



COMMERCE COMMISSION

**STANDARD TERMS DETERMINATION FOR TELECOM'S
UNBUNDLED COPPER LOCAL LOOP NETWORK
BACKHAUL (TELEPHONE EXCHANGE TO
INTERCONNECT POINT) SERVICE**

**UCLL BACKHAUL GENERAL TERMS
PUBLIC VERSION**

27 June 2008

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GENERAL INFORMATION

This document:

- is part of the standard terms determination made by the Commission under section 30M of the Act in relation to Telecom's unbundled copper local loop backhaul (telephone exchange to interconnect point) service; and
- sets out the terms on which Telecom must make its unbundled copper local loop backhaul (telephone exchange to interconnect point) service available to Access Seekers.

Structure of the UCLL Backhaul Terms

These UCLL Backhaul Terms are made up of:

- **UCLL Backhaul General Terms**

Sets out the general rights and obligations of Telecom and Access Seekers in relation to Telecom's unbundled copper local loop backhaul (telephone exchange to interconnect point) service.

- **Schedules to the UCLL Backhaul General Terms**

Schedule 1

UCLL Backhaul Service Description

Describes the services that Telecom must make available to Access Seekers under the standard terms determination.

Schedule 2

UCLL Backhaul Price List

Lists the charges for all of the services that Telecom will make available to Access Seekers under the standard terms determination.

Schedule 3

UCLL Backhaul Service Level Terms

Specifies performance levels regarding some of the services that Telecom will make available to Access Seekers under the standard terms determination.

Schedule 4

UCLL Backhaul Operations Manual

Sets out in detail the operational procedures for supplying all of the services that Telecom will make available to Access Seekers under the standard terms determination.

Schedule 5

UCLL Backhaul POI Site Related Information

Sets out available Primary and Secondary Links, and list of Local Exchanges and their Parent POI Sites, and relevant radial distances.

These UCLL Backhaul Terms, including up to date versions of those parts of the terms which may be changed, are available from the Commission (www.comcom.govt.nz) and Telecom (www.telecom.co.nz).

UCLL BACKHAUL GENERAL TERMS

1 Definitions

1.1 Except where expressly provided otherwise, in the UCLL Backhaul General Terms:

Access Date	has the meaning given in clause 4.2.
Access Seeker	means an access seeker under the Act that has made a Request.
Access Seeker Equipment	means any equipment of the Access Seeker in a Telecom Exchange pursuant to the UCLL Backhaul Terms.
Access Seeker's Network	means the telecommunication system whether fixed, mobile or wireless from time to time of the Access Seeker which the Access Seeker uses to provide services including all transmission media, equipment and related support systems but excluding anything on Telecom's side of the Handover Point between the Access Seeker's Network and Telecom's Network. For the purposes of this definition, Access Seeker includes every Related Company of the Access Seeker.
Act	means the Telecommunications Act 2001.
Bank	means any body registered as a registered bank under section 69 of the Reserve Bank of New Zealand Act 1989.
Bill Rate	means the average 90 day bank bill mid rate as quoted on Reuters Screen page BKBM or the equivalent page replacing page BKBM (known at the date of these terms as the FRA rate) at or about 10.45 am on the relevant date or, if at that time page BKBM or the equivalent replacement page is not available, the last rate quoted on that page before it became unavailable.
Charge or Charges	means all or (as the context requires) any amounts payable by the Access Seeker under the UCLL Backhaul Terms.
Customer	means: <ul style="list-style-type: none"> (a) in relation to the Access Seeker, a person who has a contractual relationship with the Access Seeker for the supply of services, the provision of which relies in whole or in part on the UCLL Backhaul Service; and (b) in relation to Telecom, means a person (other than the Access Seeker) who has a contractual relationship with Telecom for the supply of services or to whom Telecom is supplying services pursuant to any law or regulation.
Commission	means the Commerce Commission in the course of performing its functions under the Act.
Deadlock	has the meaning given in clause 36.4.
Default	means any failure, refusal or inability by either the Access Seeker or Telecom to meet any of its obligations under the UCLL Backhaul Terms.
Default Notice	has the meaning given in clause 33.1.

Dispute	has the meaning given in clause 36.1.
Dispute Notice	has the meaning given in clause 36.2.
End User	means a person who is the ultimate recipient of the UCLL Backhaul Service (or of another service the provision of which relies in whole or in part on the UCLL Backhaul Service).
Exchange	means a Telecom owned, leased or licensed building with a floor area of at least 15 square metres and a main distribution frame terminating copper local loop of at least 200 pairs, the primary function of which is to provide fixed wire line telecommunication services, and includes all of the Telecom owned, leased or licensed property on which the building is situated.
Handover Point	means either the Local Exchange Handover Point or the ASNAPOI Handover Point or both, as described in the UCLL Backhaul Service Description, as the context requires.
Implementation Plan	means the implementation plan that forms part of the UCLL Backhaul Standard Terms Determination.
Indirect Damages	means any liability resulting from or arising under or in connection with the UCLL Backhaul Terms (whether based in contract, tort, statute or otherwise) for: <ul style="list-style-type: none"> (a) indirect, incidental or consequential economic loss or damage; or (b) loss of profit, loss of revenue, loss of production, loss of income, loss of business, loss of anticipated savings, loss of entitlement to special damages and loss of opportunity.
Intellectual Property	means any patent, copyright, design, trade name, trademark, service mark or other intellectual property right (whether registered or not) including ideas, concepts, know-how, techniques, designs, specifications, drawings, blueprints, tracings, diagrams, models and other information relating to any such intellectual property.
Invoice Error	has the meaning given in clause 15.1.
Network	means, as the context requires, Telecom's Network or Access Seeker's Network.
Notice	means a notice in writing provided in accordance with section 43.
Non-Payment Notice	has the meaning given in clause 14.1.
OFM	means Telecom's online fault management system.
OO&T	means Telecom's online ordering and tracking system.
Other Service Provider	means a provider of telecommunications services other than the Access Seeker or Telecom.
Party	means (as the context requires) Telecom or the Access Seeker and Parties means both Telecom and the Access Seeker.
Performance Penalty	has the meaning given in the UCLL Backhaul Service Level Terms.
Planned Outage	has the meaning given in clause 20.2.

Related Company	has the meaning set out in section 2(3) of the Companies Act 1993.
Reported Fault	has the meaning given in clause 23.1.
Request	means a request in writing pursuant to section 30S(1) of the Act which Telecom receives from an Access Seeker to make the UCLL Backhaul Service available on the UCLL Backhaul Terms.
Suspend and Suspension	includes: <ul style="list-style-type: none"> (a) to restrict or otherwise withdraw the right to use the UCLL Backhaul Service or any part of the UCLL Backhaul Service; and (b) to refuse any order for the UCLL Backhaul Service.
Telecom	has the meaning given in section 5 of the Act.
Telecommunications Carriers' Forum	means the New Zealand Telecommunications Carriers' Forum or its successor body.
Telecom Owned Equipment	means any Telecom owned, leased or licensed equipment provided to the Access Seeker by Telecom for use as part of the UCLL Backhaul Service.
Telecom's Network	means the telecommunication system whether fixed, mobile or wireless from time to time of Telecom which Telecom uses to provide services including all transmission media, equipment and related support systems; but excluding Telecom Owned Equipment or anything on the Access Seeker's side of the Handover Point between Telecom's Network and the Access Seeker's Network. For the purposes of this definition, Telecom includes every Related Company of Telecom.
Telecom System	includes: <ul style="list-style-type: none"> (a) any operational support system of Telecom and any functionalities of such system provided to the Access Seeker under the UCLL Backhaul Terms; and (b) OO&T and OFM.
UCLL Backhaul General Terms	means the terms set out in this document, excluding its schedules.
UCLL Backhaul Operations Manual	means the manual set out in schedule 4.
UCLL Backhaul POI Site Related Information	means the information set out in schedule 5.
UCLL Backhaul Price List	means the list set out in schedule 2.
UCLL Backhaul Service	means Telecom's unbundled copper local loop backhaul (telephone exchange to interconnect point) service as described in the UCLL Backhaul Service Description or (as the context requires) any part of that service.
UCLL Backhaul Service Description	means the description set out in schedule 1.

UCLL Backhaul Service Level Terms	means the service level terms as set out in schedule 3.
UCLL Backhaul Standard Terms Determination	means the standard terms determination made by the Commission under section 30M of the Act in relation to Telecom's unbundled copper local loop backhaul (telephone exchange to interconnect point) service, including the Commission's decision report, the Implementation Plan and the UCLL Backhaul Terms.
UCLL Backhaul Terms	means, collectively, the UCLL Backhaul General Terms and all of the schedules to the UCLL Backhaul General Terms.
Unplanned Outage	has the meaning given in clause 20.4.
Working Day	means any day other than a Saturday, Sunday or public holiday in any province relevant to the provision of the UCLL Backhaul Service.

2 Guiding principles

- 2.1 The UCLL Backhaul Standard Terms Determination is designed to meet the purposes set out in the Act, and in particular, section 18 of the Act. The UCLL Backhaul Terms are to be interpreted in light of the Commission's decision report and the purposes.
- 2.2 The Parties must:
- 2.2.1 carry out their obligations under the UCLL Backhaul Terms in good faith and in furtherance of those purposes; and
 - 2.2.2 ensure that they and their employees, sub-contractors and agents do all things reasonably necessary, including executing any additional documents or instruments, to give full effect to the UCLL Backhaul Terms.
- 2.3 The standard access principles under clause 5 of schedule 1 to the Act apply to the UCLL Backhaul Service and all of Telecom's obligations under the UCLL Backhaul Terms subject to the limits on the application of those principles under the Act.

3 Interpretation

- 3.1 In interpreting the UCLL Backhaul Terms:
- 3.1.1 clause and section headings are for convenience only and do not affect the interpretation;
 - 3.1.2 a word which denotes the singular also denotes the plural and vice versa;
 - 3.1.3 words denoting natural persons include any legal entity or association of entities and vice versa;
 - 3.1.4 all currency references are to New Zealand dollars and all amounts payable are payable in New Zealand dollars;
 - 3.1.5 the words 'include' and 'including' are to be construed without limitation;
 - 3.1.6 except where the UCLL Backhaul Terms expressly provide otherwise, reference to a statute or regulation means that statute or regulation as amended or re-enacted and includes sub-ordinate legislation;

- 3.1.7 except where the UCLL Backhaul Terms expressly provide otherwise, references to months are to calendar months; and
- 3.1.8 except where the UCLL Backhaul Terms expressly provide otherwise, reference to a document (including any technical manual or user guide) means that document as amended from time to time.
- 3.2 In interpreting the UCLL Backhaul Terms references to clauses or sections are references to clauses or sections in the applicable UCLL Backhaul Terms unless expressly provided otherwise. Sections are identified by a single number (for instance 'this section 3') and clauses by a composite number (for instance 'this clause 3.2').

4 Request to access the UCLL Backhaul Service

- 4.1 Telecom must comply with a Request by making the UCLL Backhaul Service available to the Access Seeker in accordance with the UCLL Backhaul Terms unless section 30S(2) of the Act applies.
- 4.2 From the date Telecom receives the Access Seeker's Request (**Access Date**), the Access Seeker and Telecom must comply with the UCLL Backhaul Terms.
- 4.3 For the avoidance of doubt, if section 30S(3) of the Act applies, Telecom must also comply with the applicable residual terms determination.

5 Application of the UCLL Backhaul Terms

- 5.1 The UCLL Backhaul Terms are all of the terms on which Telecom will make the UCLL Backhaul Service available to the Access Seeker.
- 5.2 The Access Seeker's rights under the UCLL Backhaul Terms cannot be duplicated by making a subsequent Request. If Telecom becomes entitled to Suspend or terminate supply of the UCLL Backhaul Service to the Access Seeker, any further supply of the UCLL Backhaul Service under the UCLL Backhaul Terms is limited to the existing rights and obligations of the Access Seeker and Telecom under the UCLL Backhaul Terms at that time.
- 5.3 Termination of supply of the UCLL Backhaul Service or the UCLL Backhaul Terms coming to an end does not relieve the Access Seeker or Telecom of any rights or obligations under the UCLL Backhaul Terms which have accrued beforehand.

6 Prerequisites to the UCLL Backhaul Service being made available

- 6.1 Despite section 4, Telecom has no obligation to make the UCLL Backhaul Service available to the Access Seeker unless the prerequisites in this section 6 are satisfied at all times. For the avoidance of doubt, if the prerequisites in this section 6 are not satisfied and if provision of the UCLL Backhaul Service to the Access Seeker has commenced, then Telecom's sole remedy shall be to exercise any rights to Suspend in accordance with clause 34.7.2.

Security requirements

- 6.2 The Access Seeker must provide to Telecom:
- 6.2.1 evidence reasonably satisfactory to Telecom that the Access Seeker has a long term credit rating for its senior unsecured indebtedness of at least A3 (Moody's Investor Services), A- (Standard and Poor's Ratings Group) or B+ (AM Best); or
- 6.2.2 if such evidence cannot be provided, the Access Seeker must provide to Telecom the Access

Seeker's choice of an unconditional:

- (a) Bank guarantee;
- (b) letter of credit;
- (c) cash prepayment;
- (d) guarantee from the parent company of the Access Seeker if:
 - (i) that parent company has a credit rating which is in accordance with clause 6.2.1; and
 - (ii) where the parent company is not a 'company' registered under Part II of the Companies Act 1993, Telecom has approved that company as a guarantor (such approval not to be unreasonably withheld or delayed); or
- (e) other security agreed by Telecom in writing.

(Security).

6.3 The Security must be in a form reasonably acceptable to Telecom and, in the case of a Bank guarantee or a letter of credit, from a Bank which has a credit rating acceptable to Telecom. The Security must be for:

6.3.1 \$100,000; or

6.3.2 an amount equal to Telecom's reasonable estimate of the total value of Charges for the UCLL Backhaul Service Telecom is likely to supply to the Access Seeker under the UCLL Backhaul Terms during any two consecutive month period,

whichever is the greater.

6.4 Every six months after the Access Date, if either the Access Seeker or Telecom requests, the amount of the Security must be adjusted. The adjusted Security must meet the same requirements as any Security under clause 6.3 and be for:

6.4.1 \$100,000; or

6.4.2 an amount equal to the total value of Charges under the UCLL Backhaul Terms over the two month period immediately preceding the date any request under clause 6.4 is made,

whichever is the greater.

6.5 If the adjusted Security amount is an increase, the Access Seeker must, within 20 Working Days after that adjustment date, provide replacement or additional Security that is equal to the new Security amount. If the adjusted Security amount is a decrease, the Access Seeker may cause the Security to be reduced accordingly.

Operational requirements

6.6 The Access Seeker must comply with every applicable prerequisite under the UCLL Backhaul Operations Manual.

GENERAL RIGHTS AND OBLIGATIONS

7 General

Supply of the UCLL Backhaul Service

- 7.1 Upon the UCLL Backhaul Service being made available under section 4, Telecom will, subject to the UCLL Backhaul Terms, supply the UCLL Backhaul Service to the Access Seeker and the Access Seeker may order the UCLL Backhaul Service in accordance with the processes and procedures under the UCLL Backhaul Operations Manual.

Telecom's relationship with Customers and End Users of the Access Seeker

- 7.2 No obligation or other legal relationship is created between Telecom and any Customer or End User of the Access Seeker by the UCLL Backhaul Terms. The UCLL Backhaul Terms do not provide, grant or confer any right, benefit or privilege on any Customer or End User of the Access Seeker.

Rights not excluded

- 7.3 Nothing in the UCLL Backhaul Terms excludes or limits the Commission's, the Access Seeker's or Telecom's right to enforce the UCLL Backhaul Terms or exercise any other rights under the Act.

Amendment

- 7.4 The UCLL Backhaul Terms may be amended by the Commission under the Act including by:

- 7.4.1 a review under section 30R;
- 7.4.2 a residual terms determination under section 30ZB;
- 7.4.3 a pricing review determination under section 51;
- 7.4.4 a clarification under section 58; and
- 7.4.5 a reconsideration under section 59.

8 The schedules to the UCLL Backhaul General Terms

Compliance

- 8.1 The Access Seeker and Telecom must comply with each of the schedules to the UCLL Backhaul General Terms.
- 8.2 If there is a conflict between the UCLL Backhaul General Terms and the schedules to the UCLL Backhaul General Terms, the UCLL Backhaul General Terms will prevail except where expressly provided otherwise.

Technical manuals and user guides

- 8.3 The UCLL Backhaul Operations Manual refers to various technical manuals, international standards and user guides which are listed in Appendix B of the UCLL Backhaul Operations Manual. They contain technical and procedural detail. Where changes are made to the technical manuals, international standards or user guides that consequentially alter the UCLL Backhaul Terms, these changes must be made in accordance with the change mechanism set out in section 9. Such reference to technical manuals, international standards and user guides is necessary for both the Access Seeker and Telecom so that:

- 8.3.1 uniform standards of best practice are set;
- 8.3.2 the performance of the Telecom's Network can be maintained;

- 8.3.3 the health and safety of the Access Seeker's and Telecom's employees, contractors and other agents can be protected;
 - 8.3.4 systems are in place for the management of outages, faults and any work the Access Seeker or Telecom needs to undertake on or around Telecom's Network or any Exchange; and
 - 8.3.5 the Access Seeker's and Telecom's employees, contractors and other agents have access to uniform technical instructions.
- 8.4 The Access Seeker and Telecom are required to comply with any technical and procedural detail contained in a technical manual, international standard or user guide referred to in the UCLL Backhaul Operations Manual to the extent that they create an obligation to do so.
- 8.5 The technical manuals, international standards and user guides referred to in the UCLL Backhaul Operations Manual may have other unrelated uses and contain terms irrelevant to the UCLL Backhaul Terms.
- 8.6 To the extent that the UCLL Backhaul Operations Manual creates any obligation to comply with a technical manual, international standard or user guide, the Access Seeker and Telecom must:
- 8.6.1 apply the technical manual, international standard or user guide under the UCLL Backhaul Terms in good faith;
 - 8.6.2 interpret the technical manual, international standard or user guide consistently with the UCLL Backhaul Terms; and
 - 8.6.3 comply with the technical and/or procedural detail the technical manual, international standard or user guide contains.

9 Change Mechanism for UCLL Backhaul Operations Manual and Service Level Terms

- 9.1 Any proposed change to the UCLL Backhaul Operations Manual and UCLL Backhaul Service Level Terms must be approved by the Commission under this section 9.

Notice of change

- 9.2 Any Access Seeker may give Notice to Telecom proposing a change to the UCLL Backhaul Operations Manual or the UCLL Backhaul Service Level Terms. Telecom has 10 Working Days from the date it receives such Notice to provide comments on the proposed change to the Access Seeker. After the Access Seeker has received Telecom's comments or after the 10 Working Days (which ever is the earlier), the Access Seeker may either withdraw the proposed change or elect to proceed with it by giving Notice to Telecom. Telecom must notify the proposed change in accordance with clause 9.3 within five Working Days of receiving Notice from the Access Seeker that it elects to proceed.
- 9.3 Where any Access Seeker has elected to proceed with a proposed change under clause 9.2 or where Telecom proposes a change to the UCLL Backhaul Operations Manual or the UCLL Backhaul Service Level Terms, Telecom must notify all Access Seekers by email and by publishing the proposed change on a Telecom website accessible by all Access Seekers.
- 9.4 Telecom and all Access Seekers have 10 Working Days to object to any proposed change from the date such change is notified under clause 9.3. If:
- 9.4.1 no written objection is received by Telecom within the 10 Working Days; and
 - 9.4.2 Telecom does not object within the 10 Working Days by notifying all Access Seekers by email and by publishing such objection on a Telecom website accessible by all Access Seekers,

Telecom must submit the proposed change to the Commission for approval under clause 9.14.

Objections to change

- 9.5 If any Access Seeker or Telecom objects to a proposed change under clause 9.4, Telecom and all Access Seekers have 20 Working Days from the date Notice of the proposed change was given under clause 9.3 to negotiate and agree the proposed change. Negotiation will take place through the Telecommunications Carriers' Forum and will be administered by a Telecommunications Carriers' Forum administrator. Telecom will provide the administrator with a list of the Access Seekers. The administrator will administer the voting process and will confirm in writing the outcome to Telecom and the Access Seekers. If, despite any objection, the proposed change is agreed by 75% or more of a vote of all Access Seekers and Telecom (where the 75% must include Telecom), Telecom must submit the proposed change to the Commission for approval under clause 9.14.
- 9.6 If the proposed change is not agreed by a vote under clause 9.5, the proposed change may be referred to an independent recommendation maker at the request of the party that proposed the change. The independent recommendation maker must be agreed by Telecom and every Access Seeker that indicates it wishes to be a party to the decision (**the parties to the decision**). If the parties to the decision cannot agree, an independent recommendation maker will be appointed by the Chair of the Telecommunications Carrier's Forum.
- 9.7 To be eligible for appointment, the independent recommendation maker must be impartial, experienced in the relevant area of telecommunications and will preferably be experienced in dispute resolution. Unless the parties to the decision agree, the independent recommendation maker must not have performed any duties, whether as an employee, consultant or contractor, for any of the parties to the decision or any related person during a six month period prior to the date the proposed change was voted on.
- 9.8 The independent recommendation maker must act as an expert and not as an Arbitrator under the Arbitration Act 1996. The independent recommendation maker will be entitled to rely on their own judgement and opinion.
- 9.9 The independent recommendation maker may seek independent legal advice regarding the appropriate procedures for reaching a decision.
- 9.10 The independent recommendation maker should seek to make decisions that are timely, practical, efficient, and take into account the Act, in particular the relevant standard access principles under clause 5 of Schedule 1 to the Act. The independent recommendation maker must inform all Access Seekers and Telecom of his or her recommendation as to the proposed change and Telecom must submit the proposed change to the Commission for approval under clause 9.14.
- 9.11 If the proposed change is accepted by the independent recommendation maker, the independent recommendation maker's costs are to be met by the party or parties to the decision that opposed the change. If the proposed change is rejected by the independent recommendation maker, the independent recommendation maker's costs are to be met by the party to the decision that proposed the change.

Other reviews

- 9.12 In addition to any change proposed under clause 9.2:
- 9.12.1 Telecom must review the UCLL Backhaul Operations Manual every 24 months (with the first review commencing on the second anniversary of the UCLL Backhaul Standard Terms Determination being made); and
- 9.12.2 Telecom may review the UCLL Backhaul Operations Manual at any time at its discretion, including where any Access Seeker makes a request for an earlier review and Telecom agrees.

Referral to the Commission

- 9.13 Any changes Telecom determines to be necessary or desirable as a result of a review under clause 9.12 may be proposed using the change process under this section 9.

- 9.14 Telecom must submit any proposed change to the Commission with:
- 9.14.1 an updated version of the of the UCLL Backhaul Operations Manual or UCLL Backhaul Service Level Terms (as the case may be) containing the proposed change;
 - 9.14.2 the reasons for the proposed change; and
 - 9.14.3 information on which Parties agree or disagree with the proposed change;
- and the Commission will advise whether a proposed change is approved or not within 10 Working Days of receipt of that proposed change, unless otherwise agreed between the Commission and the Parties.

Notice of approval of proposal

- 9.15 If the proposed change is approved by the Commission, Telecom must give Notice to all Access Seekers of when the change takes effect together with providing an updated version of the UCLL Backhaul Operations Manual or the UCLL Backhaul Service Level Terms (as the case may be) containing the change.
- 9.16 For the avoidance of doubt, nothing in this section 9 prevents any Access Seeker or Telecom from seeking any remedies or exercising any other rights available to it under the Act.

THE ACCESS SEEKER'S RIGHTS AND OBLIGATIONS

10 General

- 10.1 Whenever Telecom supplies the UCLL Backhaul Service to the Access Seeker, the Access Seeker will:
- 10.1.1 follow Telecom's reasonable directions about the use of the UCLL Backhaul Service which Telecom reasonably believes are:
 - (a) in the interests of health and safety;
 - (b) about the interests of providing the quality of service to Telecom's Customers, the Access Seeker's Customers or any Other Service Provider's customers; or
 - (c) necessary to prevent risk to any person or property.
 - 10.1.2 use all reasonable endeavours to provide such information as Telecom may reasonably require in order for Telecom to perform its obligations under the UCLL Backhaul Terms;
 - 10.1.3 use all reasonable endeavours to ensure that information disclosed is correct and complete to the best of the Access Seeker's knowledge at the time of provision of the information;
 - 10.1.4 use the UCLL Backhaul Service for lawful purposes, in accordance with all applicable laws and without being a nuisance to anyone;
 - 10.1.5 never interfere with the reasonable use of any service by any Customer of Telecom or any customer of an Other Service Provider;
 - 10.1.6 where required under the UCLL Backhaul Terms, obtain any third party authorisation, licence or consent necessary or prudent for Telecom to supply the UCLL Backhaul Service to the Access Seeker (other than authorisations, licences or consents required generally by Telecom to operate Telecom's Network);
 - 10.1.7 where reasonably requested by Telecom, provide reasonable assistance to Telecom in obtaining any third party authorisation, licence or consent necessary or prudent for Telecom to supply the UCLL Backhaul Service to the Access Seeker (other than authorisations, licences or consents

required generally by Telecom to operate Telecom's Network); and

10.1.8 except where the law requires otherwise, only use the UCLL Backhaul Service in ways that are contemplated by the UCLL Backhaul Terms.

10.2 The Access Seeker must use all reasonable endeavours to ensure that there is included in:

10.2.1 each contract it has with a Customer for the provision of services which rely, in whole or in part, on the UCLL Backhaul Service; and

10.2.2 where the Customer in clause 10.2.1 is an Other Service Provider, each contract that Other Service Provider has with a customer for the provision of services which rely, in whole or in part, on the UCLL Backhaul Service,

a provision which excludes (to the maximum extent permitted by law) all liability of Telecom arising from or in connection with the services which rely, in whole or in part, on the UCLL Backhaul Service.

11 The Access Seeker's responsibility for Customers and End Users

11.1 The Access Seeker will, independently of Telecom, manage all aspects of its relationship with its Customers and End Users, including being responsible for:

11.1.1 customer service and enquiries;

11.1.2 product information, service, fault reporting and technical issues;

11.1.3 contact with the police and other government authorities; and

11.1.4 invoicing and settlement.

CHARGES, PAYMENT, NON-PAYMENT AND INVOICE ERROR DISPUTES

12 Charging principles

12.1 The Access Seeker must pay all Charges for supply of the UCLL Backhaul Service to the Access Seeker under the UCLL Backhaul Terms, regardless of who uses the UCLL Backhaul Service. The Charges payable for the UCLL Backhaul Service are set out in the UCLL Backhaul Price List and fixed in accordance with the UCLL Backhaul Terms.

12.2 The Access Seeker must pay GST in accordance with the Goods and Services Tax Act 1985 on all Charges. All Charges are expressed before the addition of GST, except any Charge expressly stated in writing by Telecom to be GST inclusive.

12.3 Except as expressly provided under the UCLL Backhaul Terms:

12.3.1 Charges for the UCLL Backhaul Service are payable for the period beginning on the date the UCLL Backhaul Service (or the relevant part of it) is capable of being used unless the Access Seeker and Telecom have agreed a scheduled operational date for the UCLL Backhaul Service (or the relevant part of it), in which case Charges will not be payable for any period before that date unless the UCLL Backhaul Service is actually being used before that date; and

12.3.2 where the UCLL Backhaul Service is supplied for a part period, a pro rata adjustment to the Charges will be made by Telecom and, where necessary, a refund will be made to the Access Seeker.

- 12.4 The Access Seeker must not rely on any information from Telecom concerning the tax treatment of any payments under the UCLL Backhaul Terms, or any other matter relating to tax in relation to the UCLL Backhaul Terms and the Access Seeker is responsible for determining the correct tax treatment of such matters.

13 Invoicing and payment of Charges

Invoices

- 13.1 Telecom will invoice the Access Seeker for all Charges.
- 13.2 Telecom's invoices must include reasonable information to enable the Access Seeker to check the accuracy of all Charges.
- 13.3 The due date of each invoice will be specified in the invoice and will not be less than 20 Working Days following the date of invoice.

Payment

- 13.4 Except as expressly provided under the UCLL Backhaul Terms:
- 13.4.1 all Charges invoiced by Telecom must be paid by the Access Seeker on or before the due date;
 - 13.4.2 all Charges invoiced by Telecom must be paid by the Access Seeker by electronic funds transfer in cleared funds to a place or bank account nominated by Telecom free of any deduction, set off or withholding (the only exceptions to the prohibition on deduction, set off and withholding are section 15 and any set off in accordance with the UCLL Backhaul Service Level Terms); and
 - 13.4.3 payments must not be made by credit card.
- 13.5 The Access Seeker must provide Telecom with sufficient information to allow Telecom to allocate any payment to a particular invoice or invoices and provide any information reasonably requested by Telecom for this purpose.
- 13.6 If the Access Seeker does not pay an invoice by the due date for payment, the Access Seeker will be in Default and Telecom may charge the Access Seeker default interest on the unpaid amount on a daily basis from the due date until payment is made. The default interest rate is the Bill Rate plus 2%.
- 13.7 Under no circumstances does payment of any amount unpaid under the UCLL Backhaul Terms release the Access Seeker from liability for any interest payable on that amount.
- 13.8 Neither the Access Seeker's obligation to pay interest under the UCLL Backhaul Terms, nor the performance of that obligation, prejudices Telecom's rights in respect of the Access Seeker's non-payment of an amount on its due date.

Electronic invoicing and billing reports

- 13.9 Telecom must provide monthly billing information to the Access Seeker in an electronic format, as set out in the UCLL Backhaul Operations Manual.
- 13.10 Telecom must provide a hardcopy of monthly billing information when requested by the Access Seeker, in which case Telecom will charge the Access Seeker in accordance with the UCLL Backhaul Price List.
- 13.11 Telecom must, where practicable, provide billing reports and information additional to the information required by this section 13 when requested by the Access Seeker, in which case Telecom may charge the Access Seeker in accordance with the UCLL Backhaul Price List.

Time limit for invoicing

- 13.12 Nothing under the UCLL Backhaul Terms or in any invoice prejudices Telecom's right to invoice the Access

Seeker for any Charges except that no Charge may be invoiced 100 days or more after the date the UCLL Backhaul Service to which that Charge relates was supplied.

14 Non-payment

- 14.1 Where the Access Seeker fails to pay any amount due under the UCLL Backhaul Terms (other than an amount withheld in accordance with section 15 or set off in accordance with the UCLL Backhaul Service Level Terms), Telecom may give Notice to the Access Seeker to pay that amount within 20 Working Days of the Notice being given (**Non-Payment Notice**). A Non-Payment Notice must state the amount due and may be given to the Access Seeker at any time from the date on which the UCLL Backhaul Terms provides for interest to begin to accrue on the amount due (regardless of whether interest is charged).
- 14.2 A Non-Payment Notice will not be affected by the Access Seeker giving a Dispute Notice to Telecom unless the Non-Payment Notice purports to require payment of an amount withheld in accordance with section 15 or set off in accordance with the UCLL Backhaul Service Level Terms. In this case the status quo will prevail and the Non-Payment Notice will not give rise to any rights under clause 14.3 or section 35 until the Dispute is resolved.

Suspension following Non-Payment Notice

- 14.3 Telecom may Suspend supply of the UCLL Backhaul Service if Telecom gives the Access Seeker a Non-Payment Notice and the amount due (including any interest charged) is not paid within 20 Working Days of the Non-Payment Notice being given.
- 14.4 Suspension of the UCLL Backhaul Service under clause 14.3 will cease as soon as it is reasonably practicable for Telecom to complete restoration of the UCLL Backhaul Service after the Access Seeker's non-payment is remedied, and in any event must cease no later than four Working Days after the Access Seeker's non-payment is remedied.

15 Invoice Disputes

Dealing with Invoice Error Disputes

- 15.1 If the Access Seeker reasonably and in good faith believes there is a manifest error in either the Charges in an invoice or the calculation of the amount of an invoice (**Invoice Error**), the Access Seeker may give Notice to Telecom before the due date setting out in full details of:
- 15.1.1 the invoice;
 - 15.1.2 the Invoice Error;
 - 15.1.3 the grounds for the Access Seeker's belief that the Invoice Error exists; and
 - 15.1.4 the amount by which the Access Seeker believes that Telecom has overcharged or undercharged it by reason of the Invoice Error.
- 15.2 Where the Access Seeker believes Telecom has overcharged it by reason of an Invoice Error, the Access Seeker may withhold payment of the amount it believes it has been overcharged until the issue has been resolved in accordance with this section 15. Whenever payment is withheld under this clause 15.2 the Access Seeker must, within 10 Working Days after the due date, give Telecom a full extract detailing each withheld Charge.
- 15.3 If the Access Seeker fails to follow the Notice requirements set out in clause 15.1, then any right under this section 15 to withhold payment of the amount it believes it has been overcharged does not apply.
- 15.4 Following the giving of any Notice of an Invoice Error, the Access Seeker and Telecom must treat that Notice as a Dispute Notice and resolve the Dispute in accordance with section 36. If the Dispute reaches a

Deadlock, the Access Seeker and Telecom must refer the Dispute to expert decision.

- 15.5 If it is agreed by the Access Seeker and Telecom or decided under clause 36.7 that an Invoice Error exists in an invoice, depending on whether the amount properly payable by the Access Seeker is more than the amount paid (an underpayment) or less than the amount paid (an overpayment), then:
- 15.5.1 in the case of an underpayment, the Access Seeker must forthwith pay to Telecom the amount of the difference between the amount paid and the amount properly payable;
- 15.5.2 in the case of an overpayment, Telecom must forthwith pay to the Access Seeker the amount of the difference between the amount paid and the amount properly payable, plus interest on that amount at the Bill Rate (as at the date the Access Seeker made the overpayment) plus 2% for the period from the date the Access Seeker made the overpayment to the date of payment, or the date clause 15.10 becomes applicable, whichever is earlier; or
- 15.5.3 in the case of an Invoice Error that affects three or more of any five consecutive invoices and constitutes an overpayment by the Access Seeker that is more than 5% of the amount properly payable by the Access Seeker under such invoices, Telecom must forthwith pay to the Access Seeker the amount of the difference between the amount paid and the amount properly payable, plus interest on that amount at the Bill Rate (as at the date the Access Seeker made the first overpayment) plus 4% for the period from the date the Access Seeker made the first overpayment to the date of payment, or the date clause 15.10 becomes applicable, whichever is the earlier.
- 15.6 If it is agreed by the Access Seeker and Telecom or decided under clause 36.7 that an Invoice Error does not exist, the Access Seeker must forthwith pay any amount withheld plus interest on the amount withheld at the Bill Rate (as at the date of the invoice) plus 2% for the period from the day after the due date to the date of payment of the amount withheld, or the date clause 15.10 becomes applicable, whichever is earlier.

Other Invoice Disputes

- 15.7 Regardless of whether or not the Access Seeker has previously given Notice of an Invoice Error in relation to any invoice, the Access Seeker may give Telecom a Dispute Notice in respect of that invoice, provided that a Dispute Notice cannot be given later than 100 days after the date of the invoice. Any Dispute Notice under this clause 15.7 must comply with clause 36.2 and set out details of the invoice, the disputed amount and the grounds for the Dispute together with any available supporting evidence. The Access Seeker and Telecom must resolve the Dispute in accordance with section 36.
- 15.8 If a Dispute under clause 15.7 is resolved in favour of the Access Seeker, Telecom must forthwith pay the amount agreed or found to have been overpaid plus interest at the Bill Rate (as at the date of the overpayment) plus 2% on the overpaid amount for the period from the date the overpayment was made to the date of refund of the overpayment or the date clause 15.10 becomes applicable, whichever is earlier.
- 15.9 If a Dispute under clause 15.7 is resolved in favour of Telecom, the Access Seeker must forthwith pay the amount agreed or found to have been underpaid plus interest at the Bill Rate (as at the date the underpayment became due) plus 2% on the underpaid amount for the period from the date the underpayment was made to the date of payment of the balance or the date clause 15.10 becomes applicable, whichever is earlier.

Interest on unpaid amounts

- 15.10 Where an amount due from Telecom or the Access Seeker under clauses 15.5, 15.6, 15.8 or 15.9 remains unpaid on the 20th Working Day after the date the Dispute is resolved, that Party must pay interest on that amount at the Bill Rate (as at that 20th Working Day) plus 5% for the period from that 20th Working Day to the date of payment of that amount, in addition to the amount due under clauses 15.5, 15.6, 15.8 or 15.9.

LIABILITY

16 Access Seeker's liability

Limitation of the Access Seeker's liability

16.1 The Access Seeker's total liability in respect of any and all Defaults, negligent acts or omissions or breaches of statutory duty is limited to \$2,000,000 in aggregate for all events (connected or unconnected) occurring in any 12 month period, save that this limitation does not apply to the exceptions under clause 16.4.

Exclusion of the Access Seeker's liability

16.2 The Access Seeker's liability for Indirect Damages in respect of any and all Defaults, negligent acts or omissions or breaches of statutory duty is excluded, save that this exclusion does not apply to the exceptions under clause 16.4.

Time bar

16.3 The Access Seeker has no liability to Telecom in respect of any Default, negligent act or omission or breach of statutory duty unless Telecom notifies the Access Seeker of its claim within 12 months after that Default, negligent act or omission or breach of statutory duty became reasonably discoverable.

Exceptions to the limitation and exclusion of the Access Seeker's liability

16.4 The limitation under clause 16.1 and the exclusion under clause 16.2 do not apply to:

16.4.1 any liability resulting from the Access Seeker's fraud or wilful Default;

16.4.2 any obligation arising under the UCLL Backhaul Terms to pay money in the ordinary course of business;

16.4.3 any liability resulting from the Access Seeker's Default under section 29; or

16.4.4 any liability resulting from the Access Seeker's Default under section 31.

Costs of recovering Charges

16.5 The Access Seeker must pay on demand all of Telecom's reasonable expenses (including legal costs on a full indemnity basis) properly incurred by Telecom in exercising its rights to recover any Charge the Access Seeker is liable to pay Telecom under the UCLL Backhaul Terms.

17 Telecom's liability

Limitation of Telecom's liability

17.1 Telecom's total liability in respect of any and all Defaults, negligent acts or omissions or breaches of statutory duty is limited to \$2,000,000 in aggregate for all events (connected or unconnected) occurring in any 12 month period, save that this limitation does not apply to the exceptions under clause 17.4.

Exclusions of Telecom's liability

17.2 Telecom's liability for Indirect Damages in respect of any and all Defaults, negligent acts or omissions or breaches of statutory duty is excluded, save that this exclusion does not apply to the exceptions under clause 17.4.

Time bar

17.3 Telecom has no liability to the Access Seeker in respect of any Default, negligent act or omission or breach

of statutory duty unless the Access Seeker notifies Telecom of its claim within 12 months after that Default became reasonably discoverable.

Exceptions to the limitation and exclusions of Telecom's liability

- 17.4 The limitation under clause 17.1 and the exclusions under clause 17.2 do not apply to:
- 17.4.1 any liability resulting from Telecom's fraud or wilful Default;
 - 17.4.2 any obligation arising under the UCLL Backhaul Terms to pay money in the ordinary course of business;
 - 17.4.3 any liability resulting from Telecom's Default under section 29;
 - 17.4.4 any liability arising under clause 30.3
 - 17.4.5 any liability resulting from Telecom's Default under section 31; or
 - 17.4.6 any Performance Penalty which may be payable by Telecom..

Costs of recovering any Performance Penalty

- 17.5 Telecom must pay on demand all of the Access Seeker's reasonable expenses (including legal costs on a full indemnity basis) properly incurred by the Access Seeker in exercising its rights to recover any Performance Penalty Telecom is liable to pay the Access Seeker under the UCLL Backhaul Terms.

18 General

- 18.1 Nothing under the UCLL Backhaul Terms excludes or limits:
- 18.1.1 any statutory liability of the Access Seeker or Telecom (to the extent that the law prohibits excluding or limiting such liability); or
 - 18.1.2 the Access Seeker's or Telecom's liability to pay any costs of, or awarded in, any proceeding, expert decision, arbitration or mediation.
- 18.2 Each term of sections 16 and 17:
- 18.2.1 is a separate limitation, exclusion or indemnity (as the case may be) applying and surviving even if one or more of such terms is inapplicable or held unreasonable in any circumstances; and
 - 18.2.2 takes effect so that every limitation, exclusion and indemnity (as the case may be) is not affected by the UCLL Backhaul Terms coming to an end.

19 Force Majeure

- 19.1 In this section 19:
- 19.1.1 **Force Majeure Event** means any event beyond the reasonable control of a Party, including:
 - (a) act of God or force of nature (including fire, earthquake, flood, landslide and weather of exceptional severity);
 - (b) public mains electrical supply failure;
 - (c) serious accident, the cause of which is unconnected to the Party relying on the Force Majeure Event (including explosion and radioactive contamination);

- (d) requirement or restriction of, or failure to act by, any government, regulatory or judicial entity (including any requirement to comply with a statutory or regulatory obligation) other than any exercise of power under the Act in relation to the UCLL Backhaul Terms itself;
- (e) epidemic, or national or local emergency (whether in fact or law);
- (f) sabotage, riot, insurrection, terrorism or civil disorder;
- (g) military operations or war (whether declared or not);
- (h) industrial dispute of any kind (provided that, in circumstances where the industrial dispute involves its own employees, the Party relying on the Force Majeure Event must have taken reasonable actions to prevent such industrial dispute from arising);
or
- (i) acts or omissions of strangers for whom the Party relying on the Force Majeure Event is not responsible (for the avoidance of doubt, the Access Seeker and Telecom are responsible for all of their respective contractors, employees, servants and agents),

but does not include:

- (j) any event which the Party relying on the Force Majeure Event could have avoided or overcome by exercising a standard of reasonable care at a reasonable cost; or
- (k) a lack of funds for any reason or any other inability to pay.

- 19.2 Notwithstanding anything in the UCLL Backhaul Terms, neither the Access Seeker nor Telecom is liable for any cost, liability, loss, damage or expense (including legal and other professional costs) for not meeting or for any delay in meeting any obligation under the UCLL Backhaul Terms (other than any obligation arising under the UCLL Backhaul Terms to pay money in the ordinary course of business) caused by a Force Majeure Event.
- 19.3 Where the Access Seeker or Telecom rely on a Force Majeure Event in respect of any failure or delay in meeting its obligations under the UCLL Backhaul Terms, it must forthwith give Notice to the other Party of the estimated extent and duration of its inability to perform or delay in performing its obligations.
- 19.4 Upon cessation of the effects of a Force Majeure Event any Party relying on it must forthwith give Notice to the other Party of such cessation.
- 19.5 A Force Majeure Event does not discharge any Party relying on it from any obligation accrued beforehand. Any Party relying on a Force Majeure Event must continue to perform those of its obligations not affected by the Force Majeure Event.
- 19.6 Any Party affected by a Force Majeure Event will use all reasonable endeavours to mitigate as soon as practicable those consequences of that Force Majeure Event which have affected its obligations under the UCLL Backhaul Terms and will keep the other Party fully informed about the status of the Force Majeure Event and the extent to which it is preventing the first Party from performing those obligations.
- 19.7 To the extent that Telecom is prevented as the result of a Force Majeure Event from providing all or part of the UCLL Backhaul Service, the Access Seeker is not required to pay the Charges that apply to that part of the UCLL Backhaul Service that is not provided by Telecom during the Force Majeure Event.

SERVICE DISRUPTION

20 Outages

20.1 Telecom must, where practicable, give the Access Seeker reasonable advice of anything that Telecom is aware of which is likely to adversely affect the UCLL Backhaul Service to the same extent that it provides advice and notification to any Customers or other part of Telecom responsible for selling services to Customers of Telecom.

Planned Outages

20.2 Telecom may Suspend supply of the UCLL Backhaul Service for the purpose of conducting works, routine maintenance, remedial work or upgrades to Telecom's Network (**Planned Outage**).

20.3 Telecom must:

20.3.1 use all reasonable endeavours to conduct any Planned Outage between the hours of 11.00 pm to 6.00 am inclusive where Telecom believes that is practicable and in such manner as to minimise, to the extent practicable, any impact on the provision of the UCLL Backhaul Service to the Access Seeker;

20.3.2 advise the Access Seeker in advance of any Planned Outage:

- (a) to the same extent that Telecom provides advice and notification to any Customer or other part of Telecom responsible for selling services to Customers of Telecom; but
- (b) at least within the timeframe set out in the UBA Backhaul Service Level Terms; and

20.3.3 in respect of any advice of a Planned Outage, provide the following information:

- (a) a brief explanation of the reason for the Planned Outage;
- (b) the intended date, time and duration of the Planned Outage;
- (c) a description of the UCLL Backhaul Service (or the relevant part of it) which will be affected by the Planned Outage; and
- (d) the name and contact details of Telecom's representative(s) who gave the advice.

Unplanned Outages

20.4 Telecom may Suspend supply of the UCLL Backhaul Service:

20.4.1 due to any unplanned unavailability of, or interruption, to Telecom's Network or the UCLL Backhaul Service; or

20.4.2 in order to provide or safeguard service to the emergency or other essential services.

(Unplanned Outage).

20.5 Telecom must:

20.5.1 use all reasonable endeavours to give the Access Seeker as much advice as possible of the existence of any Unplanned Outage;

20.5.2 advise the Access Seeker of any Unplanned Outage within the timeframe set out in the UCLL Backhaul Service Level Terms; and

20.5.3 use all reasonable endeavours to answer any reasonable questions from the Access Seeker about the extent and duration of any Unplanned Outage.

20.6 Telecom must act reasonably and in good faith in;

20.6.1 planning and implementing any Planned Outage; and

20.6.2 managing any Unplanned Outage

with a view to minimising the impact on the Access Seeker and Customers and End-Users of the Access Seeker.

20.7 If the Access Seeker becomes aware of any Unplanned Outage before it receives advice from Telecom under clause 20.5, the Access Seeker must make reasonable efforts to notify Telecom as soon as reasonably practical.

FAULTS

21 Responsibility for faults

21.1 Telecom is responsible for:

21.1.1 any faults which affect the UCLL Backhaul Service and are in the Access Seeker's Network or Access Seeker Owned Equipment, that are due to any act or omission of Telecom;

21.1.2 any faults in the Telecom Owned Equipment; and

21.1.3 any faults in Telecom's Network.

21.2 The Access Seeker is responsible for:

21.2.1 any faults which affect the UCLL Backhaul Service and are in Telecom's Network or Telecom Owned Equipment but are due to any act or omission of the Access Seeker, a Customer of the Access Seeker or an End User of the Access Seeker;

21.2.2 any faults in Access Seeker Equipment; and

21.2.3 any faults in the Access Seeker's Network.

21.3 Despite the Access Seeker's responsibilities under clause 21.2, this section 21 does not create any right for the Access Seeker to access any property controlled by Telecom or fix any equipment or other thing unless expressly provided otherwise in the UCLL Backhaul Terms.

21.4 Where the Access Seeker is responsible for a fault under clause 21.2 or that it has no right of access to fix, it may engage Telecom to fix that fault on its behalf in accordance with the UCLL Backhaul Operations Manual at the Charge specified in the UCLL Backhaul Price List.

22 Diagnosing faults

22.1 The Access Seeker must operate a competent and sufficiently resourced faults reporting service for Customers and End Users of the Access Seeker.

22.2 Before asking Telecom to investigate any fault, the Access Seeker must:

- 22.2.1 confirm the presence of a fault;
- 22.2.2 perform an initial fault diagnosis to identify where the fault has arisen;
- 22.2.3 use all reasonable endeavours to investigate the fault and find out all relevant information from its Customer or End User; and
- 22.2.4 confirm the fault is one that Telecom is responsible for fixing under clause 21.1.

23 Reporting faults to Telecom

- 23.1 Once the Access Seeker has complied with clause 22.2 it must report any fault that Telecom is responsible for fixing under clause 21.1 to Telecom and provide details of it (**Reported Fault**). The procedures for making and acknowledging a Reported Fault are set out in the UCLL Backhaul Operations Manual.
- 23.2 Where the Reported Fault is outside Telecom's responsibility under clause 21.1 or Telecom cannot confirm the presence of a fault, then Telecom may charge the Access Seeker in accordance with the UCLL Backhaul Price List.
- 23.3 Telecom must not accept any report of a fault from a Customer or End User of the Access Seeker. Any Customer or End User of the Access Seeker mistakenly contacting Telecom will be advised to contact the Access Seeker. The Access Seeker must ensure that all of its Customers and End Users are informed that all faults must be reported to the Access Seeker.

24 Fixing faults

- 24.1 A Reported Fault that is Telecom's responsibility under clause 21.1. will be fixed by Telecom between the hours of 7.00 am and 7.00 pm seven days a week. Procedures for fixing emergency faults are set out in the UCLL Backhaul Operations Manual.
- 24.2 Where entry into the property of, or interaction with, any Customer or End User of the Access Seeker is not required, Telecom may attend the premises of that Customer or End User to fix a fault without needing to arrange a site visit with the Access Seeker.
- 24.3 The Access Seeker will facilitate contact with any relevant Customer or End User of the Access Seeker and/or arrange a site visit whenever clause 24.2 does not apply and this is reasonably required by Telecom to clarify the nature of, or undertake work to fix, any Reported Fault. Telecom may communicate with a Customer or End User of the Access Seeker directly so long as such communications are confined to technical matters directly concerning the Reported Fault. Telecom representatives will comply with the customer contact procedures set out in the UCLL Backhaul Operations Manual.
- 24.4 Upon Telecom's acknowledgement of a Reported Fault that is Telecom's responsibility under clause 21.1, Telecom must:
 - 24.4.1 comply with the UCLL Backhaul Operations Manual;
 - 24.4.2 diagnose and fix the Reported Fault;
 - 24.4.3 following an initial diagnosis, provide an indication to the Access Seeker of the likely time to fix the Reported Fault, provided that Telecom has no obligation to provide such indication if the Reported Fault is fixed at the time of initial diagnosis; and
 - 24.4.4 if requested by the Access Seeker, provide progress reports after expiry of the indicated fault restoration timeframe (such progress reports must include the steps taken by Telecom to fix the Reported Fault and the expected time remaining until the Reported Fault will be resolved, if known),

in each case using all reasonable endeavours to meet the timeframes set out in the UCLL Backhaul Service Level Terms or, if there are none, the fault restoration timeframe indicated when the Reported Fault was made or as advised in the most recent progress report provided under clause 24.4.4.

TELECOM'S NETWORK, TELECOM OWNED EQUIPMENT AND PROPERTY

25 Safeguarding Telecom's Network and Telecom Owned Equipment

25.1 For the Access Seeker's own safety, and so that services supplied to Customers of Telecom are not disrupted, the Access Seeker must help safeguard Telecom's Network and Telecom Owned Equipment. The Access Seeker must:

- 25.1.1 follow Telecom's reasonable directions when connecting anything to Telecom's Network or any Telecom Owned Equipment and make sure it complies with the UCLL Backhaul Operations Manual;
- 25.1.2 only allow people authorised by Telecom to work on or around Telecom's Network or Telecom Owned Equipment; and
- 25.1.3 make sure everyone the Access Seeker is responsible for also meets these obligations.

25.2 Telecom is responsible for operating and upgrading Telecom's Network in a manner that does not:

- 25.2.1 endanger the safety or health of any of the Access Seeker's employees, contractors, agents or Customers; or
- 25.2.2 damage, interfere with, or cause any deterioration in the operation of the Access Seeker's Network. However Telecom will not be responsible for any damage to, interference with, or deterioration of the Access Seeker's Network that is caused by the Access Seeker's failure to ensure that the Access Seeker's Network is compatible with Telecom's Network.

25.3 Telecom must not unreasonably withhold or delay granting authorisation under clause 25.1.2.

26 Network performance

26.1 A Party's Network may affect the performance of the second Party's Network. If there is an issue affecting the performance of a Party's Network then, without prejudice to the other terms of the UCLL Backhaul Terms, that Party (**Affected Party**) may require the other Party to meet with it within a reasonable time frame. At that meeting, the Parties must discuss in good faith and endeavour to agree the steps the other Party will take, and the timeframes for taking those steps, to mitigate the effects on the Affected Party's Network.

27 Responsibilities for Telecom Owned Equipment

27.1 At the time any Telecom Owned Equipment is supplied, Telecom will use all reasonable endeavours to make sure it is safe, durable and approved for connection to the rest of Telecom's Network.

27.2 Where Telecom supplies the Access Seeker with any Telecom Owned Equipment, the Access Seeker will, where applicable:

- 27.2.1 leave the Telecom Owned Equipment installed and not use it otherwise than in accordance with the UCLL Backhaul Operations Manual;

- 27.2.2 protect the Telecom Owned Equipment from radio or electrical interference, power fluctuations, abnormal environmental conditions, theft and any other risks of loss or damage, except where such risks of loss or damage are caused by Telecom;
- 27.2.3 meet any requirements set out in the UCLL Backhaul Operations Manual relating to the Telecom Owned Equipment;
- 27.2.4 if the Telecom Owned Equipment is lost, stolen or damaged, notify Telecom directly and pay for repairing or replacing it, except where the loss, theft or damage was caused by Telecom;
- 27.2.5 follow Telecom's reasonable directions when using the Telecom Owned Equipment and never use the Telecom Owned Equipment for purposes for which it is not designed; and
- 27.2.6 not encumber Telecom's title to the Telecom Owned Equipment or expose such title to third party claims and notify Telecom if it becomes aware of any third party claim.

27.3 When any Telecom Owned Equipment is no longer required the Access Seeker:

- 27.3.1 must return the Telecom Owned Equipment to Telecom;
- 27.3.2 will take reasonable care to avoid causing damage when returning the Telecom Owned Equipment to Telecom and be responsible for any damage to the Telecom Owned Equipment; and
- 27.3.3 must pay all Charges for the Telecom Owned Equipment until such time as it is returned to Telecom.

27.4 Telecom must:

- 27.4.1 maintain Telecom Owned Equipment to the same specifications that Telecom maintains equivalent equipment used to supply the UCLL Backhaul Service to itself; and
- 27.4.2 where necessary to ensure the Access Seeker is able to meet its obligations under clause 27.2, provide the Access Seeker with adequate and timely information regarding these specifications.

28 Property rights

Telecom's property rights

28.1 Acquiring the UCLL Backhaul Service from Telecom does not give the Access Seeker any property rights or beneficial interest in any part of Telecom's Network. The supply of any Telecom Owned Equipment or software to the Access Seeker, or the Access Seeker's use of Telecom Owned Equipment or software, does not give the Access Seeker any beneficial interest in that Telecom Owned Equipment or software.

Personal Property Securities Act 1999

28.2 Where any lease or bailment of:

- 28.2.1 Telecom Owned Equipment to the Access Seeker; or
- 28.2.2 any property of the Access Seeker to Telecom,

constitutes a security interest for the purposes of the Personal Property Securities Act 1999 (**PPSA**), then:

- 28.2.3 Telecom or the Access Seeker (as the case may be) may perfect its security interest by registering a finance statement in the Personal Property Securities Register; and
- 28.2.4 this clause shall constitute a security agreement for the purposes of the PPSA.

29 Intellectual Property

- 29.1 Except as expressly provided under the UCLL Backhaul Terms, any Intellectual Property created or owned by Telecom shall remain the property of Telecom and any Intellectual Property created or owned by the Access Seeker shall remain the property of the Access Seeker. Nothing under the UCLL Backhaul Terms:
- 29.1.1 confers any assignment, right, title or licence of one Party's Intellectual Property to the other; or
 - 29.1.2 restricts the rights of Telecom or the Access Seeker to own, use, enjoy, licence, assign or transfer its own Intellectual Property.
- 29.2 All Intellectual Property in any improvements or changes to the UCLL Backhaul Service devised or made by anyone during the time Telecom is supplying the UCLL Backhaul Service to the Access Seeker, belong to Telecom.

30 Software and Telecom Systems

- 30.1 Where Telecom provides the Access Seeker with any software to use or grants the Access Seeker access to a Telecom System:
- 30.1.1 Telecom shall advise the Access Seeker of the purpose of the software or access to the Telecom System;
 - 30.1.2 Telecom remains the owner or licensee of the software or Telecom System and has the right to allow the Access Seeker to use it;
 - 30.1.3 the Access Seeker may use the software or Telecom System only for the purposes for which it is provided;
 - 30.1.4 the Access Seeker's right to use the software or Telecom System is personal to the Access Seeker and may not be transferred to anyone else;
 - 30.1.5 the Access Seeker will not change or interfere with the software or Telecom System in any way;
 - 30.1.6 the Access Seeker must protect and secure its usernames and passwords from unauthorised use;
 - 30.1.7 the Access Seeker will not use the software or Telecom System to recreate any source code;
 - 30.1.8 the Access Seeker will not copy any part of the software or Telecom System except for the purposes of Telecom approved backup or testing procedures; and
 - 30.1.9 the Access Seeker's right to use the software or Telecom System will continue until either:
 - (a) supply of the UCLL Backhaul Service has been terminated; or
 - (b) Telecom reasonably believes that the Access Seeker has breached any obligation under this clause 30.1, in which case Telecom may Suspend or terminate the Access Seeker's right to use the software or Telecom System immediately, with Telecom having no liability to the Access Seeker.
- 30.2 Telecom may at any time provide upgrades or new versions of any software. Provided that an upgrade or new version does not adversely affect supply of the UCLL Backhaul Service, or the Access Seeker's use of the UCLL Backhaul Service, the Access Seeker will install the upgrade or new version at its own cost:
- 30.2.1 as soon as it reasonably can and no later than six months after Telecom provides it; or

- 30.2.2 immediately, if Telecom notifies the Access Seeker that the UCLL Backhaul Service may be adversely affected if the upgrade or new version is not installed immediately.
- 30.3 Telecom indemnifies the Access Seeker against cost, liability, loss, damage or expense (including legal and other professional costs) that the Access Seeker incurs or suffers as a result of any claim or proceeding that is made, threatened or commenced by any third party where that claim or proceeding is a result of the Access Seeker's proper and lawful use of the Telecom Systems or software under the UCLL Backhaul Terms.

INFORMATION

31 Confidential Information

31.1 In this section 31:

31.1.1 **Disclosing Party** means (as the context requires):

- (a) the Access Seeker when disclosing information to Telecom; and
- (b) Telecom when disclosing information to the Access Seeker.

31.1.2 **Receiving Party** means (as the context requires):

- (a) the Access Seeker when receiving information from Telecom; and
- (b) Telecom when receiving information from the Access Seeker.

31.1.3 **Access Seeker** includes any Related Company of the Access Seeker.

31.1.4 **Telecom** includes any Related Company of Telecom.

31.1.5 **Confidential Information** means all information which is confidential or proprietary to the Disclosing Party and is used or disclosed in connection with the UCLL Backhaul Terms, including information which is confidential or proprietary to a third party and is used or disclosed in connection with the UCLL Backhaul Terms by the Disclosing Party under licence from that third party and including information derived from Confidential Information, but excludes:

- (a) information which is independently developed by the Receiving Party outside the scope of the UCLL Backhaul Terms, provided that such development did not rely on any Confidential Information;
- (b) information obtained from a source independent of the Disclosing Party;
- (c) information which was publicly available at the time it was received;
- (d) information which was known to the Receiving Party at the time it was received or becomes publicly available after the time it was received other than by a breach of an obligation of confidence;
- (e) information required to be released under any applicable law or the regulations of a stock exchange on which the Receiving Party's shares are listed;
- (f) information expressly stated under the UCLL Backhaul Terms to be disclosed to the public or telecommunications industry;
- (g) information expressly stated under the UCLL Backhaul Terms not to be Confidential

Information;

- (h) any press release or other public statement that is agreed by the Access Seeker and Telecom.

31.1.6 **Confidential Customer Information** means all information which a Party (**the first Party**) provides to the other Party on a confidential basis, or which the other Party holds or obtains, concerning a particular person who is or intends to become a Customer of the first Party. It includes the fact that the person intends to subscribe for or has subscribed for any of the first Party's services and includes information about that Customer which is generated from usage records made by the Customer or by End Users of any service provided to that Customer that relies (in whole or in part) on the UCLL Backhaul Service but excludes the contents of these UCLL Backhaul Terms and any information (including information which was formerly Confidential Customer Information):

- (a) obtained from the person or from any other source independent of either Party;
- (b) which is publicly available and is obtained from a public source;
- (c) which is both contained in and generated from a Party's own billing records relating to its Customers other than billing records relating to its services to the other Party;
- (d) resulting from the fact that a Customer has commenced receiving a service from the Access Seeker that relies (in whole or in part) on the UCLL Backhaul Service, the identity of that Customer, and all information associated with the commencement of that service; or
- (e) expressly stated in these UCLL Backhaul Terms not to be Confidential Customer Information.

31.2 Subject to the following clauses of this section 31, a Receiving Party shall keep Confidential Information in confidence and will not (and will ensure that its directors, employees, and professional advisors do not) disclose Confidential Information to any third party or use any of the Confidential Information other than as necessary for performance of the UCLL Backhaul Terms.

31.3 A Receiving Party shall exercise the greater of:

- 31.3.1 the degree of care of Confidential Information that a reasonable person with knowledge of the confidential nature of the Confidential Information would apply; and
- 31.3.2 the security or degree of care that it applies to its own Confidential Information of an equivalent nature.

31.4 A Receiving Party shall restrict disclosure of Confidential Information within itself to those persons who have a reasonable need to know.

31.5 A Receiving Party may disclose Confidential Information to a contractor, agent or professional advisor where that person has a need to know, provided that the Receiving Party will be responsible for any disclosure of the Confidential Information by that person where such disclosure would be a breach of this section 31 if made by the Receiving Party.

31.6 A disclosure of Confidential Information will not constitute a breach of this section 31 where it is:

- 31.6.1 authorised in writing by the Disclosing Party to the extent of that authority;
- 31.6.2 to an emergency organisation;
- 31.6.3 properly made pursuant to a relevant statutory or regulatory obligation;

- 31.6.4 disclosed to the Commission;
- 31.6.5 properly and reasonably made to the Court or any person appointed by the Access Seeker and Telecom under section 36 to resolve a Dispute; or
- 31.6.6 to obtain or maintain any listing on any recognised stock exchange,
- subject (in the case of any disclosure specified in clauses 31.6.3 to 31.6.6) to the Receiving Party informing the Disclosing Party as soon as reasonably practicable, after such disclosure.

- 31.7 Each Party must use reasonable care to ensure that it does not use Confidential Customer Information for sales or marketing purposes, which means using the information in a manner designed to prevent or encourage the transfer of a Customer from one Party to the other or the subscription to a service (which relies in whole or in part on the UCLL Backhaul Service) offered by a Party (whether or not that service is offered by the other Party), except that:
- 31.7.1 this clause is not intended to prevent a Party using any information about one of its Customers (who may also be a Customer of the other Party) which is generated solely within the first Party's own Network from its own records relating to its own services provided that any such information a Party generates through transferring one of its Customers to a service provided by the other Party must not be used for sales and marketing purposes before completion of the transfer process. For example, billing information of one Party indicating that a person who is a Customer of that Party is dialling and/or receiving calls from numbers allocated to the other Party is not Confidential Customer Information of the other Party; and
- 31.7.2 each Party acknowledges that the other Party's personnel (or those of the other Party's Related Companies) may engage in multiple roles or functions and a Party does not breach this clause merely because Confidential Customer Information is provided other than for sales and marketing purposes to a person who has multiple roles or functions (one of which is sales or marketing). Each Party agrees that its personnel directly involved in the supply of UCLL Backhaul Service to the other Party may not, at the same time, be involved in marketing or sales to that other Party's Customers. For the avoidance of doubt, nothing in this clause 31.7.2 prevents either Party restructuring the operational aspects of its business.
- 31.8 Each Party acknowledges that damages may not be an adequate remedy in the case of a breach of this section 31 or section 32, and that either Party may seek an injunction or interlocutory relief in these circumstances.

32 Access Seeker Information

- 32.1 Subject to the requirements of confidentiality imposed under section 31, Telecom may collect information about the Access Seeker and Customers and End Users of the Access Seeker where and to the extent that such information is reasonably required for the purpose of providing the UCLL Backhaul Service (**Access Seeker Information**). Access Seeker Information may be obtained from the Access Seeker or generated within Telecom's Network when the Access Seeker or anyone else uses the UCLL Backhaul Service.
- 32.2 For the avoidance of doubt, nothing in this section 32 shall require the Access Seeker, or entitle Telecom, to do anything in breach of any statutory or regulatory obligation or in breach of any confidentiality obligation to a third party.
- 32.3 Telecom may:
- 32.3.1 hold Access Seeker Information and share it with its employees, contractors and other agents who are directly involved in the provision of the UCLL Backhaul Service, but only where and to the extent that this is necessary to enable Telecom to provide the Access Seeker with the UCLL Backhaul Service, send the Access Seeker invoices, check that the Access Seeker's obligations are being met, or otherwise to administer and enforce the UCLL Backhaul Terms;

- 32.3.2 share Access Seeker Information with Other Service Providers, but only where and to the extent that this is necessary to enable the Access Seeker to send or receive messages of any kind through any telecommunications network;
- 32.3.3 disclose Access Seeker Information in accordance with and to the extent required by a reporting obligation under any applicable law;
- 32.3.4 use Access Seeker Information in order to ensure compliance with non-discrimination or similar clauses in contracts between Telecom and Customers of Telecom provided that the Access Seeker and any Customers or End Users of the Access Seeker are not identified; and
- 32.3.5 use Access Seeker Information for statistical purposes in fulfilment of legal or regulatory requirements, provided that the Access Seeker and any Customers or End Users of the Access Seeker are not identified.

DEFAULTS OTHER THAN FOR NON-PAYMENT AND SUSPENSION OF SUPPLY

33 Default Notice

- 33.1 Where on reasonable grounds a Party considers there has been a Default (other than a failure to pay any amount due under the UCLL Backhaul Terms), it may give Notice to the Party in Default setting out details of the Default and giving a reasonable period to remedy the Default, which must be at least 15 Working Days (**Default Notice**).
- 33.2 If a Dispute Notice is given in relation to the same subject matter as a Default Notice before the period to remedy the Default expires, then:
 - 33.2.1 the status quo will prevail until the Dispute is resolved;
 - 33.2.2 if the Default Notice was given by Telecom, it will not give rise to any rights under clauses 34.5, 34.6, 35.5.4, or 35.6 unless and until the Dispute is resolved in Telecom's favour; and
 - 33.2.3 if the Default Notice was given by the Access Seeker, it will not give rise to any rights under clause 35.4 unless and until the Dispute is resolved in the Access Seeker's favour.
- 33.3 If a Dispute Notice is given in relation to the same subject matter as a Default Notice after the period to remedy the Default expires, then:
 - 33.3.1 if the Default Notice was given by Telecom, it will give rise to rights under clauses 34.5, 34.6, 35.5.4, or 35.6 unless and until the Dispute is resolved in the Access Seeker's favour; and
 - 33.3.2 if the Default Notice was given by the Access Seeker, it will give rise to rights under clause 35.4 unless and until the Dispute is resolved in Telecom's favour.

34 Suspension of supply

- 34.1 The Access Seeker remains liable to pay all Charges for the UCLL Backhaul Service (or part of the UCLL Backhaul Service) until the UCLL Backhaul Service is Suspended. The Access Seeker must pay all Charges for any part of the UCLL Backhaul Service the supply of which has not been Suspended, except to the extent that the Access Seeker is unable to use that part of the UCLL Backhaul Service as a result of the Suspension of another part of the UCLL Backhaul Service.
- 34.2 Acceptance of part payment or the continued supply of the UCLL Backhaul Service by Telecom, either before or after its powers to Suspend have become exercisable, does not constitute a waiver of Telecom's

rights under this section 34.

- 34.3 Suspension of the UCLL Backhaul Service under this section 34 as a result of the Access Seeker's Default will cease as soon as it is reasonably practicable for Telecom to complete restoration of the UCLL Backhaul Service after the Default is remedied and in any event must cease no later than four Working Days after the Access Seeker's Default is remedied.

Suspension of supply following consultation and Default Notice

- 34.4 Except in a case of an exceptional event making prior consultation impractical, before Telecom may exercise any right under clause 34.5:
- 34.4.1 Telecom must give a Default Notice to the Access Seeker setting out the specific event giving rise to the Default Notice, any provisions of the Privacy Act 1993 or any relevant telecommunications privacy codes of practice which are relevant and any practicable process or outcome which would remove the necessity for Suspension;
 - 34.4.2 the Access Seeker and Telecom must promptly make themselves available for consultation and must promptly consult with each other with a view to establishing a better understanding of the event and agreeing on a practicable process or outcome which would remove the necessity for Suspension; and
 - 34.4.3 five Working Days must have expired since Telecom made itself available for consultation with the Access Seeker, and the event which gave rise to the Default Notice must have continued throughout this period.
- 34.5 Telecom may Suspend supply of the UCLL Backhaul Service, but only to the minimum extent practicable so as to limit disruption to services the Access Seeker provides to its Customers and End Users, if Telecom reasonably believes:
- 34.5.1 the Access Seeker does not hold a licence, permit or other official authorisation it must hold to provide services lawfully;
 - 34.5.2 the Access Seeker, in providing services that depend on the UCLL Backhaul Service, is breaching the Privacy Act 1993 or any relevant telecommunications privacy codes of practice in force under Part VI of the Privacy Act 1993;
 - 34.5.3 any person to whom the Access Seeker is providing, or from whom the Access Seeker is receiving, a service in connection with the UCLL Backhaul Service is breaching the Privacy Act 1993 or any relevant telecommunications privacy codes of practice in force under the Privacy Act 1993; or
 - 34.5.4 the Privacy Commissioner has performed a statutory function or exercised a statutory power which has or could have the effect of either making the operation of all or any part of the UCLL Backhaul Service impractical or detrimental to Telecom's reputation, or rendering Telecom incapable of performing an obligation relating to supply of the UCLL Backhaul Service.

Suspension or restriction following Default Notice

- 34.6 Where Telecom gives a Default Notice in respect of a material Default by the Access Seeker, Telecom may Suspend supply of the UCLL Backhaul Service or (where the breach affects only a part of the UCLL Backhaul Service) the relevant part of the UCLL Backhaul Service, after the period to remedy the material Default has expired if such Default has not been remedied.

Immediate Suspension or restriction

- 34.7 Telecom may Suspend supply of the UCLL Backhaul Service or (if the relevant event affects only part of the UCLL Backhaul Service) the relevant part of the UCLL Backhaul Service, either immediately or within a reasonable period of time following the date on which Telecom becomes aware of the right to Suspend if:
- 34.7.1 the Access Seeker, in meeting its obligations, exercising its rights or using the UCLL Backhaul

Service, endangers the health or safety of any person;

- 34.7.2 the prerequisites under section 6 have not been, or are no longer, satisfied by the Access Seeker;
- 34.7.3 any condition specified by Telecom under clause 35.7.3 has not been, or is no longer, satisfied by the Access Seeker;
- 34.7.4 any person to whom the Access Seeker is providing a service which relies (in whole or in part) on the UCLL Backhaul Service is, in Telecom's reasonable opinion, using that service fraudulently or in breach of the UCLL Backhaul Terms, provided that Telecom will only Suspend the UCLL Backhaul Service to the minimum extent practicable to protect Telecom from the effects of that fraud or use in breach of the UCLL Backhaul Terms;
- 34.7.5 the Access Seeker's operation or conduct, in Telecom's reasonable opinion interferes with, damages or threatens in any material way the operation of Telecom's Network;
- 34.7.6 the primary, or all, of the business activities of the Access Seeker are Suspended or cease for more than five consecutive Working Days;
- 34.7.7 the Access Seeker is unable to pay its debts as they fall due, or is presumed to be unable to pay its debts as they fall due, in terms of section 287 of the Companies Act 1993 (whether the Access Seeker is incorporated under that Act or not);
- 34.7.8 the Access Seeker goes into receivership or administration or has a receiver, trustee, administrator or statutory manager appointed in respect of all or any of its business or property;
- 34.7.9 the Access Seeker makes an assignment for the benefit of, or enters into or makes any arrangement or composition with, its creditors; or
- 34.7.10 any resolution is passed or any proceeding is commenced for the winding up or liquidation of the Access Seeker (whether on a voluntary or involuntary basis) without Telecom's prior written consent (which is not to be unreasonably withheld or delayed), and providing that if such a proceeding is commenced on an involuntary basis it has remained ongoing for 20 or more Working Days,

and Telecom must give Notice of such Suspension to the Access Seeker as soon as reasonably practicable

Obligation to inform the Commission

- 34.8 If the supply of the UCLL Service is Suspended under this section 34, Telecom must inform the Commission immediately of the suspension and the reason for the suspension.

TERMINATION OF SUPPLY

35 Termination of supply

- 35.1 The Access Seeker remains liable to pay all Charges for the UCLL Backhaul Service (or part of the UCLL Backhaul Service) until termination. The Access Seeker must pay all Charges for any part of the UCLL Backhaul Service the supply of which has not been terminated except to the extent that the Access Seeker is unable to use that part of the UCLL Backhaul Service as a result of the termination of another part of the UCLL Backhaul Service.
- 35.2 Acceptance of part payment or the continued supply of the UCLL Backhaul Service by Telecom, either before or after its powers to terminate have become exercisable, does not constitute a waiver of Telecom's rights under this section 35.

Termination of supply by the Access Seeker

- 35.3 The Access Seeker may terminate the UCLL Backhaul Service (or any part of the UCLL Backhaul Service) after giving Notice to Telecom of two months or more. If the Access Seeker gives any Notice under this clause 35.3, Telecom must terminate supply of the UCLL Backhaul Service in accordance with that Notice upon expiry of the Notice period.
- 35.4 Where the Access Seeker gives a Default Notice to Telecom, the Access Seeker may, after the period to remedy the Default has expired and provided that the Default has not been remedied, terminate supply of the UCLL Backhaul Service (or any part of the UCLL Backhaul Service) either:
- 35.4.1 immediately; or
- 35.4.2 within a reasonable period of time following the date on which the Access Seeker becomes aware of the right to terminate.

Termination of supply by Telecom

- 35.5 Telecom may, on giving Notice to the Access Seeker, terminate supply of the UCLL Backhaul Service either immediately or within a reasonable period of time following the date on which the right to terminate arises if:
- 35.5.1 the Access Seeker goes into receivership or administration or has a receiver, trustee, administrator or statutory manager appointed in respect of all or any of its business or property;
- 35.5.2 the Access Seeker makes an assignment for the benefit of, or enters into or makes any arrangement or composition with, its creditors;
- 35.5.3 any resolution is passed or any proceeding is commenced for the winding up or liquidation of the Access Seeker (whether on a voluntary or involuntary basis) without Telecom's prior written consent (which is not to be unreasonably withheld or delayed), and providing that if such a proceeding is commenced on an involuntary basis it has remained ongoing for 20 or more Working Days;
- 35.5.4 Telecom has given a total of three or more Default Notices and/or Non-Payment Notices in any period of 12 months, provided that each Notice included in the total under this clause:
- (a) may have been in respect of the same or any different Default;
- (b) must not have been subject to a Dispute that was resolved in the Access Seeker's favour; and
- (c) must not have been subject to a determination by the Commission under the Act in the Access Seeker's favour.
- 35.6 Where Telecom gives a Default Notice to the Access Seeker, Telecom may, after the later of:
- 35.6.1 the period to remedy the Default has expired; and
- 35.6.2 three months from the date the Default Notice was given
- terminate supply of the UCLL Backhaul Service (or any part of the UCLL Backhaul Service) either immediately or within a reasonable period of time following the date on which the Access Seeker becomes aware of the right to terminate, provided that:
- 35.6.3 the Default has not been remedied; and
- 35.6.4 the Default is material.
- 35.7 If supply of the UCLL Backhaul Service is terminated under clause 35.5 or 35.6, at its discretion, Telecom may:

- 35.7.1 refuse to recommence supply of the UCLL Backhaul Service to the Access Seeker;
 - 35.7.2 agree to recommence supply of the UCLL Backhaul Service to the Access Seeker; or
 - 35.7.3 agree to recommence supply of the UCLL Backhaul Service to the Access Seeker subject to any conditions, provided those conditions must not be inconsistent with the UCLL Backhaul Terms.
- 35.8 Upon termination of supply of the UCLL Backhaul Service, Telecom shall refund to the Access Seeker a pro rata proportion of all Charges which have been paid in advance by the Access Seeker for the period starting on the date of termination.

Obligation to inform the Commission

- 35.9 If the supply of the UCLL Backhaul Service is terminated under this section, Telecom must inform the Commission immediately of the termination and the reason for the termination.

DISPUTES

36 Dispute resolution

General

- 36.1 Except as expressly provided under the UCLL Backhaul Terms or the Act, any dispute, disagreement, question or difference that arises between the Parties in relation to the UCLL Backhaul Terms (**Dispute**), must be resolved in accordance with this section 36.

Notice of Dispute

- 36.2 If a Dispute arises, either Party may give Notice to the other requiring that the Dispute be resolved in accordance with this section 36 (**Dispute Notice**). A Party's Dispute Notice must specify:
- 36.2.1 the nature of the Dispute;
 - 36.2.2 its representative for negotiations under clause 36.4; and
 - 36.2.3 its suggestion for settling the Dispute.

Response to Dispute Notice

- 36.3 A Party receiving a Dispute Notice must, within five Working Days of receipt, reply to the other Party by Notice in writing specifying:
- 36.3.1 its representative for negotiations under clause 36.4; and
 - 36.3.2 its suggestion for settling the Dispute.

Negotiations

- 36.4 The Parties must enter into negotiations to resolve the Dispute within 10 Working Days of receiving the Dispute Notice. Negotiations must be held between a senior representative of each Party who must have authority to settle the Dispute. The senior representatives must endeavour to resolve the Dispute within 20 Working Days of receiving the Dispute Notice. If the senior representatives are not able to resolve the Dispute within 20 Working Days of receiving the Dispute Notice then the Dispute will be considered to have reached a deadlock (**Deadlock**).

Dispute resolution options where negotiations fail

- 36.5 If the Dispute reaches a Deadlock then:

- 36.5.1 the Parties must advise the Commission of the Dispute and the Deadlock;
- 36.5.2 the Parties may agree in writing to refer the Dispute to mediation in accordance with clause 36.6;
- 36.5.3 the Parties may agree in writing to refer the Dispute to expert determination in accordance with clause 36.7; or
- 36.5.4 either Party may refer the Dispute to arbitration in accordance with clause 36.8 (in the circumstances permitted under clause 36.8),

save that the Parties must refer any Invoice Error or Dispute of a technical, operational or implementation nature to expert decision in accordance with clause 36.7.

Mediation

- 36.6 Where the Parties have agreed in writing to refer a Dispute that has reached a Deadlock to mediation (**Mediation Referral Agreement**), the following provisions will apply:
 - 36.6.1 the mediator will be appointed by agreement between the Parties. However, if the Parties cannot agree on a mediator within five Working Days of the Mediation Referral Agreement, then the mediator will be appointed at the written request of either Party by the president for the time being of LEADR NZ - Leading Edge Alternative Dispute Resolvers, New Zealand (or the president's nominee) or its successor body. The Party making this request must copy the request to the other Party.
 - 36.6.2 unless the Parties agree otherwise in writing, the terms of reference for the mediation will be the model mediation terms suggested by LEADR NZ;
 - 36.6.3 either Party may, by Notice to the other, revoke the Mediation Referral Agreement at any time; and
 - 36.6.4 the Parties must advise the Commission if the mediation has lead to an agreement or if the Parties have ceased mediation without an agreement. If an agreement has been reached Parties must advise the Commission of the terms of the agreement.

Expert Decision

- 36.7 Where the Parties must, or have agreed in writing to, refer a Dispute that has reached a Deadlock to expert decision (**Expert Referral Agreement**), the following provisions will apply:
 - 36.7.1 The expert will be appointed by agreement between the Parties. However, if the Parties cannot agree on the expert within five Working Days of the Expert Referral Agreement, then an appropriately qualified and experienced expert will be appointed at the written request of either Party by the Chair of the Telecommunications Carriers' Forum. The Party making this request will use, and where possible ensure that the Chair of the Telecommunications Carriers' Forum uses, best endeavours to ensure that the appointment of the expert occurs no later than 15 Working Days from the date of the Expert Referral Agreement. The Party making this request must copy the request to the other Party;
 - 36.7.2 to be eligible for appointment, the expert must be independent and impartial, experienced in the relevant area of telecommunications and will preferably be experienced in dispute resolution procedures. Unless the Parties agree otherwise, he or she must not have performed any duties, whether as an employee, consultant or contractor, for any of the Parties or any Related Company during a 12 month period prior to the date the Dispute Notice was given;
 - 36.7.3 the expert may seek independent legal advice regarding the appropriate procedures for resolution of the Dispute;
 - 36.7.4 he expert must adopt a procedure which, in the expert's opinion, is the most simple and expeditious procedure practicable in the circumstances;

- 36.7.5 the Parties will provide the expert with any information that the expert reasonably requires in a timely manner. The expert is entitled to make a determination in the absence of the information requested being provided, but subject to a reasonable time being given to the relevant Party to provide that information;
- 36.7.6 the expert will act as an expert and not as an Arbitrator under the Arbitration Act 1996. The expert will be entitled to rely on the expert's own judgement and opinion;
- 36.7.7 the expert should seek to make decisions that are timely, practical, efficient, and will take into account the Act, in particular the relevant standard access principles under the Act;
- 36.7.8 the expert will provide the Parties with a draft determination for comment prior to finalising it. The expert must provide the Parties with a reasonable period in which to comment on the draft determination and must take any comments received during that period into account in finalising a determination;
- 36.7.9 the expert must provide a final decision (which must include reasons for that decision) to the Parties in writing as soon as reasonably practicable and, in the absence of manifest error or bad faith, that decision will be final and binding upon the Parties. Either Party has 10 Working Days from the date the decision is provided to assert that the expert's decision contains a manifest error or the expert has acted in bad faith;
- 36.7.10 the expert must use all reasonable endeavours to reach a final decision within 40 Working Days after appointment, and the Parties must co-operate reasonably with the expert to achieve that timetable;
- 36.7.11 except as set out in clause 36.7.12, the costs of the expert will be borne equally by the Parties. Each Party will bear its own costs in relation to the expert's decision;
- 36.7.12 where a Party has asserted that the expert's decision contains a manifest error or the expert has acted in bad faith, and such assertion is not upheld in that Party's favour by the relevant Court or authority (including the Commission), then the Party making the assertion will bear the costs (that is, all Court or other authority costs) of both Parties;
- 36.7.13 the Parties must advise the Commission if the expert has made a final decision and if so the terms and reasons for that decision.

Arbitration

36.8 If the Dispute reaches a Deadlock and the Parties:

- 36.8.1 have agreed to refer the Dispute to mediation and have not resolved the Dispute by the earlier of the conclusion of the mediation or the revoking of the Mediation Referral Agreement; or
- 36.8.2 have not agreed to refer the Dispute to mediation or expert decision,

then either Party may refer the Dispute to arbitration by a sole arbitrator (being a New Zealand resident) under the Arbitration Act 1996, by giving Notice to the other Party (**Arbitration Referral Notice**) and the following provisions will apply:

- 36.8.3 The arbitrator will be appointed by agreement between the Parties. However, if the Parties can not agree on an arbitrator within five Working Days of receipt of the Arbitration Referral Notice, the arbitrator will be appointed at the written request of either Party by the president for the time being of the New Zealand Law Society (or the president's nominee) or its successor body. The Party making this request must copy the request to the other Party.
- 36.8.4 The arbitration will take place in Auckland or Wellington (at the arbitrator's discretion).
- 36.8.5 The arbitrator must adopt a procedure which, in the arbitrator's opinion, is the most simple and

expeditious procedure practicable in the circumstances.

- 36.8.6 The arbitrator may determine the Dispute without a hearing unless either Party gives Notice requiring one, in which case the arbitrator must treat that as a material consideration in assessing costs.
- 36.8.7 The Second Schedule of the Arbitration Act 1996 will apply.
- 36.8.8 The costs of the arbitrator will be borne equally by the Parties unless the arbitrator determines otherwise.
- 36.8.9 The Parties will co-operate to ensure the expeditious conduct of the arbitration. In particular, each Party will comply with any reasonable time limits sought by the other for settling the terms of reference, interlocutory matters and all other steps preliminary and incidental to the hearing and decision of the Dispute.
- 36.8.10 The arbitrator must use all reasonable endeavours to reach a decision within 40 Working Days after appointment, and the Parties must co-operate reasonably with the arbitrator to achieve that timetable. In any event, the Dispute must be finally settled by the arbitrator within 60 Working Days after appointment, unless the Parties agree in writing to extend this period.
- 36.8.11 The Parties must advise the Commission if the arbitrator has made a decision and if so the terms and reasons for that decision.

Interlocutory or injunctive relief

- 36.9 Nothing in this section 36 will prevent either Party from seeking urgent interlocutory or injunctive relief from the Court.

Good faith and continuity

- 36.10 Pending resolution of any Dispute, the Access Seeker and Telecom will each:
- 36.10.1 make all reasonable efforts in good faith to resolve the Dispute promptly and in a manner which minimises any impact on the performance of the UCLL Backhaul Terms; and
- 36.10.2 continue to perform its other obligations under the UCLL Backhaul Terms.

Remedies under the Act

- 36.11 A copy of any decision arising from a Dispute must be provided by the Parties to the Commission immediately following that decision. The Parties must indicate if any part of the decision is confidential. A copy of the decision will be published on the Commission's website as soon as practicable, subject to any restriction made by the Commission.
- 36.12 No Disputes as to the Charges listed in the UCLL Backhaul Price List may be resolved by the Disputes Resolution procedures in this section 36. The Access Seekers or Telecom (as the case may be) must apply to the Commission under the Act.
- 36.13 For the avoidance of doubt nothing in this section 36 prevents the Access Seeker or Telecom from seeking any remedies available to it under the Act.

GENERAL

37 Health and safety

- 37.1 The Access Seeker and Telecom will comply with each other's reasonable requirements for security, health and safety when working at each other's premises. Telecom will also comply with any reasonable

requirements for security, health and safety when working at the premises of a Customer or End User of the Access Seeker. Where practicable, these requirements will be communicated to each other in writing.

38 Consumer Guarantees Act 1993

38.1 The UCLL Backhaul Service is supplied to the Access Seeker for the purposes of a business as defined in the Consumer Guarantees Act 1993. The provisions of that Act do not apply to the UCLL Backhaul Service supplied to the Access Seeker under the UCLL Backhaul Terms.

39 Assignment

39.1 The Access Seeker may transfer all of its rights or obligations (but not less than all) under the UCLL Backhaul Terms, provided that the assignee has satisfied the prerequisites set out in section 6.

39.2 Where the Access Seeker transfers its rights or obligations under the UCLL Backhaul Terms in accordance with clause 39.1, it must give prior Notice to Telecom of when that assignment will take effect.

40 Representations

40.1 The Access Seeker may not represent, and will use all reasonable endeavours to ensure that its employees, contractors or agents do not represent, that there will be a continuing relationship between Telecom and any Customer or End User of the Access Seeker.

41 Subcontracting

41.1 A Party may have subcontractors or other agents meet any of its obligations under the UCLL Backhaul Terms, but it will remain liable to the other Party for meeting all those obligations.

42 No waiver

42.1 A waiver of any right, power or remedy under the UCLL Backhaul Terms must be in writing signed by the Party granting it. A waiver is only effective in relation to the particular obligation or Default in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or Default or as an implied waiver of that obligation or Default in relation to any other occasion.

42.2 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under the UCLL Backhaul Terms does not amount to a waiver.

43 Notices

43.1 Notices to Telecom or the Access Seeker must be in writing and must be sent to the relevant contact details advised in accordance with the UCLL Backhaul Operations Manual.

43.2 Any Notice given by:

43.2.1 post to a contact address will be assumed to have been delivered three days after it is posted;

43.2.2 fax to a contact fax number will be assumed to have been delivered once a correct transmission confirmation slip is received, but any fax sent after 5.00 pm on a Working Day will be deemed to have been delivered at 9.00 am on the next Working Day;

43.2.3 email to an email address will be assumed to have been delivered on the earlier of:

- (a) the sender's receipt of confirmation of successful delivery; or
- (b) one Working Day after dispatch, provided the sender does not receive any indication of the failure of, or delay in, delivery within one Working Day after dispatch. For the purpose of this clause 43.2.3, 'dispatch' occurs when the relevant email first leaves the sender's network for delivery to the recipient's address.