

**ANNEX FIVE**

**DIGITAL CHANNEL ALLOCATION PROCESS (POST-SIMULCAST)**

This Annex comprises the following parts and attachments:

**Parts:**

Part 1: General

**Attachments:**

Attachment A: Application Form

Attachment B: Security

# PART 1

## GENERAL

### 1 Application

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- 1.1 This Annex Five only applies to the allocation of Available Digital Channels after the Simulcast End Date.

### 2 Definitions

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- 2.1 In this Annex Five, except if the context requires otherwise, the following words have these meanings:

**8 MHz Stream** has the meaning set out in the Digital Services Module.

**Allocation Date** means the date on which the Customer is notified that it is the Successful Applicant for the Available Digital Channels for which it has applied in its Application.

**Application** means an application to acquire one or more Available Digital Channels made using the Application Form.

**Application Form** means a fully completed application form identical to the *Application Form for Digital Services (Post-Simulcast Allocation)* set out in **Attachment A** to this Annex.

**Available Digital Channel** means one of the Digital Channels available for allocation.

**Channel Price** means the Channel Price set out in the Application Form.

**Digital Channel Allocation Process** means the process for allocating the Available Digital Channels set out in this Annex Five.

**Security** means a bank guarantee provided by the Applicant to Telstra in the form set out in **Attachment B** completed in accordance with all requirements set out in the Application Form.

**Simulcast End Date** means the date at which Telstra ceased carriage of FOXTEL's subscription television signals in analogue mode on the Telstra HFC Network on a commercial basis.

**Successful Applicant** means the Customer, in respect of all the Available Digital Channels for which it has applied in its Application, once the Customer's Application has been accepted by Telstra in writing in accordance with the terms and conditions set out in the Application Form.

### 3 Consents

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- 3.1 Notwithstanding clause 8 of the General Terms and Conditions, the Customer hereby consents to the disclosure by Telstra to other Applicants and Telstra Corporation and their respective People:
- (a) the number of Available Digital Channels applied for by the Customer in the Application Form;
  - (b) the Customer's participation in the Digital Channel Allocation Process; and

- (c) the number of Available Digital Channels for which the Customer is a Successful Applicant and the Channel Price of those Available Digital Channels.

#### **4. Warranties and Representations**

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- 4.1 The Customer repeats the warranties and representations made by the Customer in the Application Form and acknowledges that such warranties and representations constitute terms and conditions of this Agreement.

#### **5. Liability for Simulcast Allocation Process**

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- 5.1 Subject to paragraph 5.3, the terms and conditions set out in this Annex apply only as between Telstra and the Customer and are not intended to create rights, benefits or obligations for third parties.
- 5.2 Notwithstanding clause 10 of the General Terms and Conditions but subject to clause 10.3 of the General Terms and Conditions, Telstra and its People will have no Liability whatsoever to the Customer for any act or omission of any person (including Telstra, the Customer, or any Successful Applicant) arising under or in relation to the Digital Channel Allocation Process, including (but not limited to) no Liability for:
  - (a) any loss of business, loss of profits, loss of revenue, loss of use, loss of contract, or loss of goodwill;
  - (b) any special, indirect or consequential loss, liability, damage, cost, charge or expense incurred;
  - (c) any damages or loss resulting from liability to any other person; or
  - (d) any damages or loss resulting from loss or corruption of or damage to any computer or electronically stored data, software or hardware.
- 5.3 Paragraph 5.2 is not only for the benefit of Telstra, but is also for the benefit of its People, is to be interpreted as benefiting its People, and to be enforceable by its People against the Customer. To that extent only, Telstra has entered into this Agreement on behalf of its People.
- 5.4 The Customer acknowledges and agrees that:
  - (a) it is solely responsible for its acts and omissions, and the acts and omissions of its People, in relation to its participation in the Digital Channel Allocation Process; and
  - (b) its participation in any stage of the Digital Channel Allocation Process is at its sole risk, cost and expense.
- 5.5 Notwithstanding clause 10 of the General Terms and Conditions, the Customer indemnifies Telstra from, and holds Telstra harmless against, any Loss sustained or incurred by Telstra arising directly or indirectly from:
  - (i) any act or omission by the Customer or its People in connection with the Customer's participation in the Digital Channel Allocation Process; or
  - (ii) any breach by the Customer of its obligations or warranties under this Annex Five,

irrespective whether there was fault on the part of the person whose conduct gave rise to that Loss (including any Loss sustained or incurred by Telstra due to any need to amend, repeat, suspend, postpone or cancel the Digital Channel Allocation Process in any way in respect of any Available Digital Channel)

5.6 The Customer's liability under paragraph 5.5 will be reduced to the extent that any negligent act or omission of Telstra contributed to the relevant Loss.

**6. Contiguous Digital Channels**

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- 6.1 Telstra will aim to allocate all Digital Channels within an 8MHz Stream before allocating any Available Digital Channels from another 8MHz Stream.
- 6.2 Subject to paragraph 6.1, Telstra will aim to ensure that the Digital Channels allocated to the Customer under this paragraph 6 are Contiguous Digital Channels, but the Customer acknowledges that Telstra has no liability if this does not occur.
- 6.3 Telstra will notify the Customer which of the Digital Channels it has been allocated are Contiguous Digital Channels at the time Telstra notifies the Customer that it is a Successful Applicant for those Digital Channels

Attachment A to Annex Five

**APPLICATION FORM  
FOR DIGITAL CHANNELS (POST-SIMULCAST)**

DATED: \_\_\_\_\_ (Insert date of Application)

OFFER MADE TO: Telstra Multimedia Pty Ltd (ABN 82 069 279 072) (as "Telstra")

OFFER MADE BY: (Insert full legal name and contact details of the Customer below)

Legal name:	_____ (as "Customer")
ABN/ACN:	_____
Address of Customer:	_____ _____
Authorised Representative:	_____
Contact Phone:	_____
Contact Fax:	_____

THE CUSTOMER APPLIES FOR THE FOLLOWING NUMBER OF AVAILABLE DIGITAL CHANNELS AT THE FOLLOWING CHANNEL PRICE:

Customer to insert in this box the number of Available Digital Channels it applies for within this Application:

Number of Channels: _____
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CHANNEL PRICE:

Telstra to insert in this box the Channel Price and the date until which the Channel Price is valid: \*\*

\$ _____ per Available Digital Channel valid until 30 September 20 _____
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\*\* The Channel Price above is only valid until the date specified in the box above. This Application will be rejected by Telstra if it is received by Telstra after that date.

**DIGITAL (POST-SIMULCAST) APPLICATION FORM - PAGE 2**

TERMS AND CONDITIONS OF APPLICATION:

## **1 Interpretation**

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1.1 Capitalised terms in this Application Form have the same meaning as in the Agreement. However, for the purposes of this Application Form:

“**Agreement**” means the proposed *Telstra Multimedia Access Agreement - Digital Services* set out in **Schedule 2** to this Application Form.

“**Application Form**” means this *Application Form for Digital Channels (Post-Simulcast)*.

## **2 Pre-qualification Criteria**

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2.1 The “Pre-Qualification Criteria” are as follows:

- (a) the Customer is a company with share capital, incorporated in Australia under the *Corporations Act 2001 (Cwth)*; and
- (b) the Customer is not FOXTEL, a Related Party of FOXTEL or Telstra Corporation.

## **3 Offer by Customer**

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3.1 The Customer acknowledges and agrees that its Application comprises a legally binding irrevocable offer by the Customer to enter into the Agreement.

3.2 This Application and this offer is accepted only if, and once, Telstra has executed the Agreement and notified the Customer in writing accordingly, and the Agreement will then commence.

## **4 Warranties and representations by Customer**

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4.1 By submitting the Application, the Customer hereby warrants and represents that:

- (a) it meets all of the Pre-Qualification Criteria;
- (b) the Application Form, and all information set out by the Customer in the Application Form, is complete and accurate;
- (c) the Security is in the form of Attachment B to Annex Five of the Agreement, has been completed in accordance with this Application Form and has been duly executed by the relevant bank;
- (d) it can comply with the terms and conditions of the Agreement if, and once, its Application is accepted by Telstra;
- (e) it has not relied on any representation made by Telstra or its People in relation to its Application for, or the allocation of, an Available Digital Channel; and
- (f) it is applying for the number of Available Digital Channels it has indicated in the box labelled *Number of Channels* on the cover of this Application Form.

## **DIGITAL (POST-SIMULCAST) APPLICATION FORM - PAGE 3**

## **5 Consideration of Application by Telstra**

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5.1 Telstra may reject the Application in any of the following circumstances:

- (a) the Customer does not meet the Pre-Qualification Criteria; or
  - (b) the Customer has not provided an original copy of the Security to Telstra in the form set out in Attachment B to Annex Five of the Agreement, such Security completed in accordance with the requirements set out in this Application Form; or
  - (c) the Customer has not provided an original copy of the Agreement, executed by the Customer, to Telstra, including with the Profile Annex completed; or
  - (d) the Customer has not executed the Agreement in accordance with section 127 of the Corporations Act; or
  - (e) the Customer has not submitted an original, duly completed, copy of this Application Form to Telstra at the address nominated by Telstra for that purpose; or
  - (f) the Application is not accurate or is incomplete in any way or any part of the Application has been received by Telstra before the Simulcast End Date; or
  - (g) there are reasonable grounds to believe that the Customer would fail to a material extent, to comply with the Agreement (examples of reasonable grounds for such a belief include evidence that the Customer is not creditworthy and repeated failures by the Customer to comply with the terms and conditions on which the same or similar access has been provided (whether or not by Telstra) but do not include the mere absence of a credit history); or
  - (i) there are reasonable grounds to believe, in connection with the Agreement, that the Customer would fail to protect the integrity of the Telstra HFC Network; or
  - (j) there are reasonable grounds to believe, in connection with the Agreement, that that the Customer would fail to protect the safety of individuals working on, or using services supplied by means of the Telstra HFC Network or any associated Facility; or
  - (k) the Customer has applied for a number of Digital Channels that is greater than the number of Available Digital Channels that are still available at the time the Application is received; or
  - (l) the Application is received by Telstra after the validity date for the Channel Price specified in the Application Form.
- 5.2 Telstra will notify the Customer whether its Application has been accepted or rejected. Telstra's decision is final. Telstra will consider giving reasons for its decision on request in writing by the Customer.
- 5.3 Once an Application is accepted by Telstra, Telstra will execute the Agreement and notify the Customer in writing accordingly
- 5.4 Telstra will interpret sub-paragraphs 5.1(i), 5.1(j) and 5.1(k) in a manner consistent with the interpretation of sections 152AR(9) and 152AR(1) of the TPA.
- 5.5 The Customer acknowledges that the terms and conditions set out in this Application Form apply to other persons submitting Applications.

## **6. Security**

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- 6.1 The Security must be in the form of the bank guarantee set out in Attachment B of Annex Five of the Agreement.
- 6.2 The bank providing the Security must be a reputable bank licensed to operate in Australia.
- 6.3 The Security must be on the letterhead of that bank, must be properly executed by that bank and must be legally binding and enforceable against the bank by Telstra.



## DIGITAL (POST-SIMULCAST) APPLICATION FORM - PAGE 5

### APPLICATION CHECKLIST: *(TO BE COMPLETED BY CUSTOMER)*

Please tick the boxes to indicate that the following documents are attached to this Application Form:

- |   | Tick                     |
|---|--------------------------|
| • Schedule 1: <b>Security</b> , properly executed by the relevant bank: | <input type="checkbox"/> |
| • Schedule 2: <b>Agreement</b> , properly executed by Customer:         | <input type="checkbox"/> |

**DIGITAL (POST-SIMUL) APPLICATION FORM - SCHEDULE 1 (SECURITY)**

**Schedule 1: Security**

*(attach original copy of bank guarantee executed by bank)*

**DIGITAL (POST-SIMUL) APPLICATION FORM - SCHEDULE 2 (AGREEMENT)**

**Schedule 2: Agreement**

*(attach original copy of Agreement duly executed by Customer in accordance with section 127 of the Corporations Act, with the Profile Annex and all other relevant details completed and with the correct Annex Five incorporated)*

Attachment B to Annex Five

Security

*[On Letterhead of Bank]*

Bank Guarantee No. [     ]

To: TELSTRA MULTIMEDIA PTY LIMITED  
(ABN 82 069 279 072)

Address: Level 4, 400 George Street  
Sydney, New South Wales, 2000

Dear Sirs

We issue our irrevocable Bank Guarantee as follows:

**Favouree** TELSTRA MULTIMEDIA PTY LIMITED  
(ABN 82 069 279 072) ("Principal")

**Customer Name** *[Insert Customer's legal name]*  
*[insert Customer's ABN]* ("Customer")

**Agreement** Telstra Multimedia Access Agreement - Digital Services  
between Telstra Multimedia Pty Limited  
and *[Insert Customer's legal name]* ("Agreement")

**Bank** *[Insert Bank's legal name]*  
*[Insert Bank's ABN]* ("Bank")

**Available at** *[Insert Bank office in Sydney]* ("Bank Office")

**Maximum Liability** means the sum of the individual Channel Prices  
for each Available Digital Channel for which the  
Customer is a Successful Applicant under Annex Five of the  
Agreement ("Maximum Liability")

**Expiry Date** means the later of the following dates: ("Expiry Date")

- (a) the date 3 months after the expiry or termination of the Agreement; and
- (b) the date on which all Default Sums have been paid to Telstra.

**Other Definitions** the capitalised terms "Allocation Date", "Available Digital Channel", "Channel Price" and "Successful Applicant" in this Undertaking are as defined in Part 1 of Annex Five of the Agreement.

This Undertaking does not take effect unless and until the Allocation Date occurs.

In consideration of the Principal accepting this Undertaking, the Bank unconditionally and irrevocably:

- (a) agrees to pay the Principal on written demand and subject to the terms of this document, from time to time to any sum or sums due by the Customer in connection with the Agreement which the Customer has failed to pay (each a "Default Sum"); and
- (b) as a separate undertaking, indemnifies the Principal subject to the terms of this document against any liability or loss arising from, and any costs, charges or expenses incurred in connection with, the Customer's failure to pay any sum or sums due by the Customer in connection with the Agreement,

to an aggregate amount not exceeding the Maximum Liability.

The Bank will pay each Default Sum (subject to the Maximum Liability) on presentation by the Principal to the Bank at its Bank Office of:

- (a) a written statement that there has been a failure to pay an amount due in connection with the Agreement in full or in part, setting out the amount of the Default Sum;
- (b) a written statement that the Principal has made demand on the Customer for the payment of the Default Sum and that the Customer has defaulted in making such payment for a period of 14 days after the Principal has made the demand, sworn under oath by an officer of the Principal; and
- (c) a request for payment by the Bank of the Default Sum or the Maximum Liability (whichever is the lesser).

The Bank will pay each Default Sum in full (subject to the Maximum Liability) to the Principal without deduction or withholding, without reference to the Customer and even if the Customer has given the Bank notice not to pay the money, and without regard to the performance or non-performance of the Customer or Principal under the terms of the Agreement.

The liabilities of the Bank under this Undertaking as a guarantor, indemnifier or principal debtor and the rights of the Principal under this Undertaking are not affected by anything which might otherwise affect them at law or in equity including, but not limited to, one or more of the following: any termination, rescission, variation or assignment of the Agreement, the invalidity or unenforceability of an obligation or liability of a person other than the Bank, acquiescence, delay, acts, omissions or mistakes on the part of the Principal or any alterations or time or any other forbearance by the Principal or Customer.

Any alterations to the terms of the Agreement or any alterations of time or any other forbearance by the Principal or Customer will not impair or discharge the Bank's liability under this Undertaking.

This Undertaking remains in force until one of the following events occurs:

- (a) the Principal notifies the Bank in writing that the Undertaking is no longer required; or
- (b) the Bank has paid the Maximum Liability to the Principal; or
- (c) the Expiry Date.

Notwithstanding anything stated in this Undertaking, the Bank has the right to terminate it at any time by paying the Principal the balance outstanding from the Customer under the Agreement, or any lesser amount that the Principal may, in writing, agree.

This Undertaking is governed by the law in force in New South Wales and the Bank irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of New South Wales and the courts of appeal from them.

Dated at *[insert location]* this *[insert date]*

Signed by the Bank at *[location]*

***[insert correct execution clauses]***