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COMMERCE COMMISSION

**STANDARD TERMS DETERMINATION FOR
TELECOM'S SUB-LOOP UNBUNDLED
COPPER LOCAL LOOP SERVICES**

**SUB-LOOP SERVICES GENERAL TERMS
PUBLIC VERSION**

18 June 2009

Updated to incorporate Commerce Commission clarifications up to 23 December 2009

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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 sub-loop unbundled copper local loop network service, Telecom's sub-loop unbundled copper local loop network co-location service and Telecom's sub-loop unbundled copper local loop network backhaul (distribution cabinet to telephone exchange) service (together the **Sub-loop Services**); and
- sets out the terms on which Telecom must make its Sub-loop Services available to Access Seekers.

Structure of the Sub-loop Services Terms

The Sub-loop Services Terms are made up of:

- **Sub-loop Services General Terms**

Sets out the general rights and obligations of Telecom and Access Seekers in relation to Telecom's sub-loop unbundled copper local loop network service, Telecom's sub-loop unbundled copper local loop network co-location service and Telecom's sub-loop unbundled copper local loop network backhaul (distribution cabinet to telephone exchange) service.

The Sub-loop Services Terms contain a number of Service Appendices which operate as part of the Sub-loop Services Terms and set out the terms and conditions specific to Telecom's sub-loop unbundled copper local loop network service, Telecom's sub-loop unbundled copper local loop network co-location service or Telecom's sub-loop unbundled copper local loop network backhaul (distribution cabinet to telephone exchange) service (as the case may be). The Service Appendices contained in the Sub-loop Services Terms comprise the following:

- **Service Appendix 1 – Sub-loop UCLL Service**

Sets out the terms and conditions specific to the Telecom's sub-loop unbundled copper local loop network service, and is made up of the following schedules:

Schedule 1 **Sub-loop UCLL Service Description**

Describes the sub-loop unbundled copper local loop network service that Telecom must make available to Access Seekers under the Sub-loop Services Standard Terms Determination.

Schedule 2 **Sub-loop UCLL Price List**

Lists the charges for all of the services that Telecom will make available to Access Seekers as part of the sub-loop unbundled copper local loop network service under the Sub-loop Services Standard Terms Determination.

Schedule 3 **Sub-loop UCLL Service Level Terms**

Specifies performance levels regarding some of the services that Telecom will make available to Access Seekers as part of the sub-loop unbundled copper local loop network service under the Sub-loop Services Standard Terms Determination.

Schedule 4 **Sub-loop UCLL Operations Manual**

Sets out in detail the operational procedures for supplying all of the services that Telecom will make available to Access Seekers as part of the sub-loop unbundled copper local loop network service under the Sub-loop Services Standard Terms Determination.

- **Service Appendix 2 – Sub-loop Co-location Service**

Sets out the terms and conditions specific to the Telecom's sub-loop unbundled copper local loop network co-location service, and is made up of the following schedules:

Schedule 1 **Sub-loop Co-location Service Description**

Describes the sub-loop unbundled copper local loop network co-location service that Telecom must make available to Access Seekers under the Sub-loop Services Standard Terms Determination.

Schedule 2 **Sub-loop Co-location Price List**

Lists the charges for all of the services that Telecom will make available to Access Seekers as part of the sub-loop unbundled copper local loop network co-location service under the Sub-loop Services Standard Terms Determination.

Schedule 3 **Sub-loop Co-location Service Level Terms**

Specifies performance levels regarding some of the services that Telecom will make available to Access Seekers as part of the sub-loop unbundled copper local loop network co-location service under the Sub-loop Services Standard Terms Determination.

Schedule 4 **Sub-loop Co-location Operations Manual**

Sets out in detail the operational procedures for supplying all of the services that Telecom will make available to Access Seekers as part of the sub-loop unbundled copper local loop network co-location service under the Sub-loop Services Standard Terms Determination.

Schedule 5 **Sub-loop Co-location Access Terms**

Sets out the specific rights and obligations of Telecom and Access Seekers for access to, and co-location in, Distribution Cabinets as part of the sub-loop unbundled copper local loop network co-location service under the Sub-loop Services Standard Terms Determination.

- **Service Appendix 3 – Sub-loop Backhaul Service**

Sets out the terms and conditions specific to the Telecom's sub-loop unbundled copper local loop network backhaul service, and is made up of the following schedules:

Schedule 1 **Sub-loop Backhaul Service Description**

Describes the sub-loop unbundled copper local loop network backhaul service that Telecom must make available to Access Seekers under the Sub-loop Services Standard Terms Determination.

Schedule 2 **Sub-loop Backhaul Price List**

Lists the charges for all of the services that Telecom will make available to Access Seekers as part of the sub-loop unbundled copper local loop network backhaul service under the Sub-loop Services Standard Terms Determination.

Schedule 3 **Sub-loop Backhaul Service Level Terms**

Specifies performance levels regarding some of the services that Telecom will make available to Access Seekers as part of the sub-loop unbundled copper local loop network backhaul service under the Sub-loop Services Standard Terms Determination.

Schedule 4 **Sub-loop Backhaul Operations Manual**

Sets out in detail the operational procedures for supplying all of the services that Telecom will make available to Access Seekers as part of the sub-loop unbundled copper local loop network backhaul service under the Sub-loop Services Standard Terms Determination.

These Sub-loop Services 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 a publicly available Telecom website.

SUB-LOOP SERVICES GENERAL TERMS

1 DEFINITIONS

1.1 Except where expressly provided otherwise, in the Sub-loop Services 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 an Access Seeker on a Telecom Site pursuant to the Sub-loop Services Terms (where Telecom Site means a Distribution Cabinet, Exchange or other part of Telecom's Network, as the context requires).
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 Demarcation 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.
Authority	includes a government, statutory or regulatory authority.
B2B	means a business to business interface that allows Access Seekers to integrate their front end systems with Telecom's ordering and service management systems.

Bank	means any body registered as a registered bank under section 69 of the Reserve Bank of New Zealand Act 1989.
BAU	means business as usual - the ongoing, every day operation of business, processes and systems.
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.
Business Hours	means 8.00 am to 5.00 pm on any Working Day (where the first Business Hour in a Working Day is consecutive to the last Business Hour in the preceding Working Day).
Cabinet	means a Telecom owned, leased or licensed structure that is not an Exchange and at which Telecom copper local loops connect to a distribution frame.
Cabinetisation Notice	means the Notice required under section 38 of the UCLL General Terms and section 38 of the UCLL Co-location General Terms.
Capacity	means, as the context requires: <ul style="list-style-type: none">(a) available MPFs in the Sub-loop Network from the End User to the Distribution Cabinet;(b) the space required for installation of HDP block(s) and connection of cables on the Distribution Cabinet DF;(c) the space required for installation of relevant equipment in the Sub-loop Co-location Service Area;(d) the available wattage in the DC power system and the heat management system;

and/or

- (e) the available fibres in the cable feeding the Distribution Cabinet.

Charge or Charges	means all or (as the context requires) any amounts payable by the Access Seeker under the Sub-loop Services Terms.
Commission	means the Commerce Commission in the course of performing its functions under the Act.
Commissioned	means the commencement of offering of DSL services from a Cabinet.
Core Network	means equipment used to provide a centralised service capability to multiple Customers of Telecom where no physical part of the equipment is dedicated to a single specific Customer.
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 a Sub-loop 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.
Deadlock	has the meaning given in clause 36.5.
Default	means any failure or refusal or inability by either the Access Seeker or Telecom to meet any of its obligations under the Sub-loop Services Terms.
Default Notice	has the meaning given in clause 33.1.
Demarcation Point	means the handover points described in section 4 of the Sub-loop UCLL Service Description and

	section 2 of the Sub-loop Backhaul Service Description.
Determination Date	means the date of this Sub-loop Services Standard Terms Determination.
DF	means a distribution frame, being the place where copper lines from the End Users are laid out in an array to enable connection.
Dispute	has the meaning given in clause 36.1.
Dispute Notice	has the meaning given in clause 36.3.
Distribution Cabinet	means a Cabinet that is equipped with power and other support services, in respect of which, when equipment is installed in the cabinet and/or associated pedestal, DSL services are able to be provided to one or more End Users.
Distribution Cabinet Manhole	means the congregation point for all ducts and cables that enter the Distribution Cabinet.
Distribution Cabinet Services	means all of the ancillary services supplied by Telecom to the Access Seeker in a Distribution Cabinet in accordance with the Sub-loop Services Terms (including heat management, noise management, power, security, seismic bracing, earthing, cable trays and lighting).
DSL	means digital subscriber line.
eBill	means invoices provided in an electronic format.
End User	means a person who is the ultimate recipient of the Sub-loop UCLL Service (or of another service the provision of which relies in whole or in part on the Sub-loop UCLL Service).
ETP	means the external termination point for telecommunications services at an End User's premises or, where there is no termination point external to the premises, either the first jack on the premises wiring or, alternatively, the building distribution frame.
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 telecommunications services, and includes all of the Telecom owned, leased or licensed property on which the building is situated.

Fault Restoration Hours

means 7:00am to 7:00pm, seven days a week and Fault Restoration Hour means one hour within this period.

Grooming

means, in relation to clause 9.13 of the Sub-loop UCLL Operations Manual and section 16 of the Sub-loop Co-location Operations Manual :

- (a) in relation to HDP block(s), the rearrangement of Access Seeker Equipment, Telecom equipment or Other Service Provider equipment or tie cables (including, if necessary, the removal of unused tie cables and associated HDP block(s)) to realise unused capacity on the Distribution Cabinet DF; or
- (b) in relation to block(s) terminating the Sub-loop Network, the rearrangement of Access Seeker Equipment, Telecom equipment or Other Service Provider equipment or tie cables (including, if necessary, the removal of unused tie cables and associated HDP block(s)) to realise unused capacity on the Distribution Cabinet DF.

HDP

means the handover distribution point on the Distribution Cabinet DF.

Half Contract Year

means a six month period ending on either 31 March or 30 September.

Implementation Plan

means the implementation plan that forms part of the Sub-loop Services Standard Terms Determination.

Indirect Damages

means any liability resulting from or arising under or in connection with the Sub-loop Services Terms (whether based in contract, tort,

statute or otherwise) for:

- (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.

Interference Management Plan means the New Zealand Copper Local Loop Interference Management Plan (as amended from time to time).

Land Occupation Arrangement means, in relation to any land on which a Distribution Cabinet is located, a lease, sub-lease, licence, sub-licence, easement or other right to occupy by Telecom.

Landlord means, in relation to any Land Occupation Arrangement, the relevant lessor, licensor, grantor or other provider of the right to occupy.

Local Exchange means, in respect of any Distribution Cabinet, the Exchange where the feeder to the Distribution Cabinet is terminated for the purposes of the Sub-loop Backhaul Service.

MPF means Metallic Path Facility.

Network means, as the context requires, Telecom's Network or Access Seeker's Network.

Network Operator has the meaning given to it in section 5(1) of the Act.

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 faults management system and includes any replacement for that system from time to time.
OO&T	means Telecom's online ordering and tracking system and includes any replacement for that system from time to time.
OSS	means Telecom's operational support systems, and are the software applications needed to enable the Access Seeker to interact with Telecom's Network, and to enquire about, order, repair and be billed for the Sub-loop Services.
Other Service Provider	means a provider of telecommunications services other than the Access Seeker or Telecom, which for the avoidance of doubt, includes any other access seekers that independently access the Sub-loop Co-location Service.
Party	means (as the context requires) Telecom or the Access Seeker and Parties means both Telecom and the Access Seeker.
Passive Cabinet	means any Cabinet that is not a Distribution Cabinet.
Pedestal	means any Telecom owned, leased or licensed structure associated with, or structural extension of a Distribution Cabinet for the purpose of housing equipment (including any necessary supporting equipment) used to provide services over the copper loops connected to that Distribution Cabinet.
Performance Penalty	means a penalty as set out in: (a) Appendix 3 to the Sub-loop UCLL Service Level Terms;

(b) Appendix 3 to the Sub-loop Co-location Service Level Terms; and

(c) Appendix 3 to the Sub-loop Backhaul Service Level Terms.

Planned Outage	has the meaning given in clause 20.2.
Pre-1988 Cabinet	means any Distribution Cabinet which is "existing works" within the meaning of section 5(1) of the Act.
Rackprint	means a space of so many Rack Units at any Distribution Cabinet that is available or used for locating equipment but excludes any space occupied by tie cables.
Rack Unit	means a unit of space that is 44.45mm in height within the Sub-loop Co-location Service Area of a Distribution Cabinet (including any associated Pedestal).
Rearrangement	means the rearrangement of Access Seeker Equipment within the Sub-loop Co-location Service Area to realise Capacity in the Distribution Cabinet as set out in section 15 of the Co-location Operations Manual.
Related Company	has the meaning set out in section 2(3) of the Companies Act 1993.
Request	means a request in writing pursuant to section 30S(1) of the Act which Telecom receives from an Access Seeker to make a Sub-loop Service available on the Sub-loop Services Terms.
RFS	means ready for service.
Road	has the meaning set out in section 5 of the Act.
Service Appendix	means all or (as the context requires) any of the appendices to the Sub-loop Services General Terms for the Sub-loop Services being made available by Telecom to Access Seekers under the Sub-loop Services Standard Terms Determination, including the schedules to such appendices.

Service Identifier	means a unique alphanumeric identifier assigned by Telecom to a service.
Splitter	means a device which permits the provision over a single Sub-loop MPF of separate high and low frequency paths in order to prevent interference between analogue devices (such as telephones and analogue modems) and a DSL service operating on the same Sub-loop MPF.
Sub-loop Backhaul Operations Manual	means the manual set out in schedule 4 to Service Appendix 3.
Sub-loop Backhaul Price List	means the list set out in schedule 2 to Service Appendix 3.
Sub-loop Backhaul Service	means Telecom's sub-loop unbundled copper local loop network backhaul service as described in the Sub-loop Backhaul Service Description or (as the context requires) any part of that service.
Sub-loop Backhaul Service Description	means the description set out in schedule 1 to Service Appendix 3.
Sub-loop Backhaul Service Level Terms	means the terms set out in schedule 3 to Service Appendix 3.
Sub-loop Co-location Access Terms	means the terms set out in schedule 5 to Service Appendix 2.
Sub-loop Co-location Operations Manual	means the manual set out in schedule 4 to Service Appendix 2.
Sub-loop Co-location Price List	means the list set out in schedule 2 to Service Appendix 2.
Sub-loop Co-location Service	means Telecom's sub-loop unbundled copper local loop network co-location service as described in the Sub-loop Co-location Service Description or (as the context requires) any part of that service.
Sub-loop Co-location Service Area	means the space in a Distribution Cabinet within which Rackprints for Access Seeker Equipment are supplied.
Sub-loop Co-location	means the description set out in schedule 1 to

Service Description	Service Appendix 2.
Sub-loop Co-location Service Level Terms	means the terms set out in schedule 3 to Service Appendix 2.
Sub-loop MPF	means a circuit comprising a pair of twisted copper conductors between the ETP and the Distribution Cabinet.
Sub-loop Network	means Telecom's copper network as it relates to the connection of local loops between the ETP and the handover point on the DF in a Distribution Cabinet (including any relevant line in the Distribution Cabinet).
Sub-loop Services or Sub-loop Service	means all or (as the context may require) any of: <ul style="list-style-type: none">(a) the Sub-loop UCLL Service;(b) the Sub-loop Co-location Service; and(c) the Sub-loop Backhaul Service.
Sub-loop Services General Terms	means the terms set out in this document excluding its appendices and their schedules.
Sub-loop Services Operations Manuals or Sub-loop Services Operations Manual	means all or (as the context may require) any of: <ul style="list-style-type: none">(a) the Sub-loop UCLL Operations Manual;(b) the Sub-loop Co-location Operations Manual; and(c) the Sub-loop Backhaul Operations Manual.
Sub-loop Services Price Lists or Sub-loop Services Price List	means all or (as the context may require) any of: <ul style="list-style-type: none">(a) the Sub-loop UCLL Price List;(b) the Sub-loop Co-location Price List; and(c) the Sub-loop Backhaul Price List.
Sub-loop Services Service Descriptions	means all or (as the context may require) any

or Sub-loop Services Service Description	of: <ul style="list-style-type: none">(a) the Sub-loop UCLL Service Description;(b) the Sub-loop Co-location Service Description; and(c) the Sub-loop Backhaul Service Description.
Sub-loop Services Service Level Terms	means all or (as the context may require) any of: <ul style="list-style-type: none">(a) the Sub-loop UCLL Service Level Terms;(b) the Sub-loop Co-location Service Level Terms; and(c) the Sub-loop Backhaul Service Level Terms.
Sub-loop Services Standard Terms Determination	means the standard terms determination made by the Commission under section 30M of the Act in relation to Telecom's sub-loop unbundled copper local loop network services, including the Commission's decision report, the Implementation Plan and the Sub-loop Services Terms.
Sub-loop Services Terms	means, together, the Sub-loop Services General Terms and all the Services Appendices to the Sub-loop Services General Terms (including the schedules thereto) as described in the first page of these Sub-loop Services General Terms.
Sub-loop UCLL Operations Manual	means the manual set out in schedule 4 to Service Appendix 1.
Sub-loop UCLL Price List	means the list set out in schedule 2 to Service Appendix 1.
Sub-loop UCLL Service	means Telecom's sub-loop unbundled copper local loop network service as described in the Sub-loop UCLL Service Description or (as the context requires) any part of that service.
Sub-loop UCLL Service Description	means the description set out in schedule 1 to Service Appendix 1.

Sub-loop UCLL Service Level Terms	means the terms set out in schedule 3 to Service Appendix 1.
Suspend, Suspension and Suspended	includes: <ul style="list-style-type: none">(a) to restrict or otherwise withdraw the right to use any of the Sub-loop Services or any part of the Sub-loop Services; and(b) to refuse any order for any of Sub-loop Services.
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 any Sub-loop 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 Demarcation 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 Systems	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 Sub-loop Services Terms; and(b) OO&T and OFM.
UCLL Co-location 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 co-location service.

UCLL General Terms	means the general terms forming part of the UCLL Terms.
UCLL Service	means the UCLL service as described in the Commission's UCLL Standard Terms Determination.
UCLL 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 service.
UCLL Terms	means the UCLL General Terms and all schedules thereto forming 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 network service.
Unplanned Outage	has the meaning given in clause 20.4.
Working Day	has the meaning as given to that expression in the Act.

2 GUIDING PRINCIPLES

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

3 **INTERPRETATION**

3.1 In interpreting the Sub-loop Services Terms:

- (a) clause and section headings are for convenience only and do not affect the interpretation;
- (b) a word which denotes the singular also denotes the plural and vice versa;
- (c) words denoting natural persons include any legal entity or association of entities and vice versa;
- (d) all currency references are to New Zealand dollars and all amounts payable are payable in New Zealand dollars;
- (e) the words 'include' and 'including' are to be construed without limitation;
- (f) except where the Sub-loop Services 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;
- (g) except where the Sub-loop Services Terms expressly provide otherwise, references to months are to calendar months; and
- (h) except where the Sub-loop Services 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 Sub-loop Services General Terms references to clauses or sections are references to clauses or sections in the applicable Sub-loop Services General 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 SUB-LOOP SERVICES**

4.1 Telecom must, unless section 30S(2) of the Act applies:

- (a) comply with a Request to make the Sub-loop UCLL Service available to an Access Seeker by making the Sub-loop UCLL Service available to that Access Seeker in accordance with the Sub-loop Services Terms;
- (b) if an Access Seeker has made a Request for Telecom to make the Sub-loop UCLL Service available to that Access Seeker:

- (i) comply with a Request to make the Sub-loop Co-location Service available to an Access Seeker by making the Sub-loop Co-location Service available to that Access Seeker in accordance with the Sub-loop Services Terms; and
- (ii) comply with a Request to make the Sub-loop Backhaul Service available to an Access Seeker by making the Sub-loop Backhaul Service available to that Access Seeker in accordance with the Sub-loop Services Terms.

4.2 From the date Telecom receives the Access Seeker's Request for one or more of the Sub-loop Services (*Access Date*), the Access Seeker and Telecom must comply with the Sub-loop Services Terms in respect of that Sub-loop Service (or those Sub-loop Services, as the case may be).

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 SUB-LOOP SERVICES TERMS**

5.1 The Sub-loop Services Terms are all of the terms on which Telecom will make the Sub-loop Services available to the Access Seeker.

5.2 The Access Seeker's rights under the Sub-loop Services Terms cannot be duplicated by making a subsequent Request. If Telecom becomes entitled to Suspend or terminate supply of any Sub-loop Service to the Access Seeker, any further supply of that suspended or terminated Sub-loop Service under the Sub-loop Services Terms is limited to the existing rights and obligations of the Access Seeker and Telecom under the Sub-loop Services Terms at that time.

5.3 Termination of supply of any Sub-loop Service or the Sub-loop Services Terms coming to an end does not relieve the Access Seeker or Telecom of any rights or obligations under the Sub-loop Services Terms which have accrued beforehand.

6 **PREREQUISITES TO THE SUB-LOOP SERVICES BEING MADE AVAILABLE**

6.1 Despite section 4, Telecom has no obligation to make any Sub-loop 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 any Sub-loop 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(b).

Security requirements

6.2 The Access Seeker must provide to Telecom:

SUB-LOOP SERVICES - GENERAL TERMS

- (a) 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
 - (b) if such evidence cannot be provided, the Access Seeker must provide to Telecom the Access Seeker's choice of an unconditional:
 - (i) Bank guarantee;
 - (ii) letter of credit;
 - (iii) cash prepayment;
 - (iv) guarantee from the parent company of the Access Seeker if:
 - ◆ that parent company has a credit rating which is in accordance with clause 6.2(a); and
 - ◆ 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
 - (v) 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, acting reasonably. The Security must be for:

- (a) \$100,000; or
- (b) an amount equal to Telecom's reasonable estimate of the total value of Charges for the Sub-loop Services Telecom is likely to supply to the Access Seeker under the Sub-loop Services 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:

- (a) \$100,000; or

- (b) an amount equal to the total value of Charges under the Sub-loop Services Terms over the two month period immediately preceding the date any request under this 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.

Insurance requirements

- 6.6 In order to receive the Sub-loop Co-location Service the Access Seeker must maintain a policy or policies of insurance. Such insurance must:
- (a) cover the Access Seeker in respect of any liability arising out of or in connection with the performance of the Access Seeker's obligations under the Sub-loop Services Co-location Terms;
 - (b) be for a sum insured of not less than \$5,000,000 for any one claim;
 - (c) have a deductible payable by the Access Seeker of no more than \$1,000,000;
 - (d) be provided by an insurer or insurers reasonably acceptable to Telecom; and
 - (e) be governed by New Zealand law and subject to New Zealand jurisdiction.

Operational requirements

- 6.7 The Access Seeker must comply with every applicable prerequisite under each Sub-loop Services Operations Manual for each Sub-loop Service for which the Access Seeker has made a Request and, in relation to the Sub-loop Co-location Service, every applicable prerequisite in the Sub-loop Co-location Access Terms.

Additional requirements relating to land

- 6.8 If:
- (a) the Access Seeker has made a Request to make the Sub-loop UCLL Service available; and
 - (b) the relevant Distribution Cabinet to which the Access Seeker is seeking access is located on land which is subject to a Land Occupation Arrangement,

then Telecom has no obligations to make the Sub-loop Tie Cable Service available to the Access Seeker in any such Distribution Cabinet unless the Access Seeker has provided to Telecom the evidence required under clause 9.14 of the Sub-loop UCLL Operations Manual that the Access Seeker has obtained the relevant consent or given the appropriate notification.

- 6.9 If the Access Seeker has made a Request for the Sub-loop Co-location Service, Telecom has no obligation to make the Sub-loop Co-location Service available to the Access Seeker in a Distribution Cabinet, unless:
- (a) the Access Seeker has provided to Telecom evidence reasonably satisfactory to Telecom that the Access Seeker is a Network Operator; and
 - (i) if the Distribution Cabinet to which the Access Seeker is seeking access is located on land which is subject to a Land Occupation Arrangement, then the Access Seeker has provided to Telecom the evidence required under section 14 of the Sub-loop Co-location Operations Manual that the Access Seeker has obtained the relevant consent or given the appropriate notification; or
 - (ii) if the Distribution Cabinet to which the Access Seeker is seeking access is located on a Road, the Access Seeker has complied with, and continues to comply with, any conditions required of, or imposed on, the Access Seeker by any Authority pursuant to section 135 or 142 of the Act; and
 - (b) the Distribution Cabinet to which the Access Seeker is seeking access is not a pre-1988 Cabinet.

GENERAL RIGHTS AND OBLIGATIONS

7 GENERAL

Supply of the Sub-loop Services

- 7.1 Upon any Sub-loop Service being made available under section 4, Telecom will, subject to the Sub-loop Services Terms, supply that Sub-loop Service to the Access Seeker and the Access Seeker may order that Sub-loop Service in accordance with the process and procedures under the Sub-loop Services 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 Sub-loop Services Terms. The Sub-loop Services 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 Sub-loop Services Terms excludes or limits the Commission's, the Access Seeker's or Telecom's right to enforce the Sub-loop Services Terms or exercise any other rights under the Act.

Amendment

- 7.4 The Sub-loop Services Terms may be amended by the Commission under the Act, including by:
- (a) a review under section 30R;
 - (b) a residual terms determination under section 30ZB;
 - (c) a pricing review determination under section 51;
 - (d) a clarification under section 58; or
 - (e) a reconsideration under section 59.

8 THE SCHEDULES TO THE SUB-LOOP SERVICES GENERAL TERMS

Compliance

- 8.1 The Access Seeker and Telecom must comply with each of the Service Appendices to the Sub-loop Services General Terms applicable to each Sub-loop Service supplied to that Access Seeker (and with each schedule to each such Service Appendix).
- 8.2 If there is a conflict between the Sub-loop Services General Terms and any Service Appendix to the Sub-loop Services General Terms (or any schedule to any such Service Appendix), the Sub-loop Services General Terms will prevail except where expressly provided otherwise.

Technical manuals and user guides

- 8.3 The Sub-loop Services Operations Manuals and the Interference Management Plan refer to various technical manuals, published international standards and user guides which are listed in Appendix E of the Sub-loop UCLL Operations Manual, Appendix F of the Sub-loop Backhaul Operations Manual, Appendix C of the Sub-loop Co-location Operations Manual and Appendix B of the Interference Management Plan. They contain technical and procedural detail. Where changes are made to the technical manuals, international standards and user guides that consequently alter the Sub-loop Services Terms, these changes will be made under the change mechanisms set out in section 9 or section 44 as applicable. Such reference to the technical manuals, international standards and user guides is necessary for both the Access Seeker and Telecom so that:
- (a) uniform standards of best practice are set;

- (b) the performance of the Sub-loop Network can be maintained;
 - (c) the health and safety of the Access Seeker's and Telecom's employees, contractors and other agents can be protected;
 - (d) systems are in place for the management of outages, faults and any work the Access Seeker or Telecom needs to undertake on or around the Sub-loop Network or any Distribution Cabinet; and
 - (e) 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 Sub-loop Services 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 Sub-loop Services Operations Manuals or the Interference Management Plan may have other unrelated uses and contain terms irrelevant to the Sub-loop Services Terms.
- 8.6 To the extent that any Sub-loop Services Operations Manual or the Interference Management Plan creates any obligation to comply with a technical manual, international standard or user guide, the Access Seeker and Telecom must:
- (a) apply the technical manual, international standard or user guide under the Sub-loop Services Terms in good faith;
 - (b) interpret the technical manual, international standard or user guide consistently with the Sub-loop Services Terms; and
 - (c) comply with the technical and/or procedural detail the technical manual, international standard or user guide contains.

9 CHANGE MECHANISM FOR ANY SUB-LOOP SERVICES OPERATIONS MANUAL AND ANY SUB-LOOP SERVICES SERVICE LEVEL TERMS

- 9.1 Any proposed change to any Sub-loop Services Operations Manual or any Sub-loop Services 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 any Sub-loop Services Operations Manual or any Sub-loop Services 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 earliest), 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 any Sub-loop Services Operations Manual or any Sub-loop Services Service Level Terms, Telecom must notify the Commission and all Access Seekers by email and by publishing the proposed change on a Telecom website accessible by the Commission and 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:

- (a) no written objection is received by Telecom within the 10 Working Days; and
- (b) 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 all 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 Carriers' 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 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 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:
- (a) Telecom must review the Sub-loop Services Operations Manuals every 24 months (with the first review commencing on the second anniversary of the Sub-loop Services Standard Terms Determination being made); and
 - (b) Telecom may review any Sub-loop Services 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 must be proposed using the change process under this section 9.

9.14 Telecom must submit any proposed change to the Commission with:

- (a) an updated version of the of each relevant Sub-loop Services Operations Manual or Sub-loop Services Service Level Terms (as the case may be) containing the proposed change;
- (b) the reasons for the proposed change; and
- (c) 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 each relevant Sub-loop Services Operations Manual or Sub-loop Services Service Level Terms (as the case may be) containing the change.

9.16 For the avoidance of doubt, nothing in this section 9 prevents the 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 any Sub-loop Service to the Access Seeker, the Access Seeker will:

- (a) follow Telecom's reasonable directions about the use of the Sub-loop Services which Telecom reasonably believes are:
 - (i) in the interests of health and safety;
 - (ii) in the interests of the quality of service to Telecom's Customers, the Access Seeker's Customers or any Other Service Provider's customers; or

- (iii) necessary to prevent a risk to persons and property;
- (b) use all reasonable endeavours to provide such information as Telecom may reasonably require in order for Telecom to perform its obligations under the Sub-loop Services Terms;
- (c) 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;
- (d) use the Sub-loop Services for lawful purposes, in accordance with all applicable laws and without being a nuisance to anyone;
- (e) never interfere with the reasonable use of any service by any Customer of Telecom or any customer of an Other Service Provider;
- (f) where required under the Sub-loop Services Terms, use all reasonable endeavours to obtain any third party authorisation, licence or consent necessary or prudent for Telecom to supply the relevant Sub-loop Service to the Access Seeker (other than authorisations, licences or consents required generally by Telecom to operate Telecom's Network);
- (g) 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 relevant Sub-loop Service to the Access Seeker (other than authorisations, licences or consents required generally by Telecom to operate Telecom's Network);
- (h) be responsible to Telecom for any act or omission relating to any Sub-loop Service, any part of any Sub-loop Service or any service that is based, in whole or in part, on any Sub-loop Service by any person (including all Customers and End Users of the Access Seeker) who uses the relevant Sub-loop Service, any part of the relevant Sub-loop Service, or any service that is based, in whole or in part, on the relevant Sub-loop Service that is supplied to the Access Seeker; and
- (i) except where the law requires otherwise, only use the relevant Sub-loop Service in ways that are contemplated by the Sub-loop Services Terms.

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

- (a) each contract it has with a Customer for the provision of services which rely, in whole or in part, on any Sub-loop Service; and

- (b) where the Customer in clause 10.2(a) is an Other Service Provider, each contract that the Other Service Provider has with a customer for the provision of services which rely, in whole or in part, on any Sub-loop Service,

a provision which excludes (to the maximum extent permitted by law) all liability of Telecom and any officer, employee, contractor or agent of Telecom arising from or in connection with the services which rely, in whole or in part, on any Sub-loop 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:

- (a) customer service and enquiries;
- (b) product information, service, fault reporting and technical issues;
- (c) contact with the police and other government authorities; and
- (d) 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 Sub-loop Services to the Access Seeker under the Sub-loop Services Terms, regardless of who uses the Sub-loop Services. The Charges payable are set out in the Sub-loop Services Price Lists and fixed in accordance with the Sub-loop Services 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 Sub-loop Services Terms:

- (a) Charges for the Sub-loop Services are payable for the period beginning on the date the relevant Sub-loop 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 relevant Sub-loop Service (or the relevant part of it), in which case Charges will not be payable for any period before that date unless the relevant Sub-loop Service is actually being used before that date; and

- (b) where any Sub-loop 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 Neither Party may rely on any information from the other Party concerning the tax treatment of any payments under the Sub-loop Services Terms, or any other matter relating to tax in relation to the Sub-loop Services Terms. The Party receiving the payment 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 be not less than 20 Working Days following the date of invoice.

Payment

- 13.4 Except as expressly provided under the Sub-loop Services Terms:
 - (a) all Charges invoiced by Telecom must be paid by the Access Seeker on or before the due date;
 - (b) 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 any relevant Sub-loop Services Service Level Terms); and
 - (c) 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 Sub-loop Services General 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 Sub-loop Services General 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 each relevant Sub-loop Services 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 each relevant Sub-loop Services 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 will charge the Access Seeker in accordance with each relevant Sub-loop Services Price List.

Time limit for invoicing

- 13.12 Nothing under the Sub-loop Services 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 relevant Sub-loop 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 Sub-loop Services Terms (other than an amount withheld in accordance with section 15 or set off in accordance with the relevant Sub-loop Services 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 Sub-loop Services 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 relevant Sub-loop Services 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 any Sub-loop 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 Sub-loop Services under clause 14.3 must cease as soon as it is reasonably practicable for Telecom to complete restoration of the Sub-loop Services 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 in 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:
- (a) the invoice;
 - (b) the Invoice Error;
 - (c) the grounds for the Access Seeker's belief that the Invoice Error exists;
and
 - (d) 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 36.8 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:
- (a) 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;
 - (b) 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 15.7 becomes applicable, whichever is earlier; or
 - (c) 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 15.7 becomes applicable, whichever is the earlier.
- 15.6 If it is agreed by the Access Seeker and Telecom or decided under clause 36.8 that an Invoice Error does not exist in an invoice, 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 15.7 becomes applicable, whichever is earlier.

Interest on unpaid amounts

- 15.7 Where an amount due from Telecom or the Access Seeker under clauses 15.5, 15.6, 15.9 or 15.10 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, 15.9 or 15.10.

Other Invoice Disputes

- 15.8 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 15.8 must comply with clause 36.3 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.

- 15.9 If a Dispute under clause 15.8 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 15.7 becomes applicable, whichever is earlier.
- 15.10 If a Dispute under clause 15.8 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 paid to the date of payment of the balance or the date clause 15.7 becomes applicable, whichever is earlier.

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 the following:
- (a) \$500,000 in aggregate for all events (connected or unconnected) occurring in any 12 month period, in respect of the Sub-loop UCLL Service;
 - (b) \$5,000,000 in aggregate for all events (connected or unconnected) occurring in any 12 month period, in respect of the Sub-loop Co-location Service;
 - (c) \$2,000,000 in aggregate for all events (connected or unconnected) occurring in any 12 month period, in respect of the Sub-loop Backhaul Service,

save that these limitations do not apply to the exceptions under clause 16.5.

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 16.5.

- 16.3 The Access Seeker's liability to Telecom in respect of any Default, negligent act or omission or breach of statutory duty is excluded to the extent that such Default, negligent act or omission or breach of statutory duty is a direct result of the negligent act or omission of Telecom, save that this exclusion does not apply to the exceptions under clauses 16.5(a) and 16.5(b).

Time bar

- 16.4 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

- 16.5 The limitations under clause 16.1 and the exclusion under clause 16.2 do not apply to:
- (a) any liability resulting from the Access Seeker's fraud or wilful Default;
 - (b) any obligation arising under the Sub-loop Services Terms to pay money in the ordinary course of business;
 - (c) any liability resulting from the Access Seeker's Default under section 29; or
 - (d) any liability resulting from the Access Seeker's Default under section 31.

Costs of recovering Charges

- 16.6 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 Sub-loop Services 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 the following:
- (a) \$500,000 in aggregate for all events (connected or unconnected) occurring in any 12 month period, in respect of the Sub-loop UCLL Service;
 - (b) \$5,000,000 in aggregate for all events (connected or unconnected) occurring in any 12 month period, in respect of the Sub-loop Co-location Service;

- (c) \$2,000,000 in aggregate for all events (connected or unconnected) occurring in any 12 month period, in respect of the Sub-loop Backhaul Service,

save that these limitations do not apply to the exceptions under clause 17.5.

Exclusion 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 17.5.
- 17.3 Telecom's liability to the Access Seeker in respect of any Default, negligent act or omission or breach of statutory duty is excluded to the extent that such Default, negligent act or omission or breach of statutory duty is a direct result of the negligent act or omission of the Access Seeker, save that this exclusion does not apply to the exceptions under clauses 17.5(a), 17.5(b) and 17.5(f).

Time bar

- 17.4 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, negligent act or omission or breach of statutory duty became reasonably discoverable.

Exceptions to the limitation and exclusions of Telecom's liability

- 17.5 The limitations under clause 17.1 and the exclusions under clause 17.2 do not apply to:
 - (a) any liability resulting from Telecom's fraud or wilful Default;
 - (b) any obligation arising under the Sub-loop Services Terms to pay money in the ordinary course of business;
 - (c) any liability resulting from Telecom's Default under section 29;
 - (d) any liability arising under clause 30.3;
 - (e) any liability resulting from Telecom's Default under section 31; or
 - (f) any Performance Penalty which may be payable by Telecom.

Costs of recovering Performance Penalties

- 17.6 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 Sub-loop Services Terms.

18 **GENERAL**

18.1 Nothing under the Sub-loop Services Terms excludes or limits:

- (a) any statutory liability of the Access Seeker or Telecom (to the extent that the law prohibits excluding or limiting such liability); or
- (b) 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:

- (a) 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
- (b) takes effect so that every limitation, exclusion and indemnity (as the case may be) is not affected by the Sub-loop Services Terms coming to an end.

19 **FORCE MAJEURE**

19.1 In this section 19, *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 Sub-loop Services 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 Sub-loop Services 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 Sub-loop Services Terms (other than any obligation arising under the Sub-loop Services 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 Sub-loop Services 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 Sub-loop Services 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 a result of a Force Majeure Event from providing all or part of any Sub-loop Service, the Access Seeker is not

required to pay the Charges that apply to that part of the relevant Sub-loop 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 notice of anything that Telecom is aware of which is likely to adversely affect any Sub-loop 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 any Sub-loop Service for the purpose of conducting works, routine maintenance, remedial work, Grooming, Rearrangement or upgrades to Telecom's Network (*Planned Outage*).

20.3 Telecom must:

- (a) 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 any relevant Sub-loop Service to the Access Seeker;
- (b) give the Access Seeker notice in advance of any Planned Outage:
 - (i) 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
 - (ii) at least within the timeframes set out in the relevant Sub-loop Services Service Level Terms; and
- (c) in respect of any notice of a Planned Outage, provide the following information:
 - (i) a brief explanation of the reason for the Planned Outage;
 - (ii) the intended date, time and duration of the Planned Outage;
 - (iii) a description of the Sub-loop Service (or the relevant part of it) which will be affected by the Planned Outage; and

- (iv) the name and contact details of Telecom's representative(s) who gave the advice.

Unplanned Outages

20.4 Telecom may Suspend supply of any Sub-loop Service:

- (a) due to any unplanned unavailability of, or interruption to, Telecom's Network or any Sub-loop Service; or
- (b) in order to provide or safeguard service to the emergency or other essential services,

(Unplanned Outage).

20.5 Telecom must:

- (a) use all reasonable endeavours to give the Access Seeker as much notice as possible of the existence of any Unplanned Outage;
- (b) notify the Access Seeker of any Unplanned Outage within the timeframe set out in the relevant Sub-loop Services Service Level Terms; and
- (c) 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:

- (a) planning and implementing any Planned Outage; and
- (b) 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 notice from Telecom under clause 20.5, the Access Seeker must make reasonable efforts to notify Telecom as soon as reasonably practical.

Outages on Access Seeker's Network

20.8 The Access Seeker must use reasonable endeavours to notify Telecom in advance of any planned event on the Access Seeker's Network that is likely to adversely affect the provision by Telecom of all or any part of any Sub-loop Service to the Access Seeker or Other Service Providers.

FAULTS

21 RESPONSIBILITY FOR FAULTS

21.1 Telecom is responsible for:

- (a) any faults which affect any Sub-loop Service and are in the Access Seeker's Network or Access Seeker Equipment, that are due to any act or omission of Telecom;
- (b) any faults in the Telecom Owned Equipment, except where any such fault affects the Sub-loop Service and is due to any act or omission of the Access Seeker, a Customer of the Access Seeker or an End User of the Access Seeker; and
- (c) any faults in Telecom's Network, except where any such fault affects the Sub-loop Service and is 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 The Access Seeker is responsible for:

- (a) any faults which affect any Sub-loop 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;
- (b) any faults in Access Seeker Equipment, except where any such fault affects the Sub-loop Service and is due to any act or omission of Telecom; and
- (c) any faults in the Access Seeker's Network, except where any such fault affects the Sub-loop Service and is due to any act or omission of Telecom.

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 Sub-loop Services Terms.

21.4 Where the Access Seeker is responsible for a fault under clause 21.2 that it has no right of access to fix, it may engage Telecom to fix that fault on its behalf in accordance with the relevant Sub-loop Services Operations Manual at the Charge specified in the relevant Sub-loop Services Price List. All other faults for which the Access Seeker is responsible are to be fixed by the Access Seeker in accordance with the relevant Sub-loop Services Operations Manual.

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:
- (a) confirm the presence of a fault;
 - (b) perform an initial fault diagnosis to identify where the fault has arisen;
 - (c) use all reasonable endeavours to investigate the fault and find out all relevant information from its Customer or End User; and
 - (d) 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 Sub-loop Services Operations Manuals.
- 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 relevant Sub-loop Services 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 during the Fault Restoration Hours. Procedures for fixing emergency faults are set out in the Sub-loop Services Operations Manuals.
- 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 each relevant Sub-loop Services Operations Manual.

24.4 Upon Telecom's acknowledgement of a Reported Fault that is Telecom's responsibility under clause 21.1, Telecom must:

- (a) comply with each relevant Sub-loop Services Operations Manual;
- (b) diagnose and fix the Reported Fault;
- (c) following the 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
- (d) 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 resolve 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 each relevant Sub-loop Services 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 (d).

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:

- (a) follow Telecom's reasonable directions when connecting anything to Telecom's Network or any Telecom Owned Equipment and make sure it complies with the Sub-loop Services Operations Manuals;

- (b) only allow people authorised by Telecom to work on or around Telecom's Network or Telecom Owned Equipment; and
 - (c) make sure everyone the Access Seeker is responsible for also meets these obligations.
- 25.2 Telecom is responsible for the safe operation and upgrading of Telecom's Network in a manner that does not:
- (a) endanger the safety or health of any of the Access Seeker's employees, contractors, agents or Customers; or
 - (b) 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(b).

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 Sub-loop Services 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:
- (a) leave the Telecom Owned Equipment installed and not use it otherwise than in accordance with each relevant Sub-loop Services Operations Manual;
 - (b) 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;

- (c) meet any requirements set out in each relevant Sub-loop Services Operations Manual relating to the Telecom Owned Equipment;
- (d) 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;
- (e) 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
- (f) 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:

- (a) must return the Telecom Owned Equipment to Telecom;
- (b) 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
- (c) must pay all Charges for the Telecom Owned Equipment until such time as it is returned to Telecom.

27.4 Telecom must:

- (a) maintain the Telecom Owned Equipment to the same specifications that Telecom maintains equivalent equipment used to supply the Sub-loop Services to itself; and
- (b) 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 Sub-loop 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:

- (a) Telecom Owned Equipment to the Access Seeker; or
- (b) any property of the Access Seeker to Telecom,

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

- (c) 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
- (d) this clause shall constitute a security agreement for the purposes of the PPSA.

29 INTELLECTUAL PROPERTY

29.1 Except as expressly provided under the Sub-loop Services 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 Sub-loop Services Terms:

- (a) confers any assignment, right, title or licence of one Party's Intellectual Property to the other; or
- (b) 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 any Sub-loop Service devised or made by anyone during the time Telecom is supplying any Sub-loop 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:

- (a) Telecom shall advise the Access Seeker of the purpose of the software or access to the Telecom System;

- (b) Telecom remains the owner or licensee of the software or Telecom System and has the right to allow the Access Seeker to use it;
- (c) the Access Seeker may use the software or Telecom System only for the purposes for which it is provided;
- (d) 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;
- (e) the Access Seeker will not change or interfere with the software or Telecom System in any way;
- (f) the Access Seeker must protect and secure its usernames and passwords from unauthorised use;
- (g) the Access Seeker will not use the software or Telecom System to recreate any source code;
- (h) 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
- (i) the Access Seeker's right to use the software or Telecom System will continue until either:
 - (i) supply of the relevant Sub-loop Service has been terminated; or
 - (ii) 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 Sub-loop Services, or the Access Seeker's use of the Sub-loop Services, the Access Seeker will install the upgrade or new version at its own cost:

- (a) as soon as it reasonably can and no later than six months after Telecom provides it; or
- (b) immediately, if Telecom notifies the Access Seeker that any Sub-loop 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 Sub-loop Services Terms.

INFORMATION

31 CONFIDENTIAL INFORMATION

31.1 In this section 31:

- (a) *Disclosing Party* means (as the context requires):
- (i) the Access Seeker when disclosing information to Telecom; and
 - (ii) Telecom when disclosing information to the Access Seeker.
- (b) *Receiving Party* means (as the context requires):
- (i) the Access Seeker when receiving information from Telecom; and
 - (ii) Telecom when receiving information from the Access Seeker.
- (c) *Access Seeker* includes any Related Company of the Access Seeker.
- (d) *Telecom* includes any Related Company of Telecom.
- (e) *Confidential Information* means all information which is *confidential* or proprietary to the Disclosing Party and is used or disclosed in connection with the Sub-loop Services Terms, including information which is confidential or proprietary to a third party and is used or disclosed in connection with the Sub-loop Services Terms by the Disclosing Party under licence from that third party and including information derived from Confidential Information, but excludes:
- (i) information which is independently developed by the Receiving Party outside the scope of the Sub-loop Services Terms, provided that such development did not rely on any Confidential Information;
 - (ii) information obtained from a source independent of the Disclosing Party;
 - (iii) information which was publicly available at the time it was received;

- (iv) 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;
 - (v) 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;
 - (vi) information expressly stated under the Sub-loop Services Terms to be disclosed to the public or telecommunications industry;
 - (vii) information expressly stated under the Sub-loop Services Terms not to be Confidential Information; or
 - (viii) any press release or other public statement that is agreed by the Access Seeker and Telecom.
- (f) *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 that Customer or by End Users of any service provided to that Customer that relies (in whole or in part) on the Sub-loop Services but excludes the contents of these Sub-loop Services Terms and any information (including information which was formerly Confidential Customer Information):
- (i) obtained from the person or from any other source independent of either Party;
 - (ii) which is publicly available and is obtained from a public source;
 - (iii) 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;
 - (iv) resulting from the fact that a Customer has commenced receiving a service from the Access Seeker that relies (in whole or part) on the Sub-loop Services, the identity of that Customer, and all information associated with the commencement of that service; or
 - (v) expressly stated in these Sub-loop Services 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 Sub-loop Services Terms.
- 31.3 A Receiving Party shall exercise the greater of:
- (a) the degree of care of Confidential Information that a reasonable person with knowledge of the confidential nature of the Confidential Information would apply; and
 - (b) 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:
- (a) authorised in writing by the Disclosing Party to the extent of that authority;
 - (b) to an emergency organisation;
 - (c) properly made pursuant to a relevant statutory or regulatory obligation;
 - (d) disclosed to the Commission;
 - (e) 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
 - (f) to obtain or maintain any listing on any recognised stock exchange,
- subject (in the case of any disclosure specified in clauses (c) to (f)) 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 Sub-loop Services) offered by a Party (whether or not that service is offered by the other Party), except that:

- (a) 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
- (b) 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 must ensure that its personnel directly involved in the supply of any Sub-loop Service to the Other Party may not, at the same time, be involved in marketing or sales to that other Party's Customer. To avoid doubt, nothing in this clause (b) 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 clauses 31 or 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 Sub-loop Services (*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 a Sub-loop 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:

- (a) hold Access Seeker Information and share it with its employees, contractors and other agents who are directly involved in the provision of any Sub-loop Service, but only where and to the extent that this is necessary to enable Telecom to provide the Access Seeker with any Sub-loop Service, send the Access Seeker invoices, check that the Access Seeker's obligations are being met, or otherwise to administer and enforce the Sub-loop Services Terms;
- (b) 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;
- (c) disclose Access Seeker Information in accordance with and to the extent required by a reporting obligation under any applicable law;
- (d) 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
- (e) 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 Sub-loop Services 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:
 - (a) the status quo will prevail until the Dispute is resolved;
 - (b) if the Default Notice was given by Telecom, it will not give rise to any rights under clauses 34.5, 34.6, 35.5(d), or 35.6 unless and until the Dispute is resolved in Telecom's favour; and

- (c) 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:

- (a) if the Default Notice was given by Telecom, it will give rise to rights under clauses 34.5, 34.6, 35.5(d), or 35.6 unless and until the Dispute is resolved in the Access Seeker's favour; and
- (b) 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 each Sub-loop Service (or part of each Sub-loop Service) until that Sub-loop Service is Suspended. The Access Seeker must pay all Charges for any part of any Sub-loop Service the supply of which has not been Suspended, except to the extent that the Access Seeker is unable to use that part of that Sub-loop Service as a result of the Suspension of another part of that Sub-loop Service.

34.2 Acceptance of part payment or the continued supply of any Sub-loop 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 any Sub-loop 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 that Sub-loop Service after the Default is remedied, and in any event must cease no later than 4 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:

- (a) 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 and any practicable process or outcome which would remove the necessity for suspension;
- (b) 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 practical process or outcome which would remove the necessity for Suspension; and

- (c) 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 Sub-loop Services, 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:

- (a) the Access Seeker does not hold a licence, permit or other official authorisation it must hold to provide its services lawfully;
- (b) the Access Seeker, in providing services that depend on the relevant Sub-loop 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;
- (c) any person to whom the Access Seeker is providing, or from whom the Access Seeker is receiving, a service in connection with the relevant Sub-loop Service is breaching the Privacy Act 1993 or any relevant telecommunications privacy codes of practice in force under the Privacy Act 1993; or
- (d) 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 relevant Sub-loop Service impractical or detrimental to Telecom's reputation, or rendering Telecom incapable of performing an obligation relating to supply of the relevant Sub-loop 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 any Sub-loop Service, or (where that Default affects only a part of any Sub-loop Service) the relevant part of any Sub-loop 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 any Sub-loop Service, or (if the relevant event affects only part of any Sub-loop Service) the relevant part of any Sub-loop Service, either immediately or within a reasonable period of time following the date on which the right to Suspend arises if:

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- (a) the Access Seeker, in meeting its obligations, exercising its rights or using the relevant Sub-loop Service, endangers the health or safety of any person;
- (b) the prerequisites under section 6 have not been, or are no longer, satisfied by the Access Seeker;
- (c) any condition specified by Telecom under clause 35.7(c) has not been, or is no longer, satisfied by the Access Seeker;
- (d) any person to whom the Access Seeker is providing a service, that relies (in whole or in part) on the relevant Sub-loop Service is, in Telecom's reasonable opinion, using that service fraudulently or in breach of the Sub-loop Services Terms, provided that Telecom will only Suspend the relevant Sub-loop Service to the minimum extent practicable to protect Telecom from the effects of that fraud or use in breach of the Sub-loop Services Terms;
- (e) 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;
- (f) the primary, or all, of the business activities of the Access Seeker are suspended or cease for more than five consecutive Working Days;
- (g) 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);
- (h) 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;
- (i) the Access Seeker makes an assignment for the benefit of, or enters into or makes any arrangement or composition with, its creditors; or
- (j) 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 any Sub-loop Service is Suspended under this section 34, Telecom must inform the Commission immediately of the suspension and the reason for the suspension.

Application of Service Level Terms where Sub-loop Services Suspended

- 34.9 For the avoidance of doubt, where Telecom Suspends the supply of any Sub-loop Service, or (if the relevant event affects only part of any Sub-loop Service) the relevant part of any Sub-loop Service under this section 34, the Service Levels under the relevant Sub-loop Services Service Level Terms will not apply to the relevant Sub-loop Service or the relevant part of the relevant Sub-loop Service that is Suspended.

35 TERMINATION OF SUPPLY

- 35.1 The Access Seeker remains liable to pay all Charges for each Sub-loop Service (or part of each Sub-loop Service) until termination. The Access Seeker must pay all Charges for any part of any Sub-loop Service the supply of which has not been terminated, except to the extent that the Access Seeker is unable to use a part of any Sub-loop Service as a result of the termination of another part of that Sub-loop Service.
- 35.2 Acceptance of part payment or the continued supply of any Sub-loop 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 supply of any Sub-loop Service (or any part of any Sub-loop Service) after giving Notice to Telecom of two months or more. If the Access Seeker gives Telecom any Notice under this clause 35.3, Telecom must terminate supply of the relevant Sub-loop Service (or the relevant part of the relevant Sub-loop 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 relevant Sub-loop Service (or any part of the relevant Sub-loop Service) either:
- (a) immediately; or
 - (b) 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 any Sub-loop Service or any relevant part of any Sub-loop Service, either immediately or within a reasonable period of time following the date on which the right to terminate arises if:
- (a) 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;
 - (b) the Access Seeker makes an assignment for the benefit of, or enters into or makes any arrangement or composition with, its creditors;
 - (c) 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;
 - (d) Telecom has given a total of five 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 (d):
 - (i) may have been in respect of the same or any different Default;
 - (ii) must not have been subject to a Dispute that was resolved in the Access Seeker's favour; and
 - (iii) 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:
- (a) the period to remedy the Default has expired; and
 - (b) three months from the date the Default Notice was given,
- terminate supply of any Sub-loop Service (or any part of any Sub-loop 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:
- (c) the Default has not been remedied; and
 - (d) the Default is material.

- 35.7 If supply of any Sub-loop Service is terminated under clause 35.5, at its discretion, Telecom may:
- (a) refuse to recommence supply of the relevant Sub-loop Service to the Access Seeker;
 - (b) agree to recommence supply of the relevant Sub-loop Service to the Access Seeker; or
 - (c) agree to recommence supply of the relevant Sub-loop Service to the Access Seeker subject to any conditions, provided those conditions must not be inconsistent with the Sub-loop Services Terms.
- 35.8 Upon termination of supply of any Sub-loop 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 and which relate to services that were not supplied by Telecom for the period starting on the date of termination.

Early Termination of supply by Telecom

- 35.9 If at any time any of the following events occur in respect of any Distribution Cabinet:
- (a) Telecom at any time becomes under notice to quit the Distribution Cabinet pursuant to any Land Occupation Arrangement and Telecom is unable to renew or extend the Land Occupation Arrangement on reasonable commercial terms;
 - (b) the Distribution Cabinet or the use of the Distribution Cabinet is rendered unlawful by any competent Authority;
 - (c) the Distribution Cabinet or any substantial part of the Distribution Cabinet is destroyed or so materially damaged by fire, earthquake or other cause as to require reconstruction or as to be rendered unfit for use and occupation and Telecom does not intend in its discretion to reinstate the Distribution Cabinet; or
 - (d) Telecom's legal interest in the Distribution Cabinet is materially affected by any other event or circumstance beyond Telecom's reasonable control,
- then Telecom will advise the Access Seeker at the earliest possible date and may terminate the Sub-loop Services at the affected Distribution Cabinet by giving Notice to the Access Seeker, in which case Telecom will use its reasonable endeavours to give not less than three months' Notice prior to the date of the termination.

35.10 Subject to section 17, Telecom shall be liable to the Access Seeker for any cost, liability, loss, damage or expense that the Access Seeker incurs or suffers as a direct result of the termination of any Sub-loop Service by Telecom in respect of any Distribution Cabinet pursuant to clause 35.9 where the termination is a result of:

- (a) a breach by Telecom of the Land Occupation Arrangement; and/or
- (b) any other unlawful act by Telecom which resulted in the termination of the Land Occupation Arrangement.

35.11 Upon termination of supply of any Sub-loop Service under clause 35.9:

- (a) the Access Seeker is not discharged from any liability under the Sub-loop Services Terms accrued up to the date that the Access Seeker vacates their Rackprint at the relevant Distribution Cabinet;
- (b) the Access Seeker must allow Telecom to access the relevant Rackprint used by the Access Seeker.

Obligation to inform the Commission

35.12 If the supply of any Sub-loop 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 Sub-loop Services Terms or the Act, any dispute, disagreement, question or difference that arises between the Parties in relation to the Sub-loop Services Terms (*Dispute*), must be resolved in accordance with this section 36.

36.2 Any Charges or Performance Penalties owing by and/or accruing to either Party for payment to the other Party in accordance with the Sub-loop Services Terms shall continue to accrue and/or be paid notwithstanding the commencement or continuation of Dispute resolution proceedings in accordance with this section 36. For the avoidance of doubt, nothing in this clause 36.2 limits the discretion of an Arbitrator appointed pursuant to clause 36.9 to make an award as to costs in respect of the Dispute.

Notice of Dispute

- 36.3 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:
- (a) the nature of the Dispute;
 - (b) its representative for negotiations under clause 36.5; and
 - (c) its suggestion for settling the Dispute.

Response to Dispute Notice

- 36.4 A Party receiving a Dispute Notice must, within five Working Days of receipt, reply to the other Party by Notice in writing specifying:
- (a) its representative for negotiations under clause 36.5; and
 - (b) its suggestion for settling the Dispute.

Negotiations

- 36.5 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

- 36.6 If the Dispute reaches a Deadlock then:
- (a) the Parties must advise the Commission of the Dispute and the Deadlock;
 - (b) the Parties may agree in writing to refer the Dispute to mediation in accordance with clause 36.7;
 - (c) the Parties may agree in writing to refer the Dispute to expert decision in accordance with clause 36.8; or
 - (d) either Party may refer the Dispute to arbitration in accordance with clause 36.9 (in the circumstances permitted under clause 36.9),

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 36.8.

Mediation

36.7 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:

- (a) the mediator will be appointed by agreement between the Parties. However, if the Parties can not 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 its successor body (or the president's nominee). The Party making this request must copy the request to the other Party;
- (b) unless the Parties agree otherwise in writing, the terms of reference for the mediation will be the model mediation terms suggested by LEADR;
- (c) either Party may, by Notice to the other, revoke the Mediation Referral Agreement at any time; and
- (d) 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

36.8 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:

- (a) 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;
- (b) 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;

- (c) the expert may seek independent legal advice regarding the appropriate procedures for resolution of the Dispute;
- (d) the expert must adopt a procedure which, in the expert's opinion, is the most simple and expeditious procedure practicable in the circumstances;
- (e) the Parties will provide the expert with any information that the expert reasonably requires in a timely manner. The expert is entitled to make his or her decision 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;
- (f) 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;
- (g) 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;
- (h) the expert will provide the Parties with a draft decision for comment prior to finalising it. The expert must provide the Parties with a reasonable period in which to comment on the draft decision and must take any comments received during that period into account in finalising a decision;
- (i) 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 final decision is provided to assert that the expert's decision contains a manifest error or the expert has acted in bad faith;
- (j) 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;
- (k) except as set out in clause (l), 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;

- (l) 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 other 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; and
- (m) the Parties must advise the Commission if the expert has made a final decision and if so the terms and reasons for that final decision.

Arbitration

36.9 If the Dispute reaches a Deadlock and the Parties:

- (a) 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

- (b) 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 (*Arbitrator*), by giving Notice to the other Party (*Arbitration Referral Notice*) and the following provisions will apply:

- (c) 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;
- (d) the arbitration will take place in Auckland or Wellington (at the Arbitrator's discretion);
- (e) the Arbitrator must adopt a procedure which, in the Arbitrator's opinion, is the most simple and expeditious procedure practicable in the circumstances;
- (f) 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;
- (g) the Second Schedule of the Arbitration Act 1996 will apply;
- (h) the costs of the Arbitrator will be borne equally by the Parties unless the Arbitrator determines otherwise;

- (i) 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;
- (j) 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; and
- (k) 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

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

Good faith and continuity

36.11 Pending resolution of any Dispute, the Access Seeker and Telecom will each:

- (a) 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 Sub-loop Services Terms; and
- (b) continue to perform its other obligations under the Sub-loop Services Terms.

Remedies under the Act

36.12 A copy of any decision arising from a Dispute must be provided by the Parties to the Commission immediately following that decision. The Parties will 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.

36.13 No Disputes as to the Charges listed in any Sub-loop Services Price List may be resolved by the Disputes Resolution procedures in this section 36. The Access Seeker or Telecom (as the case may be) must apply to the Commission under the Act.

36.14 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 Sub-loop Services are 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 Sub-loop Services supplied to the Access Seeker under the Sub-loop Services Terms.

39 ASSIGNMENT

- 39.1 The Access Seeker may transfer all of its rights and obligations (but not less than all) under the Sub-loop Services Terms, provided that the assignee has satisfied the prerequisites set out in section 6.
- 39.2 Where the Access Seeker transfers its rights and obligations under the Sub-loop Services Terms in accordance with clause 39.1, it must give prior Notice to Telecom of when that assignment will take effect.
- 39.3 Telecom may transfer its rights and obligations under the Sub-loop Services Terms to any wholly owned subsidiary of Telecom Corporation of New Zealand Limited.

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 Sub-loop Services 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 Sub-loop Services 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 Sub-loop Services 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 each Sub-loop Services Operations Manual.
- 43.2 Any Notice given by:
- (a) post to a contact address will be assumed to have been delivered three days after it is posted;
 - (b) 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;
 - (c) email to an email address will be assumed to have been delivered on the earlier of:
 - (i) the sender's receipt of confirmation of successful delivery; or
 - (ii) 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 (c), 'dispatch' occurs when the relevant email first leaves the sender's network for delivery to the recipient's address.

44 CHANGE MECHANISM FOR THE INTERFERENCE MANAGEMENT PLAN

- 44.1 Subject to clause 44.2, the definitions set out in the Interference Management Plan will apply to this section 44 to the extent that such definitions are not inconsistent with the Sub-loop Services General Terms.
- 44.2 In this section 44, Notice means a notice in writing that is sent to the relevant contact details of Telecom, an Access Seeker or the Commission (as applicable)

as notified by the receiving party from time to time. Clause 43.2 will apply to any such Notice.

Notice of change

- 44.3 Telecom or any Access Seeker who wishes to propose a change to the Interference Management Plan (in this section 44, the **Proposing Party**) must, unless the proposed change is not technical in nature, undertake an initial technical investigation in accordance with the spectral compatibility determination process described in Part Two of the Interference Management Plan. The purpose of the initial technical investigation will be to assess the result of the proposed change for the purposes of clause 44.4(b).
- 44.4 If the Proposing Party elects to proceed with the proposed change to the Interference Management Plan, the Proposing Party must give Notice to all Access Seekers and Telecom (where applicable) (in this section 44, the **Non-proposing Parties**). Any Notice given under this clause 44.4 must:
- (a) specify the exact details of the proposed amendments to the text, tables and/or graphs in the Interference Management Plan (the **Proposal**); and
 - (b) specify whether the Proposal:
 - (i) is not technical in nature or will not result in Unacceptable Interference to a Basis system, Unacceptable Excess Power or a change to the deployment limits of a Basis System (a **Minor Impact Proposal**); or
 - (ii) will result in Unacceptable Interference to a Basis System, Unacceptable Excess Power or a change to the deployment limits of a Basis System (a **Major Impact Proposal**).
- 44.5 The Proposing Party must give the Commission a copy of the Proposal at the same time that it gives Notice to the Non-proposing Parties in accordance with clause 44.4.
- 44.6 Telecom must:
- (a) if it is the Proposing Party, give notice of the Proposal as the "Proposing Party" in accordance with clauses 47.4 and 47.5 of the UCLL General Terms at the same time as it gives Notice to the Non-proposing Parties in accordance with clause 44.4; or
 - (b) if it is a Non-proposing Party, give notice of the Proposal as the "Proposing Party" in accordance with clauses 47.4 and 47.5 of the UCLL General Terms promptly after receipt by it of the Notice given under clause 44.4.

44.7 Unless otherwise agreed by Telecom and all Access Seekers, each Non-proposing Party will give Notice to the Proposing Party and all other Non-proposing Parties by email that it:

- (a) accepts the Proposal;
- (b) requires further clarification of the Proposal or further work to be performed by the Proposing Party in respect of the Proposal. In this case, any request for clarification or further work must be reasonable and clearly defined; or
- (c) rejects the Proposal (subject to clause 44.11). In this case, the Non-proposing Party must provide reasons why it has rejected the Proposal.

44.8 Unless otherwise agreed by Telecom and all Access Seekers, any Notice given by a Non-proposing Party in accordance with clause 44.7 will:

- (a) in the case of a Minor Impact Proposal, be given no later than 10 Working Days from the date of receipt of the Notice given under clause 44.4; and
- (b) in the case of a Major Impact Proposal, be given no later than 30 Working Days from the date of receipt of the Notice given under clause 44.4.

Further clarification or further work required

44.9 Where a Non-proposing Party provides Notice that it requires further clarification of the Proposal or further work to be performed in respect of the Proposal under clause 44.7(b), then:

- (a) the Proposing Party may provide any additional information relating to the request to all Non-proposing Parties;
- (b) Telecom and the Access Seekers will use reasonable endeavours to reach agreement on any changes to the Proposal; and
- (c) unless otherwise agreed by Telecom and all Access Providers, each Non-proposing Party will give Notice to the Proposing Party and all other Non-proposing Parties by email that it accepts the Proposal or that it rejects the Proposal (subject to clause 44.11):
 - (i) no later than 10 Working Days from the date of receipt of the Notice containing the additional information specified in clause (a) in the case of a Minor Impact Proposal; or
 - (ii) no later than 30 Working Days from the date of receipt of the Notice containing the additional information specified in clause (a) in the case of a Major Impact Proposal.

Deemed acceptance

- 44.10 If any Non-proposing Party does not provide Notice by the end of the period specified in clause 44.8 or the end of the period specified in clause 44.9(c) (as applicable), that Non-proposing Party will be deemed to have accepted the Proposal.

Minor Impact Proposals for the operation of a Non-Deployment Class System

- 44.11 In the case of a Minor Impact Proposal that relates to the operation of a Non-Deployment Class System, a Non-proposing party may only:
- (a) reject the Proposal in accordance with clause 44.7(c) or clause 44.9(c)(i) (as applicable); or
 - (b) give Notice to the Commission (following a rejection under clause (a) in accordance with clause 44.12(a)(ii),

for technical reasons where that Non-proposing Party reasonably believes that the Proposal will result in Unacceptable Interference to a Basis system, Unacceptable Excess Power or a change to the deployment limits of a Basis System.

Referral to the Commission

- 44.12 In the case of a Minor Impact Proposal:
- (a) either:
 - (i) the Proposing Party, where the Minor Impact Proposal has not been agreed by the majority, may give Notice to the Commission that it seeks a decision whether the Proposal is approved or not; or
 - (ii) the Proposing Party, where the Minor Impact Proposal has been agreed by the majority, must give Notice to the Commission that it seeks a decision whether the Proposal is approved or not;
 - (b) such Notice under clause (a) will be given no later than 10 Working Days from the end of the period specified in clause 44.8(a) or clause 44.9(c)(i) (as applicable); and
 - (c) the Commission will use its reasonable endeavours to advise whether the Proposal is approved no later than 30 Working Days from the date of the receipt of Notice in accordance with clause (a). The Commission will give Telecom and all Access Seekers Notice of its decision by email and will publish its decision on the Commission's website.

- 44.13 In the case of a Major Impact Proposal, then:

- (a) if the Non-proposing Parties do not unanimously agree to a Major Impact Proposal, then the Proposing Party may give Notice to the Commission that it seeks a decision whether the Proposal is approved or not; or
- (b) if the Non-proposing Parties do unanimously agree to a Major Impact Proposal, then the Proposing Party must give notice to the Commission that it seeks a decision whether the Proposal is approved or not,

and the Commission will use its reasonable endeavours to advise whether the Proposal is approved and will give Telecom and all Access Seekers Notice of its decision by email and will publish its decision on the Commission's website.

44.14 Any Notice given in accordance with clauses 44.12(a), 44.12(b) or 44.13(a) must be given to all other parties at the same time such Notice is given to the Commission.

Notice of acceptance of Proposal

44.15 Unless otherwise provided in the Proposal, the Proposal will take effect from the date Telecom gives Notice of the updated Interference Management Plan in accordance with clause 44.16.

44.16 Telecom will give the Commission and all Access Seekers Notice of the updated Interference Management Plan no later than 15 Working Days from the date that the Proposal is approved by the Commission.

44.17 For the avoidance of doubt, no Proposal and no change to the Interference Management Plan is effective unless it has been approved by the Commission.

Resubmission of any Proposal

44.18 For the avoidance of doubt, nothing in this section 44 will prevent the Proposing Party from re-submitting any Proposal, provided that:

- (a) in the case of a Minor Impact Proposal, the Minor Impact Proposal has not been accepted by the majority;
- (b) in the case of a Major Impact Proposal, the Major Impact Proposal has been rejected by any party; and
- (c) any resubmission is notified to the Non-proposing Parties and the Commission in accordance with clauses 44.4 and 44.5.