must not disclose any of the Confidential Information of the Disclosing Party to any person, except:

- (a) in accordance with clause 19.3; or
- (b) on receiving the prior written consent of the Disclosing Party.



### **19.2 Permitted Use**

The Receiving Party must not use or copy the Confidential Information of the Disclosing Party except in connection with and for the purposes of performing its obligations or exercising its rights under this Agreement.

### **19.3 Disclosure**

The Receiving Party may disclose the Confidential Information of the Disclosing Party:

- (a) to the Receiving Party's Personnel to whom disclosure is necessary in order to perform its obligations or exercise its rights under this Agreement and only on a need-to-know basis;
- (b) to the Receiving Party's professional advisers, but only to the extent necessary for those advisers to provide advice or protect the rights of the Receiving Party under this Agreement;
- (c) to the Receiving Party's appointed financial advisers or appointed bankers only to the extent necessary for those financial advisers or appointed bankers to provide financial advice or services to the Receiving Party; and
- (d) where the Receiving Party is the Representative Company, a Digital Community Broadcaster to whom disclosure is necessary to ensure that the Digital Community Broadcaster can obtain the benefits that are intended to accrue to that Digital Community Broadcaster as a result of the operation of this Agreement and only on a need-to-know basis,

(each an **Authorised Person**), subject to:

- (e) the Receiving Party ensuring that each Authorised Person to whom any Confidential Information is disclosed strictly maintains its confidentiality and does not disclose it to any other person;
- (f) the Authorised Person agreeing to comply with the terms of this clause as though it were the Receiving Party; and
- (g) the Receiving Party remaining primarily responsible at all times for acts and omissions of that Authorised Person in connection with that Confidential Information.

### **19.4 Injunctive relief**

Each Party acknowledges that damages are not an adequate remedy for a breach of this clause 19 and that in addition to other remedies that may be available, a Party may seek injunctive relief against such a breach or threatened breach.

### **19.5 Exclusion**

Clause 19.1 does not apply to the disclosure by a Party of the minimum information necessary in order to comply with any applicable law or legally binding order of any Government Agency, including but not limited to a Regulator.

#### **19.6 Notification prior to disclosure**

Prior to any use or disclosure pursuant to clause 19.5, a Party must give notice to the other Party of the relevant disclosure. A Party must give the other Party a reasonable opportunity to:

- (a) challenge in a court of law or other appropriate body whether the proposed use or disclosure is in accordance with clause 19.5;
- (b) minimise the amount of information which is disclosed; and
- (c) determine or specify the terms upon which that information is disclosed.

#### **19.7 Return of Confidential Information**

- (a) All Confidential Information recorded in any form or any part thereof shall be returned to the Disclosing Party or destroyed by the Receiving Party, as directed and when requested by the Disclosing Party at any time (and at the option of the Disclosing Party), or when the Receiving Party's need for such information has ended or when this Agreement expires or is terminated, whichever is earlier.
- (b) If a Receiving Party has been directed to destroy the Confidential Information of the Disclosing Party pursuant to clause 19.7(a), the Receiving Party must certify that such information has been destroyed within 30 days of being so directed.

#### **19.8 Public announcements**

A Party must not, without the prior written consent of the other Party, make media or other public statements relating specifically to the performance of or disputes under this Agreement.

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## **20 External audits**

The Parties acknowledge that the ACCC may conduct external audits in accordance with Subdivision E of Division 4B of the Radiocommunications Act.

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## **21 Force Majeure**

- (a) Subject to clause 21(b), if a Party is unable to perform an obligation under this Agreement by reason of a Force Majeure Event, that obligation is suspended for the minimum extent and duration of the Force Majeure Event, provided that the Party:

- (i) gives the other Party prompt notice and reasonable details of the Force Majeure Event and, to the extent ascertainable, an estimate of the extent and duration of its inability to perform an obligation under this Agreement; and
  - (ii) uses reasonable endeavours to minimise or remove the effect of the Force Majeure Event as soon as possible.
- (b) Each Party remains liable:
  - (i) for the performance of each obligation, and to comply with and observe each term, of this Agreement that is not affected by the Force Majeure Event; and
  - (ii) to pay all Standard Charges payable in respect of the Multiplex Transmission Service provided during the period of the Force Majeure Event.
- (c) If a Force Majeure Event continues to prevent the affected Party from performing its obligations in whole or in material part for more than 90 days from the date of the notification under clause 21(a)(i), the other Party may terminate this Agreement by giving 30 days written notice to the other Party.
- (d) If this Agreement is not terminated in accordance with clause 21(c), then any obligations outstanding must be fulfilled by the Party affected by the Force Majeure Event as soon as reasonably practicable after the Force Majeure Event has ended, except where the fulfilment of that obligation by the Party is no longer possible or required.

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## 22 Dispute resolution

All disputes arising under or in relation to this Agreement are to be resolved in accordance with the Dispute Resolution Procedures, except Billing Disputes which are to be resolved in accordance with the process set out in clause 13 in the first instance.

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## 23 General

### 23.1 Notices

- (a) A notice, consent or other communication under this Agreement is only effective if it is:
  - (i) in writing and in legible English, signed by or on behalf of the Party giving it;
  - (ii) addressed to the Party to whom it is to be given; and

- (iii) either:
  - (A) sent by pre-paid mail (by airmail, if the addressee is overseas) or delivered to that Party's address; or
  - (B) sent by fax to that Party's fax number.
- (b) Subject to clause 23.1(c) a notice, consent or other communication under this Agreement is, in the absence of earlier receipt, regarded as given and received:
  - (i) if it is delivered, on delivery at the address of the relevant Party;
  - (ii) if it is sent by fax, at the time and on the day it was successfully sent; or
  - (iii) if it is sent by mail, on the 3rd Business Day after the day of posting, or if to or from a place outside Australia, on the 7th Business Day after the day of posting.
- (c) If a notice, consent or other communication under this Agreement is given and received on a day that is not a Business Day or after 5.00 pm (local time in the place of receipt) on a Business Day, it is regarded as being given and received at 9.00 am on the next Business Day.
- (d) For the purposes of this clause 23.1, a Party's address and fax number are those set out below:

**the Multiplex Licensee:**

Address:  
Fax number:  
Attention:

**Access Seeker:**

Address:  
Fax number:  
Attention:

**23.2 Waiver**

- (a) No waiver of a right or remedy under this Agreement is effective unless it is in writing and signed by the Party granting it. It is only effective in the specific instance and for the specific purpose for which it is granted.
- (b) A single or partial exercise of a right or remedy under this Agreement does not prevent a further exercise of that or of any other right or remedy.

- (c) Failure to exercise or delay in exercising a right or remedy under this Agreement does not operate as a waiver or prevent further exercise of that or of any other right or remedy.

### **23.3 Severability**

Any term of this Agreement which is wholly or partially void or unenforceable is severed to the extent that it is void or unenforceable. The validity or enforceability of the remainder of this Agreement is not affected.

### **23.4 Costs, expenses and duties**

Except as expressly provided in this Agreement:

- (a) each Party must pay its own costs and expenses of negotiating, preparing and executing this Agreement and any other instrument executed under this Agreement; and
- (b) the Access Seeker:
  - (i) must pay all stamp duty (including interest, fines and penalties) payable on this Agreement, the performance of this Agreement (including the transfer of any property) and any transaction contemplated by it; and
  - (ii) indemnifies the Multiplex Licensee against any failure to comply with clause 23.4(b)(i).

### **23.5 Relationship of the parties**

Except as expressly provided in this Agreement:

- (a) nothing in this Agreement is intended to constitute a fiduciary relationship or an agency, partnership or trust; and
- (b) no Party has authority to bind any other Party.

### **23.6 Governing law**

This Agreement is governed by the laws of New South Wales.

### **23.7 Jurisdiction**

Each Party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of New South Wales.

### **23.8 Entire agreement**

- (a) This Agreement is the entire agreement between the parties about its subject matter and replaces all previous agreements, understandings, representations and warranties about that subject matter.
- (b) Each Party represents and warrants that it has not relied on any representations or warranties about the subject matter of this Agreement except as expressly provided in this Agreement.

**23.9 Variation**

- (a) Subject to clause 23.9(b), no variation of this Agreement is effective unless made in writing and signed by each Party and accepted by the ACCC under section 118NH of the Radiocommunications Act.
- (b) Pursuant to clause 4.2 of the Access Undertaking, any replacement or variation of the Access Undertaking will automatically form part of this Agreement.

**23.10 Assignment, novation and other dealings**

- (a) Subject to clause 23.10(b), a Party must not assign or novate this Agreement or otherwise deal with the benefit of it or a right under it, or purport to do so, without the prior written consent of the other Party (such consent not to be unreasonably withheld).
- (b) The Access Seeker must not transfer a Standard Access Entitlement and may only transfer an Excess-Capacity Access Entitlement in accordance with clause 7.

**23.11 Cumulative rights**

Except as expressly provided in this Agreement, the rights of a Party under this Agreement are in addition to and do not exclude or limit any other rights or remedies provided by law.

**23.12 Further assurances**

Except as expressly provided in this Agreement, each Party must, at its own expense, do all things reasonably necessary to give full effect to this Agreement and the matters contemplated by it.

**23.13 Consents and approvals**

Except as expressly provided in this Agreement, a Party may conditionally or unconditionally give or withhold any consent or approval under this Agreement, but that consent is not to be unreasonably delayed or withheld.

**23.14 Survival and merger**

- (a) No term of this Agreement merges on completion of any transaction contemplated by this Agreement.
- (b) Clauses 12, 16.4, 16.5 and 19 survive termination or expiry of this Agreement, together with any other clause which by its nature is intended to do so.

**23.15 Third party rights**

Except as expressly provided in this Agreement:

- (a) each person who executes this Agreement does so solely in its own legal capacity and not as agent or trustee for or a partner of any other person; and
- (b) only those persons who execute this Agreement have a right or benefit under it.

**23.16 Counterparts**

This Agreement may be executed in any number of counterparts, each of which, when executed, is an original. Those counterparts together make one instrument.

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## Schedule 1 Dictionary

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### 1 Definitions

In this Agreement:

**ACCC** means the Australian Competition and Consumer Commission.

**Access Seeker** means an access seeker under this Agreement and may include:

- (a) an Incumbent Commercial Broadcaster;
- (b) a Digital Community Broadcaster;
- (c) the Representative Company where the Representative Company is exercising powers specified in its constitution or the powers referred to in section 9C(1)(k) of the Radiocommunications Act; and
- (d) a Restricted Datacaster.

**Access Seeker Initiated Review** has the meaning given to it in clause 5.3(a) of Schedule 2 (**Pricing Principles**) of this Agreement.

**Access Undertaking** means the access undertaking accepted by the ACCC pursuant to section 118NF(7) of the Radiocommunications Act, to which this Agreement forms a part.

**ACMA** means the Australian Communications and Media Authority.

**ADI** has the meaning given to it in the *Banking Act 1959 (Cth)*, as amended from time to time.

**Agreement** means this access agreement, including the main body and all schedules, attachments and annexures.

**Auction Rules** means the rules developed by the Multiplex Licensee in accordance with section 118NT(6) of the Radiocommunications Act to allocate Excess-Capacity Access Entitlements to Qualified Content Service Providers.

**Authorised Person** has the meaning given to it in clause 19.3 of the main body of this Agreement.

**Billing Dispute** means a dispute in relation to an invoice issued by the Multiplex Licensee to the Access Seeker under this Agreement that is notified by the Access Seeker to the Multiplex Licensee in accordance with clause 13(a) of the main body of this Agreement.

**Broadcasting Services Act** means the *Broadcasting Services Act 1992 (Cth)*, as amended from time to time.



**Business Day** means a day (other than a Saturday, Sunday or public holiday) on which banks are open generally for business in Sydney.

**Claim** means any claim, demand, suit, action or proceeding by a third party.

**Confidential Information** of the Disclosing Party means all information of:

- (a) the Disclosing Party;
- (b) any Related Bodies Corporate of the Disclosing Party;
- (c) where the Multiplex Licensee is the Disclosing Party, all information of a third party supplier or vendor of the Multiplex Licensee); and
- (d) where the Representative Company is the Disclosing Party, all information of Digital Community Broadcasters within the possession or control of the Representative Company,

which:

- (e) is regarded by the Disclosing Party (or the other persons referred to in paragraphs (a)-(d) above) as confidential to it, marked as confidential or can reasonably be inferred to be confidential from the circumstances in which it is disclosed; and
- (f) is disclosed to or observed by the Recipient in connection with this Agreement,

including:

- (g) the financial, accounting, marketing, technical and other commercially sensitive information of the Disclosing Party, its Related Bodies Corporate or the other persons referred to in paragraphs (a)-(d) above;
- (h) information relating to, or that may affect, the business, financial position, assets, liabilities or reputation of the Disclosing Party, its Related Bodies Corporate or the other persons referred to in paragraphs (a)-(d) above;
- (i) information relating to the internal management and structure of, or policies and strategies of the Disclosing Party, its Related Bodies Corporate or the other persons referred to in paragraphs (a)-(d) above;
- (j) all information that the Recipient or its Personnel become aware of, or generate in working with the Disclosing Party, pursuant to the terms of this Agreement;
- (k) all notes, compilations, analyses, extracts, summaries and other records prepared by or for the benefit of the Recipient or any of its Related Bodies

Corporate based on or incorporating the information referred to in paragraphs (g) – (j) inclusive;

- (l) all copies of the information and the notes and other records referred to above,

but not including information that:

- (m) is in or comes into the public domain otherwise than by disclosure in breach of this Agreement;
- (n) at the time of first disclosure to or observation by the Recipient, was already in the lawful possession of that Party; or
- (o) is disclosed to, or observed by, the Recipient from a third party entitled to disclose it.

**Consequential Loss** means:

- (a) loss of revenue, loss of profits, loss of anticipated savings or business, pure economic loss, loss or corruption of data, loss of value of equipment (other than cost of repair), loss of opportunity, expectation loss, loss of goodwill, loss of bargain or loss arising out of any claims by third parties and any other form of consequential, special, indirect, punitive or exemplary loss or damages; or
- (b) any penalties or fines imposed by a Regulator,
- (c) whether or not foreseeable or contemplated and whether caused by negligence or otherwise.

**Content Service** has the meaning given to it in section 118NB of the Radiocommunications Act.

**Corporations Act** means the *Corporations Act 2001 (Cth)*, as amended from time to time.

**Damages** means any liabilities, losses, damages, costs and expenses (including legal costs on a full indemnity basis and whether incurred by or awarded against a Party).

**Designated BSA Radio Area** has the meaning given to it in section 5 of the Radiocommunications Act.

**Digital Broadcaster** means:

- (a) an Incumbent Commercial Broadcaster; or
- (b) a Digital Community Broadcaster.

**Digital Channel** means a digital stream of programming corresponding to the equivalent of a single (or part thereof) analogue radio broadcasting service or other content services which is permitted to be provided in the Designated BSA Radio Area.

**Digital Commercial Radio Broadcasting Service** has the meaning given to in section 6 of the Broadcasting Services Act.

**Digital Community Broadcaster** means the holder of a Digital Community Radio Broadcasting Licence.

**Digital Community Radio Broadcasting Licence** has the meaning given to it in section 5 of the Radiocommunications Act.

**Digital Community Radio Broadcasting Representative Company** has the meaning given to it in section 9C of the Radiocommunications Act.

**Digital Community Radio Broadcasting Service** has the meaning given to in section 6 of the Broadcasting Services Act.

**Digital Radio Multiplex Transmitter Licence** has the meaning given to it in section 5 of the Radiocommunications Act.

**Digital Radio Start Up Day** has the meaning given to it in section 8AC of the Broadcasting Services Act.

**Disclosing Party** has the meaning given to it in clause 19.1 of the main body of this Agreement.

**Dispute Resolution Procedures** means the dispute resolution procedures set out in Schedule 3 (**Dispute Resolution Procedures**) of this Agreement.

**Due Date** has the meaning given to it in clause 12.4(a) of the main body of this Agreement.

**Efficient Costs** has the meaning given to it in clause 3.3 of Schedule 2 (**Pricing Principles**) of this Agreement.

**Effective Date** means:

(a) [if the Access Seeker acquired the Multiplex Transmission Service prior to 1 January 2013 from the Multiplex Licensee, 1 January 2013; and](#)

~~(e)~~(b) [if the Access Seeker did not acquire the Multiplex Transmission Service prior to 1 January 2013 from the Multiplex Licensee,](#) the date that this Agreement is executed by both Parties.

**Excess-Capacity Access Entitlement** has the meaning given to it in section 118NB of the Radiocommunications Act.

**Excess-Capacity Access Obligations** has the meaning given to it in section 118NB of the Radiocommunications Act.

**Excess Multiplex Capacity** has the meaning given to it in clause 7.3 of the main body of the Agreement.

**Excluded Event** means:

- (a) a breach of this Agreement by the Access Seeker;
- (b) a negligent or fraudulent act or omission of the Access Seeker or any of its Personnel;
- (c) a failure of any Access Seeker equipment; or
- (d) an act or omission of any third party (including a supplier or vendor) or unavailability of a third party product or service upon which the supply of the Multiplex Transmission Service is dependent.

**Financial Security** means any instrument that secures the payment of amounts due and owing under this Agreement and includes, without limitation, a bank guarantee, a parent company guarantee, personal guarantee from directors, a letter of credit, security over a bank deposit, a related company guarantee, a right of set-off, a fixed charge or a fixed and floating charge.

**Force Majeure Event** means any event or circumstance outside a person's reasonable control, and includes fire, storm, flood, earthquake, accident, war, terrorist act, labour dispute (other than a dispute solely between that person and its own staff or staff under its control), materials or labour shortage.

**Foundation Category 1 Digital Radio Multiplex Transmitter Licence** has the meaning given to it in section 98C of the Radiocommunications Act.

**Good Industry Practice** means the exercise of a degree of skill, diligence, prudence and foresight that would be reasonably expected from a significant proportion of operators that supply the Multiplex Transmission Service.

**Government Agency** means any governmental, semi-governmental, regulatory, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity.

**GST** has the meaning given to it in the *A New Tax System (Goods and Service Tax) Act 1999 (Cth)*, as amended from time to time.

**Incumbent Commercial Broadcaster** means an Incumbent Digital Commercial Radio Broadcasting Licensee.

**Incumbent Digital Commercial Radio Broadcasting Licensee** has the meaning given to it in section 5 of the Radiocommunications Act.

**Indemnified Party** has the meaning given to it in clause 17.7(a) of the main body of this Agreement.

**Indemnifying Party** has the meaning given to it in clause 17.7(a) of the main body of this Agreement.

**Initial Price List** has the meaning given to it in clause 5.1(a) of Schedule 2 (**Pricing Principles**) of this Agreement.

**Insolvency Event** means the occurrence of any one or more of the following events in relation to any person:

- (a) an application is made to a court for an order, or an order is made, that it be wound up, declared bankrupt or that a provisional liquidator or receiver or receiver and manager be appointed, unless the application is withdrawn, struck out or dismissed within 21 days of it being filed;
- (b) a liquidator or provisional liquidator is appointed and that appointment is not dismissed, withdrawn or terminated within 21 days of it being made;
- (c) an administrator is appointed to it under sections 436A, 436B or 436C of the Corporations Act and the appointment is not dismissed, withdrawn or terminated within 21 days of it being made;
- (d) a Controller (as defined in section 9 of the Corporations Act) is appointed to it or any of its assets and the appointment is not dismissed, withdrawn or terminated within 21 days of it being made;
- (e) a receiver is appointed to it or any of its assets and the appointment is not dismissed, withdrawn or terminated within 21 days of it being made;
- (f) it enters into an arrangement or composition with one or more of its creditors, or an assignment for the benefit of one or more of its creditors, in each case other than to carry out a reconstruction or amalgamation while solvent;
- (g) it proposes a winding-up, dissolution or reorganisation, moratorium, deed of company arrangement or other administration involving one or more of its creditors;
- (h) it is insolvent as disclosed in its accounts or otherwise, states that it is insolvent, is presumed to be insolvent under an applicable law (including under sections 459C(2) or 585 of the Corporations Act) or otherwise is, or states that it is, unable to pay all its debts as and when they become due and payable;
- (i) it is taken to have failed to comply with a statutory demand as a result of the Corporations Act section 459F(1);

- (j) a notice is issued under sections 601AA or 601AB of the Corporations Act and not withdrawn or dismissed within 21 days;
- (k) a writ of execution is levied against it or a material part of its property which is not dismissed within 21 days;
- (l) it ceases to carry on business or threatens to do so; or
- (m) anything occurs under the law of any jurisdiction which has a substantially similar effect to any of the events set out in the above paragraphs of this definition.

**Intellectual Property Rights** means all rights conferred under statute, common law and equity in and in respect of intellectual property rights, including without limitation trade marks, trade names, logos and get up, inventions, patents, designs, copyright, circuit layouts, Confidential Information (including the confidential information of a third party), know-how and trade secrets, whether registered or not, and all rights and interests in them or licences to use any of them.

**Interested Party** has the meaning given to it in clause 7.4(b) of the main body of this Agreement.

**Interruption** means a delay in supplying, a failure to supply or an error or defect in the supply of, the Multiplex Transmission Service.

**Late Payment Charge** has the meaning given to it in clause 12.6(a) of the main body of this Agreement.

**Multiplex Capacity** has the meaning given to it in section 118NB of the Radiocommunications Act.

**Multiplex Licensee** means the holder of a Digital Radio Multiplex Transmitter Licence that provides the Multiplex Transmission Service pursuant to this Agreement.

**Multiplex Licensee Initiated Review** has the meaning given to it in clause 5.2(a) of Schedule 2 (**Pricing Principles**) of this Agreement.

**Multiplex Transmission Service** has the meaning given to it in Attachment A (**Service description**) of the Access Undertaking.

**Notice of Dispute** has the meaning given to it in clause 2.1 of Schedule 3 (**Dispute Resolution Procedures**) of this Agreement.

**OFDM** means orthogonal frequency division multiplex.

**Operational Manual** has the meaning given to it in clause 2.2(a) of the main body of this Agreement.

**Party** means a party to this Agreement.

**Personnel** means employees, agents, contractors or other representatives of a Party.

**Premises** means locations at which the Multiplex Licensee supplies a Multiplex Transmission Service, and locations to which the Multiplex Licensee needs to have access in order to supply a Multiplex Transmission Service.

**Price Adjustment Date** has the meaning given to it in clause 5.2(f) and 5.3(f) (as the case may be) of Schedule 2 (**Pricing Principles**) of this Agreement.

**Pricing Principles** means the pricing principles set out in clause 3 of Schedule 2 (**Pricing Principles**) of this Agreement.

**Qualified Content Service Provider** means:

- (a) an Incumbent Commercial Broadcaster;
- (b) a Digital Community Broadcaster; and
- (c) a Restricted Datacaster.

**Radiocommunications Act** means the *Radiocommunications Act 1992 (Cth)*, as amended from time to time.

**Receiving Party** has the meaning given to it in clause 19.1 of the main body of this Agreement.

**Regulator** means the ACMA, the ACCC, or any other government, administrative, judicial or statutory body or authority (as the case may be).

**Related Body Corporate** has the meaning given to that term in section 9 of the Corporations Act.

**Representative Company** means the Digital Community Radio Broadcasting Representative Company.

**Restricted Datacaster** means a holder of a Restricted Datacasting Licence.

**Restricted Datacasting Licence** has the meaning given to it in section 6 of the Broadcasting Services Act.

**Restricted Datacasting Service** has the meaning given to it in section 6 of the Broadcasting Services Act.

**Standard Access Entitlement** has the meaning given to it in section 118NB of the Radiocommunications Act.

**Standard Access Obligations** has the meaning given to it in section 118NB of the Radiocommunications Act.

**Standard Charges** has the meaning given to it in clause 12.2(a) of the main body of this Agreement.

**Tax** means any withholding tax, charge (and associated penalty or interest), rate, duty or impost imposed by any authority at any time but does not include GST, or any tax on income or capital gains.

**Term** has the meaning given to it in clause 5.15 of the main body of this Agreement.

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## 2 Interpretation

- (a) In this Agreement, the following rules of interpretation apply unless the contrary intention appears:
- (b) headings are for convenience only and do not affect the interpretation of this Agreement;
- (c) the singular includes the plural and vice versa;
- (d) words that are gender neutral or gender specific include each gender;
- (e) where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings;
- (f) the words 'such as', 'including', 'particularly' and similar expressions are not used as, nor are intended to be, interpreted as words of limitation;
- (g) a reference to:
  - (i) a person includes a natural person, partnership, joint venture, governmental agency, association, corporation or other body corporate;
  - (ii) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;
  - (iii) a Party includes its, agents, successors and permitted assigns;
  - (iv) a document includes all amendments or supplements to that document;
  - (v) a clause, term, Party, schedule or attachment is a reference to a clause or term of, or Party, schedule or attachment to this Agreement;
  - (vi) this Agreement includes all schedules and attachments to it;
  - (vii) a law includes a constitutional provision, treaty, decree, convention, statute, regulation, ordinance, by-law, judgment, rule of common law



- or equity, or rule of any stock exchange and is a reference to that law as amended, consolidated or replaced and includes any regulations and other subordinate instruments made under or in accordance with those laws;
- (viii) an agreement other than this Agreement includes an undertaking, or legally enforceable arrangement or understanding, whether or not in writing; and
  - (ix) a monetary amount is in Australian dollars;
- (h) an agreement on the part of two or more persons binds them jointly and severally;
- (i) when the day on which something must be done is not a Business Day, that thing must be done on the following Business Day;
- (j) in determining the time of day, where relevant to this Agreement, the relevant time of day is:
- (i) for the purposes of giving or receiving notices, the time of day where a Party receiving a notice is located; or
  - (ii) for any other purpose under this Agreement, the time of day in the place where the Party required to perform an obligation is located; and
- (k) no rule of construction applies to the disadvantage of a Party because that Party was responsible for the preparation of this Agreement or any part of it.

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## Schedule 2 Pricing Principles

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### 1 General

This Schedule sets out the following:

- (a) the pricing principles applicable to the provision of the Multiplex Transmission Service by the Multiplex Licensee; and
- (b) the methodology for determining the Standard Charges payable by Access Seekers to the Multiplex Licensee for the Multiplex Transmission Service.

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### 2 Operation of these principles

- (a) It is intended that these pricing principles will be used by the Parties when commercially negotiating the prices to be paid by an Access Seeker to the Multiplex Licensee for the acquisition of the Multiplex Transmission Service.
- (b) If there is a dispute about the price to be paid by an Access Seeker to the Multiplex Licensee for the acquisition of the Multiplex Transmission Service, the person appointed under the Dispute Resolution Procedures to resolve the dispute is required to have regard to, and apply, these principles when deriving the price to be paid.

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### 3 Pricing Principles

#### 3.1 Cost recovery principle

As a general over-arching principle, a Multiplex Licensee may supply the Multiplex Transmission Service at a price that allows the Multiplex Licensee to:

- (a) recover no more than its Efficient Costs; and
- (b) earn a normal commercial rate of return on its investment.

#### 3.2 Cost categories

The Multiplex Licensee may recover all Efficient Costs it incurs in relation to the supply of the Multiplex Transmission Service. The Efficient Costs that the Multiplex Licensee may incur and recover is presently anticipated to include:

- (a) **capital expenditure**, being the capital outlays incurred by the Multiplex Licensee in order to supply the Multiplex Transmission Service including all efficient expenditure on:
  - (i) line terminating equipment;

- (ii) multiplexer equipment;
- (iii) modulation equipment;
- (iv) monitoring equipment;
- (v) control equipment;
- (vi) test equipment;
- (vii) transmitter equipment;
- (viii) feeder;
- (ix) antenna;
- (x) housing for the above equipment; and
- (xi) all other equipment used to supply the Multiplex Transmission Service,

**(Assets);**

- (b) **operating expenditure**, being the operational outlays incurred by the Multiplex Licensee in order to supply the Multiplex Transmission Service, including all efficient expenditure on:
  - (i) operations and maintenance of the Assets;
  - (ii) site access costs;
  - (iii) antenna access costs;
  - (iv) utilities, including power;
  - (v) air conditioning;
  - (vi) rental costs; and
  - (vii) all other operational and maintenance activities involved in the supply of the Multiplex Transmission Service; and
- (c) **expenditure on corporate overheads** incurred by the Multiplex Licensee.

### 3.3 Efficient Costs

For the purposes of calculating the fixed recurring charges and determining whether the costs incurred by the Multiplex Licensee are “Efficient Costs”, it is necessary to have regard to the following:

- (a) in respect of capital expenditure:

- (i) the need for the Multiplex Licensee to recover its efficient costs of supplying the Multiplex Transmission Service in accordance with this Agreement and any applicable legal and regulatory obligations;
  - (ii) whether the capital expenditure undertaken by the Multiplex Licensee in relation to the Assets was, at the time it was undertaken, an efficient option having regard to the overall economic life of the Asset and long term planning in respect of the supply of the Multiplex Transmission Service;
  - (iii) whether the capital expenditure undertaken by the Multiplex Licensee was, at the time it was undertaken, consistent with Good Industry Practice;
  - (iv) whether the capital expenditure undertaken by the Multiplex Licensee in relation to the Assets was, at the time it was undertaken and having regard to the circumstances at that time, subject to an appropriate competitive procurement process (or similar process);
  - (v) the value of relevant Assets as shown in audited accounts; and
- (b) in respect of operational expenditure and expenditure on corporate overheads:
- (i) the need for the Multiplex Licensee to recover its efficient costs of supplying the Multiplex Transmission Service in accordance with this Agreement and any applicable legal and regulatory obligations;
  - (ii) whether the operational expenditure incurred by the Multiplex Licensee was, at the time it was incurred, reasonably necessary to meet or manage the expected demand for the Multiplex Transmission Service for the relevant period; and
  - (iii) whether the operational expenditure incurred by the Multiplex Licensee was, at the time it was incurred, reasonably necessary to establish and maintain the quality, reliability and security of supply of the Multiplex Transmission Service for the relevant period.

### 3.4 Annualisation of costs

- (a) In order to derive fixed recurring charges, costs incurred by the Multiplex Licensee need to be annualised. The total annualised costs will be derived by aggregating all costs incurred by the Multiplex Licensee in relation to the supply of the Multiplex Transmission Service, including the following:
- (i) the annualised capital expenditure;
  - (ii) the annual operating expenditure; and

- (iii) the annual corporate overhead expenditure.
- (b) Capital expenditure will be recovered by annualising these costs over the economic life of the Assets. For the purpose of these pricing principles, the economic life of each of the Assets is to be determined in accordance with the following criteria for “radio and television broadcasting equipment” as set out in Table 1 of *the Income Tax (Effective Life of Depreciating Assets) Determination 2001*:
  - (i) computer automated – 10 years;
  - (ii) general plant – 6<sup>2/3</sup> years; and
  - (iii) steel masts – 40 years.
- (c) The annualised capital expenditure will be determined by aggregating the return on capital of the depreciated value of the Assets, and the return of capital. For the purposes of this calculation:
  - (i) the return on capital is the weighted average cost of capital of the depreciated value of the Assets. The weighted average cost of capital is the nominal post-tax return on capital and is calculated by reference to the cost of equity and the cost of debt to the Multiplex Licensee. The weighted average cost of capital of the Multiplex Licensee will be commensurate with the weighted average cost of capital of similar enterprises conducting similar businesses, with a similar risk profile and at a similar phase of their business cycle; and
  - (ii) the return of capital is the depreciation expense incurred in each period calculated by applying a straight-line depreciation schedule to each of the Multiplex Licensee Assets.

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## 4 Principles for determining fixed recurring charges

### 4.1 Fixed recurring charge

Fixed recurring charges will be levied based on the Multiplex Capacity allocated to an Access Seeker, irrespective of whether that capacity is used or not and irrespective of the type of use.

### 4.2 Converting costs into charges

The annualised costs derived under section 3 of these pricing principles will be converted into an annual fixed recurring charge according to the following formula:

$$\text{AFRC} = \frac{\text{AC} \times \text{BMC}}{\text{TMC}}$$

where,

**AFRC** is the annual fixed recurring charge.

**AC** is the annualised costs derived under section 3.

**BMC** is the amount of Multiplex Capacity allocated to the relevant Access Seeker by the Multiplex Licensee.

**TMC** is the total amount of Multiplex Capacity allocated to all Access Seekers by the Multiplex Licensee and which shall be no greater (but may be less) than 9/9.

#### **4.3 Changes in the number of Access Seekers receiving the Multiplex Transmission Service**

In the event that the total amount of Multiplex Capacity allocated to all Access Seekers by the Multiplex Licensee increases or decreases within a billing period, the Standard Charges payable by each Access Seeker are to be proportionally adjusted upwards or downwards (as the case may be) from the date of the relevant increase or decrease.

#### **4.4 Lower bit rate**

In the event that the Multiplex Licensee provides the Multiplex Transmission Service to Access Seekers (pursuant to clause ~~9.3(d)~~~~9.3(d)~~~~9.3(e)~~ of the main body of this Agreement) at a lower bit rate than that which the Multiplex Licensee provides to other Access Seekers, the Access Seekers that access the lower bit rate agree that the charges payable pursuant to this Schedule 2 (**Pricing Principles**) will also include any specific costs incurred by the Multiplex Licensee in providing a lower bit rate service to those Access Seekers, including but not limited to the cost of any additional line cards and other equipment that are required to supply those Access Seekers with the Multiplex Transmission Service at the lower bit rate.

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## **5 Review of fixed recurring charges**

### **5.1 Initial Price List**

- (a) [If the Access Seeker did not acquire the Multiplex Transmission Service prior to 1 January 2013, then as at](#) the Effective Date, the Multiplex Licensee will provide the Access Seeker with a price list setting out the fixed recurring charges that are applicable in respect of Multiplex Capacity allocated to the Access Seeker and if applicable, the period for which the fixed recurring charges are valid (**Initial Price List**).
- (b) The Multiplex Licensee will also provide such data that the Multiplex Licensee, acting reasonably and in good faith, considers is reasonably necessary for the Access Seeker to verify that the fixed recurring charges in

the Initial Price List are consistent with the Pricing Principles, including but not limited to data setting out the various cost elements described in clauses 3.2 and 3.4.

## 5.2 Multiplex Licensee Initiated Reviews

- (a) The Multiplex Licensee may review the fixed recurring charges payable by Access Seekers who acquire the Multiplex Transmission Service to ensure consistency with the Pricing Principles, including but not limited to adjustments to reflect:
- (i) actual expenditure incurred by the Multiplex Licensee when compared with the forecasted or estimated costs;
  - (ii) changes in the costs incurred by the Multiplex Licensee;
  - (iii) changes in the consumer price index; and
  - (iv) technological developments that change the cost of supplying the Multiplex Transmission Service or the number of Access Seekers that can be accommodated by the Multiplex Licensee,
- (Multiplex Licensee Initiated Review).**
- (b) The Access Seeker must, for the duration of the Multiplex Licensee Initiated Review, continue to pay the fixed recurring charges that are applicable at the time of commencement of the Multiplex Licensee Initiated Review.
- (c) In the event that the Multiplex Licensee wishes to undertake a Multiplex Licensee Initiated Review, the Multiplex Licensee will provide all Access Seekers with notice of the following:
- (i) an estimate of the fixed recurring charges that it reasonably considers should apply following the completion of the Multiplex Licensee Initiated Review;
  - (ii) the reasons for any proposed changes in the level of the fixed recurring charges, as described in clauses 5.2(a)(i)-5.2(a)(iv);
  - (iii) such data that the Multiplex Licensee, acting reasonably and in good faith, considers is reasonably necessary for Access Seekers to verify that the fixed recurring charges estimated by the Multiplex Licensee are consistent with the Pricing Principles, including but not limited to data setting out the various cost elements described in clauses 3.2 and 3.4; and
  - (iv) any other information that the Multiplex Licensee considers appropriate.

- (d) Within 30 days of receipt of the information described in clause 5.2(c), each Access Seeker may (but is not obliged to) provide the Multiplex Licensee with any views or comments it may have in respect of the fixed recurring charges estimated by the Multiplex Licensee.
- (e) The Multiplex Licensee will consider any views or comments received from each Access Seeker under clause 5.2(d) in good faith. The Multiplex Licensee may revise the fixed recurring charges, if, after having considered any such views or comments in good faith, it forms the opinion that it is necessary to revise the fixed recurring charges to ensure consistency with the Pricing Principles.
- (f) Within 30 days of the expiry of the 30 day period described in clause 5.2(d), the Multiplex Licensee will provide all Access Seekers with written notice of the fixed recurring charges that are to apply as a consequence of the completion of the Multiplex Licensee Initiated Review. Such fixed recurring charges will take effect from the next applicable billing period (**Price Adjustment Date**). For the avoidance of doubt, a Multiplex Licensee Initiated Review is deemed to have been completed on the date that the Multiplex Licensee issues a notice under this clause 5.2(f).
- (g) For the avoidance of doubt:
  - (i) all Access Seekers must:
    - (A) pay the fixed recurring charges that are applicable from the Price Adjustment Date; and
    - (B) continue to pay those fixed recurring charges for the duration of any dispute notified under the Dispute Resolution Procedures; and
  - (ii) in the event that the dispute is resolved in a manner that requires:
    - (A) an increase in the level of fixed recurring charges paid or payable by Access Seekers since the Price Adjustment Date, the Multiplex Licensee may invoice the Access Seekers for the unpaid portion of the fixed recurring charges in a later invoice; or
    - (B) a decrease in the level of fixed recurring charges paid or payable by Access Seekers since the Price Adjustment Date, the Multiplex Licensee must repay the overpaid portion of the fixed recurring charges to the Access Seekers.



### 5.3 Access Seeker Initiated Reviews

- (a) Subject to clause 5.3(d) an Access Seeker may request that the Multiplex Licensee review the applicable fixed recurring charges to ensure consistency with the Pricing Principles, including but not limited to adjustments to reflect:
- (i) actual expenditure incurred by the Multiplex Licensee when compared with the forecasted or estimated costs;
  - (ii) changes in the costs incurred by the Multiplex Licensee;
  - (iii) changes in the consumer price index; and
  - (iv) technological developments that change the cost of supplying the Multiplex Transmission Service or the number of Access Seekers that can be accommodated by the Multiplex Licensee,
- (Access Seeker Initiated Review).**
- (b) The Access Seeker must, for the duration of the Access Seeker Initiated Review, continue to pay the fixed recurring charges that are applicable at the time of commencement of the Access Seeker Initiated Review.
- (c) The Access Seeker must provide the Multiplex Licensee with notice that it wishes to commence an Access Seeker Initiated Review.
- (d) A Multiplex Licensee is not obliged to accept an Access Seeker Initiated Review pursuant to clause 5.3(a) in the event that:
- (i) the Access Seeker Initiated Review is lodged within a period that is less than 2 years from the date of completion of a previous review of the fixed recurring charges pursuant to clause 5.2 or 5.3 (as the case may be); or
  - (ii) at the time of lodgement of the Access Seeker Initiated Review by the Access Seeker:
    - (A) the Multiplex Licensee has given notice pursuant to clause 5.2(c) of a Multiplex Licensee Initiated Review and that review has not yet been completed; or
    - (B) another Access Seeker has already give notice pursuant to clause 5.3(c) of an Access Seeker Initiated Review and that review has not yet been completed.
- (e) In the event that the Multiplex Licensee receives a valid request for an Access Seeker Initiated Review (as determined in accordance with clause 5.3(d)), the Multiplex Licensee will, within 30 days of receipt of such a request (or such other period as may be agreed between the Parties):

- (i) provide the Access Seeker that lodged the valid request for an Access Seeker Initiated Review with the following:
  - (A) an estimate of the fixed recurring charges that it reasonably considers should apply following the completion of the Access Seeker Initiated Review;
  - (B) the reasons for any proposed changes in the level of the fixed recurring charges, as described in clauses 5.3(a)(i)-5.3(a)(iv);
  - (C) such data that the Multiplex Licensee, acting reasonably and in good faith, considers is reasonably necessary for the Access Seeker to verify that the fixed recurring charges estimated by the Multiplex Licensee are consistent with the Pricing Principles, including but not limited to data setting out the various cost elements described in clauses 3.2 and 3.4; and
  - (D) such other information that the Multiplex Licensee considers appropriate; and
- (ii) provide all other Access Seekers with the following:
  - (A) a notice that an Access Seeker Initiated Review has been lodged by an Access Seeker; and
  - (B) the same information provided to the Access Seeker that lodged the request for an Access Seeker Initiated Review, as described in clauses 5.3(e)(i)(A) - 5.3(e)(i)(D).
- (f) Within 30 days of receipt of the information described in clause 5.3(e)(i), each Access Seeker may (but is not obliged to) provide the Multiplex Licensee with any views or comments it may have in respect of the fixed recurring charges estimated by the Multiplex Licensee.
- (g) The Multiplex Licensee will consider any views or comments received from each Access Seeker under clause 5.3(f) in good faith. The Multiplex Licensee may revise the fixed recurring charges, if, after having considered any such views or comments in good faith, it forms the opinion that it is necessary to revise the fixed recurring charges to ensure consistency with the Pricing Principles.
- (h) Within 30 days of the expiry of the 30 day period described in clause 5.3(f), the Multiplex Licensee will provide all Access Seekers with written notice of the fixed recurring charges that are to apply as a consequence of the completion of the Access Seeker Initiated Review. Such fixed recurring charges will take effect from the next applicable billing period (**Price Adjustment Date**). For the avoidance of doubt, an Access Seeker Initiated

Review is deemed to have been completed on the date that the Multiplex Licensee issues a notice under this clause 5.3(h).

- (i) For the avoidance of doubt:
  - (i) all Access Seekers must:
    - (A) pay the fixed recurring charges that are applicable from the Price Adjustment Date; and
    - (B) continue to pay those fixed recurring charges for the duration of any dispute notified under the Dispute Resolution Procedures; and
  - (ii) in the event that the dispute is resolved in a manner that requires:
    - (A) an increase in the level of fixed recurring charges paid or payable by Access Seekers since the Price Adjustment Date, the Multiplex Licensee may invoice the Access Seekers for the unpaid portion of the fixed recurring charges in a later invoice; or
    - (B) a decrease in the level of fixed recurring charges paid or payable by Access Seekers since the Price Adjustment Date, the Multiplex Licensee must repay the overpaid portion of the fixed recurring charges to the Access Seekers.

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## Schedule 3 Dispute Resolution Procedures

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### 1 General

#### 1.1 Application

The Parties must resolve all disputes (on price and non-price terms) arising under or in connection with this Agreement in accordance with these Dispute Resolution Procedures, except where:

- (a) a Party seeks urgent interlocutory, injunctive or other immediate relief from a court; or
- (b) the dispute is a Billing Dispute, in which case the dispute must be dealt with pursuant to clause 13 of the main body of this Agreement prior to escalation under these Dispute Resolution Procedures.

#### 1.2 Variation of time limits and provisions

Any time limits or provisions specified in these Dispute Resolution Procedures may only be varied by agreement between the Parties.

#### 1.3 Continuation of performance

Each Party must continue to perform its obligations under this Agreement in the event and for the duration of any dispute notified under these Dispute Resolution Procedures.

#### 1.4 Use of information

A Party must not use information obtained in the course of any dispute for any purpose other than to resolve the relevant dispute.

#### 1.5 Good faith

Each Party must act in good faith for the duration of a dispute and must use its best endeavours to resolve disputes as quickly as possible and to minimise any delays in the settlement of such disputes.

#### 1.6 Costs

Subject to any order of a court, each Party will bear its own costs (including costs of retaining legal advisers) in relation to a dispute pursuant to these Dispute Resolution Procedures.

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### 2 Dispute resolution procedure

### 2.1 Initial escalation procedure

- (a) A dispute will commence when a Party notifies the other Party (**Receiving Party**) in writing that a dispute exists and gives reasonable particulars of the dispute to the Receiving Party (**Notice of Dispute**).
- (b) Unless agreed otherwise, the Parties must meet within 5 Business Days of receipt of a Notice of Dispute by the Receiving Party and use their best endeavours to resolve the dispute through joint discussions.

### 2.2 Escalation to Chief Executive Officer level

- (a) If the Parties are unable to resolve the dispute with 10 Business Days of their first meeting, the dispute is to be immediately escalated to the Chief Executive Officer level of each Party.
- (b) In the event that a dispute is escalated to the Chief Executive Officer level, the Chief Executive Officers of each Party (or their nominees) must meet within 10 Business Days of the date of escalation of the dispute to the Chief Executive Officer and use best endeavours to resolve the dispute through joint discussions.
- (c) If the Chief Executive Officer's of each party (or their nominees) cannot resolve a dispute within 10 Business Days of their first meeting, the dispute is to be resolved in accordance with clause 3.

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## 3 Mediation

### 3.1 General

If the Parties cannot resolve the dispute pursuant to the procedures in clause 2, either Party may refer the dispute to mediation by giving the other Party notice in writing.

### 3.2 Selection of mediator

- (a) If the Parties cannot agree on the selection of a mediator within 5 Business Days of the escalation of a dispute to mediation, either Party may apply to the president of the Australian Commercial Disputes Centre (**ACDC**) requesting the appointment of an independent mediator.
- (b) Unless agreed otherwise, any mediator that is selected or appointed must:
  - (i) have an understanding of the broadcasting industry (or be able to acquire such an understanding quickly);
  - (ii) need not be a citizen or resident of Australia;

- (iii) have at least 10 years' experience in the broadcasting industry, or as a mediator of similar disputes; and
- (iv) be independent of the Parties and free of conflicts of interest.

### **3.3 Conduct of mediation**

- (a) Any mediation must be conducted in accordance with the *ACDC Commercial Mediation Guidelines*.
- (b) The terms of these Dispute Resolution Procedures prevail to the extent of any inconsistency between these Dispute Resolution Procedures and the *ACDC Commercial Mediation Guidelines*.

### **3.4 Settlement of dispute**

- (a) The settlement agreement arising from mediation is confidential between the Parties.
- (b) The Parties agree that any settlement reached through mediation is final and binding on the Parties.

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## **4 Binding expert determination**

### **4.1 General**

If the Parties cannot resolve the dispute pursuant to the procedures in clause 3, either Party may refer the dispute for binding expert determination by giving the other Party notice in writing.

### **4.2 Selection of expert**

- (a) If the Parties cannot agree on the selection of an expert within 10 Business Days of the escalation of a dispute to a binding expert determination, either Party may apply to the president of the ACDC requesting the appointment of an expert.
- (b) Unless agreed otherwise, any expert that is appointed must:
  - (i) have an understanding of the broadcasting industry (or be able to acquire such an understanding quickly);
  - (ii) need not be a citizen or resident of Australia;
  - (iii) have at least 10 years experience in the broadcasting industry or as an adjudicator of similar disputes; and
  - (iv) be independent of the Parties and free of conflicts of interest.

#### **4.3 Conduct of binding expert determination**

- (a) Any binding expert determination must be conducted in accordance with the *ACDC Rules for Expert Determination*.
- (b) The terms of these Dispute Resolution Procedures prevail to the extent of any inconsistency between these Dispute Resolution Procedures and the *ACDC Rules for Expert Determination*.
- (c) In making a binding expert determination, the expert must have regard to the following:
  - (i) the terms of the Access Undertaking and this Agreement;
  - (ii) the applicable terms of the Radiocommunications Act;
  - (iii) the legitimate business interests of the Multiplex Licensee and its investment in facilities used to supply the Multiplex Transmission Service;
  - (iv) the interests of Access Seekers;
  - (v) the public interest in having competition in markets and efficient investment in facilities used to supply the Multiplex Transmission Service and services that use the Multiplex Transmission Service as an input;
  - (vi) the operational and technical requirements necessary for the safe and reliable operation of the Multiplex Transmission Service; and
  - (vii) the economically efficient operation of the facilities used to supply the Multiplex Transmission Service.

#### **4.4 Expert decision**

- (a) Any decision by an expert is confidential between the Parties.
- (b) The Parties agree that the decision of an expert is final and binding on the Parties.

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## Attachment A Conditions Precedent

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### 1 General

- (a) The Access Seeker must satisfy the conditions precedent set out in this Attachment A before the Multiplex Licensee is obliged to supply, and the Access Seeker is able to acquire, the Multiplex Transmission Service.
- (b) The conditions precedent that have to be satisfied are as follows:
  - (i) the Access Seeker must be either:
    - (A) an Incumbent Commercial Broadcaster;
    - (B) a Digital Community Broadcaster;
    - (C) the Representative Company where the Representative Company is exercising powers specified in its constitution or the powers referred to in section 9C(1)(k) of the Radiocommunications Act; or
    - (D) a Restricted Datacaster;
  - (ii) the Access Seeker must submit an Application for entry into Agreement in accordance with clause 2 of this Attachment A; and
  - (iii) the Access Seeker has satisfied any requirements for Financial Security set out in clause 3 of this Attachment A.
  - ~~(iii)~~(c) [The Multiplex Licensee will waive the conditions precedent in clauses 1\(b\)\(ii\) and 1\(b\)\(iii\) of this Attachment A in respect of all Access Seekers that acquired the Multiplex Transmission Service prior to 1 January 2013 from the Multiplex Licensee.](#)

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### 2 Lodgement of Application for entry into Agreement

An Access Seeker must lodge an application to enter into an Agreement with the Multiplex Licensee in a form specified by the Multiplex Licensee (**Application for entry into Agreement**).

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### 3 Financial Security

#### 3.1 Initial review

The Multiplex Licensee may conduct an initial review of the creditworthiness of the Access Seeker upon receipt of an Application for entry into Agreement.



### **3.2 Provision of information**

The Access Seeker must provide the Multiplex Licensee with all information reasonably requested by the Multiplex Licensee in relation to the Access Seeker's creditworthiness.

### **3.3 Review of creditworthiness**

If:

- (a) the Multiplex Licensee, acting reasonably and in good faith, does not consider that the Access Seeker is creditworthy following its review of the information provided pursuant to clause 3.2; or
- (b) the Access Seeker fails to provide the Multiplex Licensee with the information requested pursuant to clause 3.2,

the Multiplex Licensee may request that the Access Seeker provide Financial Security for an amount that meets the Multiplex Licensee's reasonable financial security requirements in accordance with clause 14.

### **3.4 Request for Financial Security**

- (a) The Financial Security may only be requested under clause 3.3 when it is reasonably necessary to protect the legitimate business interests of the Multiplex Licensee and shall be of an amount and in a form which is reasonable in all the circumstances.
- (b) As a statement of general principle the amount of any Financial Security shall be calculated by reference to the aggregate value of all services likely to be provided to the Access Seeker under this Agreement over a reasonable period or the value of amounts invoiced under this Agreement but unpaid (excluding any amounts in respect of which there is a current Billing Dispute).

### **3.5 Provision of Financial Security**

The Access Seeker must provide the Financial Security requested by the Multiplex Licensee within 21 Business Days of the date of receipt of such a request.

### **3.6 Continuing obligation**

Unless otherwise directed by the Multiplex Licensee, the Access Seeker must maintain any Financial Security provided pursuant to this clause 3 for the duration of this Agreement or otherwise in accordance with clause 14 of the main body of the Agreement.

**3.7 Use of Financial Security**

The Multiplex Licensee may only exercise its rights under, or call on, a Financial Security in respect of amounts due and owing pursuant to this Agreement and in accordance with clause 14 of this Agreement.

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## Execution page

### Executed as a deed

Signed and delivered by #company name# by:

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Signature of director

---

Signature of director/secretary

---

Name of director (print)

---

Name of director/secretary (print)

---

The common seal of #company name# is fixed  
in the presence of:

---

Signature of director

---

Signature of director/secretary

---

Name of director (print)

---

Name of director/secretary (print)

---

The common seal of #company name# is fixed  
in the presence of:

---

Signature of #sole director/secretary name#  
who states that #he/she# is the sole director  
and sole secretary of #company name#

---

Signed and delivered by #company name# by:

---

Signature of #sole director/secretary name#  
who states that #he/she# is the sole director  
and sole secretary of #company name#