

MINISTRY OF ECONOMIC DEVELOPMENT

RADIO FREQUENCY AUCTION

No. 11

AUCTION CATALOGUE

March 2009

MINISTRY OF ECONOMIC DEVELOPMENT
RADIO FREQUENCY AUCTION NUMBER 11
CALL FOR BIDS

On Thursday 19 February 2009 the Ministry of Economic Development announced an auction for additional unrestricted commercial FM broadcasting licences. I give notice of intention to conduct an auction of spectrum licences commencing at **3.00 p.m. Tuesday 31 March 2009** in accordance with the Terms and Conditions attached to this notice. Auction 11 is an open outcry auction that will be conducted by Dunbar Sloane Limited, Wellington. The spectrum licences are described in Schedule 1 to these Terms and Conditions but full details of the licences are contained in the Register of Radio Frequencies. There are 25 unrestricted licences available, with each licence commencing on 1 July 2009.

The licences to be sold by auction are subject to the provisions of the Radiocommunications Act 1989, together with the Radiocommunications Regulations 2001. Before the auction commences, prospective bidders should familiarise themselves thoroughly with that Act and those Regulations, as well as the Terms and Conditions, the attached Renewal Agreement and the details of the licences in the Register of Radio Frequencies.

Dated at WELLINGTON this 2nd day of March 2009.



Brian Miller
Manager
Radio Spectrum Policy and Planning
Ministry of Economic Development

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TERMS AND CONDITIONS

The Terms and Conditions applicable to this auction are as follows:

1. INTERPRETATION

1.1 Defined Terms

In these Terms and Conditions, the following terms have the following meanings.

“Act”	The Radiocommunications Act 1989, as amended from time to time;
“Auctioneer”	Dunbar Sloane Limited or such other person appointed by the Chief Executive to conduct the auction on behalf of the Ministry (such other person to be notified by the Chief Executive on the Auction Information Page in advance of the auction).
“Auction Information Page”	The internet site at the following address: http://www.rsm.govt.nz/cms/policy-and-planning/spectrum-auctions/auction-11-licences-suitable-for-sound-broadcasting/
“Auctioneer’s Conditions of Sale”	The rules on which the auction will be conducted, as available on the Auctioneer’s web page at: http://www.dunbarsloane.co.nz/webpage.php?page=7 ;
“Auction Manager”	The person designated by the Ministry as the Auction Manager from time to time and whose contact details are set out in Schedule 3
“Chief Executive”	The Chief Executive of the Ministry and his or her delegate;
“Clause”	A clause of these Terms and Conditions;
“GST”	Goods and services tax within the meaning of the Goods and Services Act 1985;
“Lot”	A lot comprising of a spectrum licence described in Schedule 1 and the right to enter the Renewal Agreement;
“Ministry”	The Ministry of Economic Development and any other government department given responsibility for the auction from time to time;
“Register”	(a) when used as a noun, means the Register of Radio Frequencies established under section 5 of the Radiocommunications Act 1989; (b) when used as a verb, means to record on the Register.
“Registered Bidder”	Those persons whose registration as a bidder has been confirmed to have been received by the Ministry under clause 4;
“Renewal Agreement”	means an agreement for renewal of a Lot following expiry in the form contained in Schedule 2;
“Schedule”	A Schedule to these terms and conditions;

“Successful Bidder”	The Registered Bidder with the highest valid bid accepted by the Auctioneers in accordance with clause 8;
“Terms and Conditions”	These Terms and Conditions, including the Schedules attached to it; and
“Working Day”	Between the hours of 8.30am to 5.00pm on any day that is not a Saturday or a Sunday or a day that is the anniversary of any province or a public holiday within the meaning of section 7A(2) of the Holidays Act 1981.

1.2 Construction

In these Terms and Conditions:

- (a) a reference to “including” or similar phrases does not imply any limitation;
- (b) a reference to a person includes an individual, body corporate or unincorporated body of persons;
- (c) the singular includes the plural, and vice versa;
- (d) a reference to \$ or dollars is a reference to New Zealand currency;
- (e) the headings and clause and sub-clause headings in these Terms and Conditions are for convenience only and have no legal effect; and
- (f) where any word or phrase has been given a defined meaning, any other part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.

2. AMENDMENTS TO THIS CALL FOR BIDS

This call, including these Terms and Conditions, may be amended or revoked by the Chief Executive in whole or in part, and at any time, by notice on the Auction Information Page or by notice in writing to Registered Bidders.

3. ACQUISITION SUBJECT TO THE ACT

These Terms and Conditions, and any licence acquired under these Terms and Conditions, are subject to all legal requirements that apply to the acquisition and holding of licences created under the Act, including section 138 of the Act which provides that section 47 of the Commerce Act 1986 (relating to acquisitions of assets of a business) applies to the acquisition of licences in relation to the spectrum.

4. COMMERCE ACT 1986

4.1 Successful Bidder’s warranty regarding Commerce Act

Every Successful Bidder warrants that:

- (a) the acquisition of the relevant Lot will not breach section 47 of the Commerce Act 1986; and
- (b) it has, prior to settlement, obtained a clearance from the Commerce Commission for the proposed acquisition under section 66 of the

Commerce Act 1986 if there is a reasonable possibility that the acquisition will breach section 47 of the Commerce Act.

4.2 Effect of Commerce Act breach

The Successful Bidder indemnifies the Ministry against any claim, liability, loss or expense (including legal fees on a solicitor own client basis) brought or threatened against, or incurred by the Ministry, in the event that the purchase of the Lot by the Successful Bidder breaches, or is alleged to breach, the Commerce Act 1986.

5. REGISTRATION AS A BIDDER

5.1 Who may bid

Persons may bid only if they are Registered Bidders.

5.2 Prospective applicants to register

Persons wishing to be Registered Bidders in this auction must email the Auction Manager at radiospectrum@med.govt.nz no later than **5 p.m. Thursday 26 March 2009**, providing the name of the entity that will be registered as the bidder, contact names, numbers and addresses. In general, the Ministry's policy is not to accept registrations received after the deadline. However, the Ministry does retain the right to accept and evaluate such late registrations at its sole discretion.

By registering to bid, the Registered Bidder agrees to be bound by these Terms and Conditions.

5.3 Telephone bidding

If a Registered Bidder wishes to bid by telephone, it must contact the Auctioneer no later than 12 noon on Monday 30 March 2009 to arrange that facility. The Auctioneer can be contacted by phone on (04) 472 1367 or by email: info@dunbarsloane.co.nz

6. THE LICENCES

6.1 Schedules 1 contains details of Lots

Lots are described in Schedule 1.

6.2 Replacement Licences will be issued on expiry

Licences comprising a Lot commence on 1 July 2009 and expire on 2 April 2011. The Renewal Agreement in Schedule 2 provides for further licences to be granted if the Licence is in continuous ongoing use.

6.3 Changes prior to Auction

For technical reasons the Lots and technical details of Lots may change prior to the Auction. Any changes will be notified on the Auction Information Page.

6.4 No representation regarding suitability

It is the responsibility of Registered Bidders to ensure that any Lots for which they are bidding are suitable for their purpose. The Chief Executive, the Ministry (on behalf of the Crown) and the Auction Manager make no representations in this respect.

7. THE AUCTION

7.1 Open and sequential outcry auction

The auction will be an open and sequential outcry auction conducted by the Auctioneer in accordance with the Auctioneer's Conditions of Sale. The Auctioneer's Conditions of Sale are available on the Auctioneer's web page at <http://www.dunbarsloane.co.nz/webpage.php?page=7>. Where the Auctioneer's Conditions of Sale conflict with these Terms and Conditions, these Terms and Conditions will prevail. To avoid doubt, clauses 4(c) and 7(b) of the Auctioneer's Conditions of Sale do not apply.

7.2 GST

All bids are deemed to be inclusive of GST.

7.3 Bids by Ministry employees invalid

Any bid made by or on behalf of an employee of the Ministry will be invalid unless the prior written consent of the Chief Executive is obtained to that employee participating in the auction. If the Chief Executive has consented to an employee participating in the auction this will be advertised on the Auction Information Page before the commencement of the auction.

8. WITHDRAWAL OF LICENCES

8.1 Chief Executive may withdraw Lots

All or any of the Lots may be withdrawn from the auction at the discretion of the Chief Executive at any time prior to the close of the auction, notwithstanding that valid bids may have been made in excess of the reserve prices of any of the Lots.

8.2 Withdraws to be announced

If the Chief Executive exercises his discretion to withdraw all or any of the Licences from the auction, the Auction Manager will announce this on the Auction Information Page, or if the withdrawal is within 2 Working Days prior to the Auction, by advising the Auctioneer.

8.3 No claims if Licences withdrawn

No Registered Bidder or prospective bidder will have any claim against the Chief Executive or the Ministry for any expenses or other compensation as a direct or indirect consequence of such withdrawal.

9. CONCLUSION OF AUCTION

9.1 Bidding closes when Auctioneer declares completion

Bidding for the Lots will close when the Auctioneer declares the auction completed. All bids are considered to be inclusive of GST.

9.2 Successful Bidder is highest bidder

The Successful Bidder for a Lot is the bidder with the highest valid bid for that Lot as determined by the Auctioneer.

9.3 Successful Bidders

When the Auctioneer is satisfied that the auction is complete:

- (a) the Successful Bidder will be under a contractual obligation to pay the Auctioneer the full amount of the successful bid; and
- (b) the Successful Bidder will be under a contractual obligation to purchase that Lot.

10. POST AUCTION PROCESSES

10.1 Publication and Renewal Agreement

Within 5 Working Days following the conclusion of the Auction the Auction Manager will publish the details of the Auction results (including successful bids and Successful Bidders) on the Auction Information Page and send two copies of the Renewal Agreement for execution to each Successful Bidder.

11. SETTLEMENT REQUIREMENTS

11.1 Payment of successful bid and return of completed, signed Renewal Agreement

Each Successful Bidder must pay the full amount of its successful bid to the Auctioneer under the Auctioneer's Conditions of Sale (and within 10 Working Days of the auction) and return the completed, signed Renewal Agreement to the Auction Manager within 10 Working days of the Auction.

11.2 Grant and Registration of Licences

Subject to any law, the Chief Executive will procure Registration of the relevant Licences comprising a Lot in the name of the Successful Bidder within 10 Working Days of the later of the Auction Manager receiving a completed, signed Renewal Agreement from the Successful Bidder, and the Auctioneer confirming to the Auction Manager that the full amount for the Lot has been paid.

12. CANCELLATION AND LIABILITY

12.1 Cancellation events

The cancellation event is if a Successful Bidder fails to settle in terms of clause 11.1.

12.2 Effect of cancellation event

If an event set out in clause 12.1 occurs, then (without limit to any other legal rights and remedies available and despite anything to the contrary in these Terms and Conditions):

- (a) the contract for the purchase of relevant Lot by the Successful Bidder is deemed to be cancelled;
- (b) the following liquidated damages will be payable to the Crown by the Successful Bidder in respect of each Licence:

- (c) a sum of money equal to the difference between the final amount bid for the Licence by the Successful Bidder and the amount eventually paid to the Ministry for that Lot, if that amount is lower than the value of the successful bid; plus
- (d) a sum of money which fully recovers any expenses (including staff time) incurred by the Chief Executive in seeking settlement by the bidder. A certificate from the Chief Executive of such losses, costs or expenses is prima facie evidence of such loss, cost or expense; plus
- (e) a sum of money which fully recovers any losses, costs or expenses suffered or incurred by the Crown as a result of processing the bidder's registration and any reallocation of the Licence. A certificate from the Chief Executive of such losses, costs or expenses is prima facie evidence of such loss, cost or expense.

13. ANNOUNCEMENT OF FINAL RESULTS AND PUBLISHING OTHER INFORMATION

13.1 Results published

Final results will be published by the Auction Manager on the Auction Information Page once settlement of all lots is complete.

13.2 Information of interest may be published on Internet

Bidders agree that the results of the auction (including the names and details of Successful Bidders, and the Licence details) and any other information related to this auction that the Chief Executive believes to be of general interest, may be publicised in any way, including published on the Auction Information Page or anywhere else.

14. CROWN NOT LIABLE

The Crown will not be liable in any way to a Registered Bidder (including a Successful Bidder) for the exercise of any right or obligation set out in these Terms and Conditions, including (to avoid doubt) for any claim for direct or indirect losses, costs or expenses as a result of, or in connection with, that exercise of the right or obligation.

15. NOTICES

15.1 Notices by bidders to be in writing

Any notice or other communication, e.g. provision of information (notice) required to be given under these Terms and Conditions by a Registered Bidder (including a Provisionally Successful Bidder or Successful Bidder) must be in writing and hand delivered or sent by registered post to the Auction Manager.

15.2 Notices to meet requirements to be effective

A notice will only be effective:

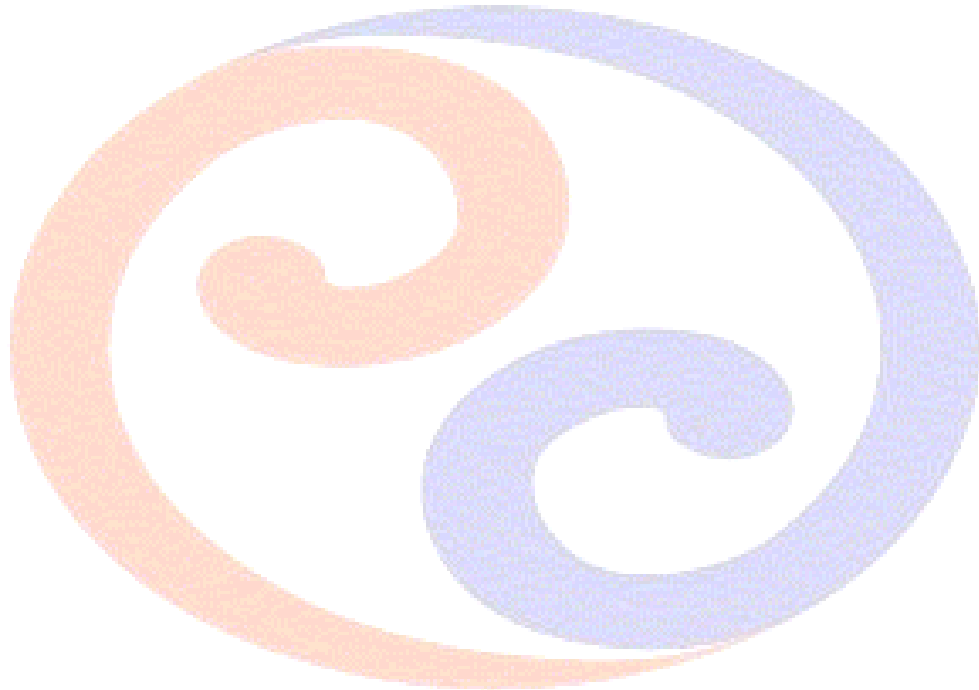
- (a) if hand delivered, when delivered; or
- (b) if sent by registered post, two (2) Working Days after posting (in proving such posting, it is sufficient to show that the envelope was correctly addressed and posted).

15.3 Facsimile notices effective sometimes

Despite clause 15.2, a Registered Bidder may also provide such notice by facsimile to the number set out in Schedule 3, provided that the Registered Bidder immediately forwards the original notice to the relevant person in accordance with clause 15.2. A facsimile notice is only effective upon production of a transmission report by the machine from which the facsimile was sent which indicates that the facsimile was sent in its entirety to the facsimile number of the recipient.

15.4 Timing of Notices and Working Days

A notice received after 5.00 pm or on a day which is not a Working Day shall be deemed not to have been received until the next Working Day.



SCHEDULE 1 - SCHEDULE OF LOTS

This auction, Radio Frequency Auction No. 11, comprises 25 spectrum licences, full details of which are set out in the Register. Each lot is generally described as follows:

Lots					
Lot #	Licence Id	Licence Number	Area	Transmit Site	Freq (MHz)
11FM001	111922	211592	Bay of Plenty	Putauaki	93.7
11FM002	112510	211597	Bay of Plenty	Putauaki	104.9
11FM003	126316	217260	Blenheim	Wither Hills	104.9
11FM004 ¹	128200 ⁵		Christchurch	Sugarloaf	106.5
11FM005	112139	211604	Dunedin	Mt Cargill	106.2
11FM006	112086	211606	Gisborne	Wheaststone Rd	100.5
11FM007	112088	211608	Gisborne	Wheaststone Rd	105.3
11FM008	112399	211612	Hawke Bay	Mt Erin	105.5
11FM009	112115	211616	Invercargill	Hedgehope	104.4
11FM010	126340	217261	Kaikoura	Kaikoura	100.3
11FM011 ²	126121	217262	National Park	National Park	90.4
11FM012 ³	112662	211620	Nelson	Grampians	100.2
11FM013	126321	217263	Oamaru	Cape Wanbrow	104.8
11FM014	126128	217264	Ohakune	Ohakune	106.2
11FM015	112095	211624	Queenstown	Peninsula Hill	100.8
11FM016	112093	211626	Queenstown	Peninsula Hill	105.6
11FM017	112417	211630	Rotorua	Pukepoto	105.5
11FM018	123530	217268	Ruawai	Cates Road	104.2
11FM019	112160	211641	Timaru	Mt Studholme	105.5
11FM020	126442	217265	Turangi	Karangahape	89.6
11FM021	126073 ⁴	217266	Waipuna	Waipuna	93.4
11FM022	112326	211643	Wairarapa	Otahoua	100.7
11FM023	112325	211645	Wairarapa	Otahoua	105.5
11FM024	112349	211647	Wanganui	Shakespeare Rd	100.8
11FM025	126139	217267	Whitianga	Red Hill	105.5

¹ Prospective bidders should note that the Upper Unwanted Emission Limit of Lot 11FM004 differs from the normal practice documented in the Ministry's PIB39 publication

² The frequency of the Licence post 2011 will differ from the frequency of the initial Licence before 2011

³ The frequency of the Licence post 2011 will differ from the frequency of the initial Licence before 2011

⁴ The frequency of the Licence post 2011 will differ from the frequency of the initial Licence before 2011

⁵ This licence ID differs from the original licence ID.

SCHEDULE 2 – RENEWAL AGREEMENT

THIS RENEWAL AGREEMENT is made the _____ day of _____ 2009

BETWEEN **HER MAJESTY THE QUEEN** in the right of the Government of New Zealand acting by and through **BRIAN MILLER**, Manager, Radio Spectrum Planning and Policy, acting under the delegated authority from the **CHIEF EXECUTIVE OF THE MINISTRY OF ECONOMIC DEVELOPMENT** (“the Ministry”)
AND [legal entity] of [address], (“the Licensee”)

Background

A The Ministry of Economic Development conducted an auction of spectrum licences generally suitable for FM sound broadcasting. The Licensee was the Successful Applicant for the Licence and was required to execute this Agreement as a condition of settlement.

AGREEMENT

1 Interpretation

1.1 In this Renewal Agreement, unless the context otherwise requires:

“Act”	means the Radiocommunications Act 1989, as amended from time to time;
“Auction Terms and Conditions”	means the auction catalogue dated March 2009 for Radio Frequency Auction No. 11;
“Broadcasting”	has the meaning in section 2 of the Broadcasting Act 1989;
“Chief Executive”	means the Chief Executive of the Ministry or his or her delegate;
“Current Ongoing Use”	means the ongoing use test set out in clause 5.1 and determined by the Licensor in accordance with clause 5.2;
“Date of Registration”	means that date that the Licence was registered in the name of the Licensee;
“Licence”	means the licence or licences as listed in Schedule 1 to this Renewal Agreement (as such licence or licences may be amended from time to time);
“Renewal Agreement”	means this renewal agreement;
“Licence Price”	means the amount paid in settlement under the Auction Terms and Conditions for the purchase of the Licence;
“Ministry”	includes any other department of State given responsibility for the Licences;
“Regulations”	means regulations made pursuant to the Act, in the form in force at the relevant time;
“Term”	has the meaning given to it in clause 3;
“Working Day”	means between the hours of 8.30am to 5.00pm on any day that is not a Saturday or a Sunday or a public holiday within the meaning of section 44 of the Holidays Act 2003 (other than in section 44(1)(k), Wellington Anniversary Day).

- 1.2 In the event of inconsistency between the terms of this Renewal Agreement and the terms of a Licence, the terms of this Renewal Agreement prevail.
- 1.3 In this Renewal Agreement, unless the context requires otherwise:
- a. the singular includes the plural, and vice versa; and
 - b. “**including**” and similar words do not imply any limitation.
 - c. a reference to a person includes an individual, body corporate or unincorporated body of persons;
 - d. the headings and clause and subclause headings in this Agreement are for convenience only and have no legal effect; and
 - e. where any word or phrase has been given a defined meaning, any other part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.

2 Renewal

- 3.1 This Renewal Agreement commences on the date of execution and continues until the grant of a replacement licence in accordance with clause 3, or 2 April 2011, whichever is earlier.

3. Right to replacement Licence

- 3.1 The Ministry will, provided the Licensee requests in writing before a date 3 months before expiry of the Licence and the Licensee satisfies clause 4, provide a further licence expiring in April 2031.

4. Current Ongoing Use Test

- 4.1 The Licence must demonstrate current ongoing use of the Licence for Broadcasting.
- 4.2 Whether or not there is current ongoing use is a matter to be determined by the Chief Executive in his or her sole discretion exercising a common sense judgment. However, without limiting what will be determined to be current ongoing use, Broadcasting for a minimum of 24 hours per day, seven (7) days per week (or the maximum hours of transmission under the licence if less) at a power substantially the same as the maximum power of emissions of the Licence for a continuous six (6) month period immediately prior to the date of the request will be considered current ongoing use.
- 4.3 To assist the Chief Executive with his or her determination in clause 4.2, the Licensee must submit to the Chief Executive with the request under clause 3.1, a statutory declaration:
- 4.3.1 stating that the Licence is in current ongoing use; and
 - 4.3.2 identifying the programme and detailing the extent of the current ongoing use for the Licence including average hours Broadcasting per day, average days Broadcasting per week, average transmitting power and the period of continuous ongoing use up to the date as at which the declaration is made; and
 - 4.3.3 undertaking that such current ongoing use detailed in 4.3.2 will continue up to, and be ongoing at, the date of expiry of the Licence.

- 4.4 The Chief Executive may request further information from the Licensee to make his or her determination under clause 4.2 and the Licensee must respond promptly to such a request.
- 4.5 The Chief Executive will provide written notice to the Licensee if the Chief Executive is not satisfied current ongoing use has been demonstrated by the Licensee and renewal will not proceed. Written notice from the Chief Executive that the Licensee has not met the current ongoing use test is conclusive in the absence of manifest error.
- 4.6 If the Licensee receives notice under clause 4.5 that the current ongoing use test has not been met, the right to renew the Licence and this Agreement is terminated immediately. The Licensee, the Crown, the Ministry, the Chief Executive and any officer of the Ministry has no further liability or obligations in relation to that Licence or this Agreement.
- 4.7 If the Ministry does not receive a request for renewal, or the statutory declaration provided under clause 4.3 or other information is incomplete or misleading, the Licence may be deemed by the Chief Executive in his or her sole discretion, to be not in current ongoing use and this Agreement is terminated.

5. Limitation of liability

- 5.1 Neither the Crown nor the Ministry nor any officer of the Ministry will be liable for any indirect, consequential, incidental, or special loss or damage (including loss of profit, loss of revenue, loss of business or any other form of economic loss) resulting from or connected with the performance of its rights and obligations under the Licence or this Renewal Agreement.
- 5.2 The total maximum liability of the Crown, the Ministry and any officer of the Ministry for breach of contract, statutory duty, in tort (including negligence), equity or in respect of any other cause of action resulting from or connected with the performance of their rights and obligations under the Licence or this Renewal Agreement shall not exceed the GST exclusive Licence Fee paid to the Crown by the Licensee for the Licence in question.

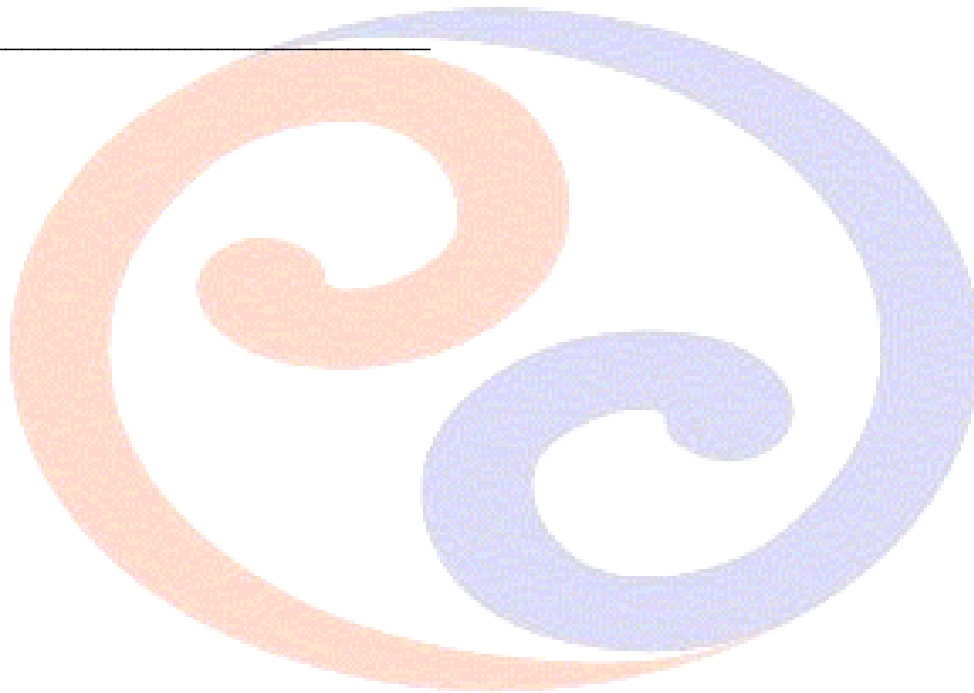
6 Notices

- 6.1 Any notice to be given under this Renewal Agreement will be in writing and will be hand delivered or sent by registered post to the Parties' respective addresses as set out in clause 6.3 and clause 6.4.
- 6.2 Any notice will be deemed to be served on the date of delivery or the Working Day next following the date of posting as the case may be. In proving the giving of a notice it is sufficient to prove that the envelope containing such notice was properly addressed and posted.
- 6.3 The address for the service of notices on the Ministry, unless otherwise notified in writing, is:
Ministry of Economic Development
33 Bowen Street
PO Box 1473
WELLINGTON
Attention: Manager Radio Spectrum Policy and Planning
- 6.4 The address for the service of notices on the Licensee, unless otherwise notified, is as described in the Licence.

Signed for and on behalf of)
HER MAJESTY THE QUEEN)
in right of the Government of)
New Zealand by Brian Miller, Manager Radio)
Spectrum Policy and Planning, Energy and)
Communications, Ministry of Economic)
Development) _____
in the presence of:

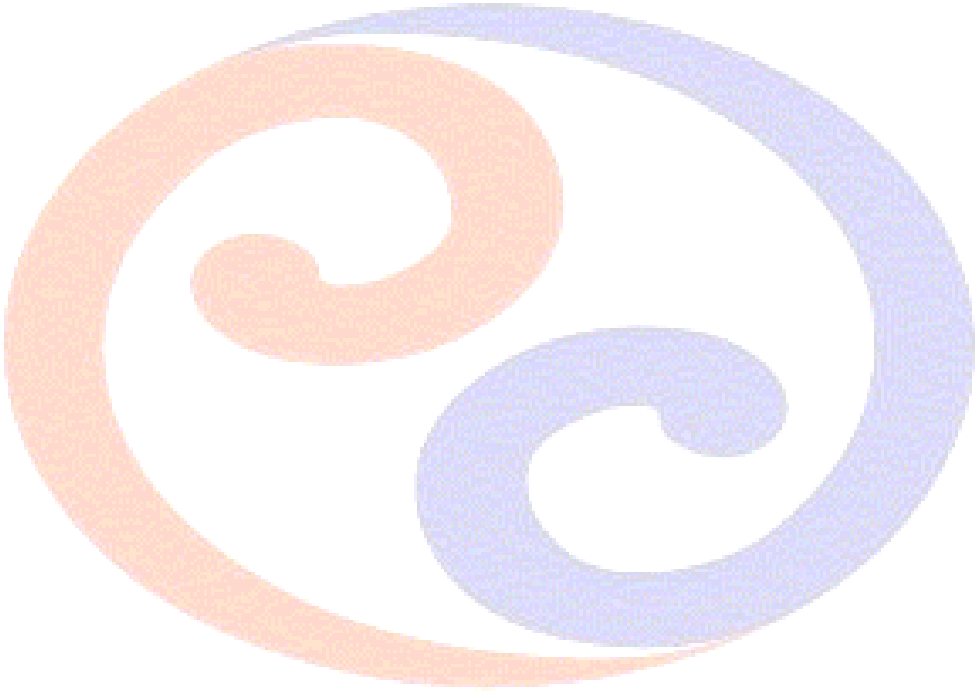
Signed for and on behalf of)
)

by _____
in the presence of:



SCHEDULE 1 TO RENEWAL AGREEMENT – Licence

Licence Id	Licence Number	Region	Transmit Site	Freq (MHz)
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SCHEDULE 3 - CONTACT DETAILS

Kirsty Johnston
Auction 11 Manager
Radio Spectrum Policy and Planning
Ministry of Economic Development
PO Box 1473 (33 Bowen Street)
WELLINGTON

DDI: +64-4-462 4290

Fax: +64-4-499 0969

email: radiospectrum@med.govt.nz

