

**RADIO SPECTRUM
MANAGEMENT**



FM Licences Auction Catalogue

Radio Frequency Auction No. 14

19 September 2017



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HĪKINA WHAKATUTUKI

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FM Licences Auction Catalogue

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Call for bids

I give notice of the Ministry's intention to conduct an auction of spectrum licences commencing at 10 am, 3 November 2017 in accordance with the Terms and Conditions.

Auction 14 is an online sequential auction that will be conducted by Turners Group NZ Limited, www.turners.co.nz. 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 five (5) licences available, with each licence being available from the date of transfer and expiring on 2 April 2031.

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 the details of the licences in the Register of Radio Frequencies. The provisions of the Broadcasting Act 1989 and the Commerce Act 1986 also apply. Annual fees and levies are required to be paid pursuant to the Radiocommunications Act and the Broadcasting Act.

Radio Spectrum Management and the Ministry of Business, Innovation and Employment provide no guarantees regarding access to land, infrastructure, or services in relation to any licence. These are matters for which licensees are directly responsible.

Prospective bidders should familiarise themselves thoroughly with these Terms and Conditions (including the Contract forming part of these Terms and Conditions) and should obtain independent legal advice where required.

Dated this 19th day of September 2017.



Len Starling

Manager, Radio Spectrum Policy and Planning

Ministry of Business, Innovation and Employment

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”	Turners Group NZ 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/projects-auctions/current-projects/licences-for-fm-sound-broadcasting-auction-14
“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 2;
“Bidder”	Those persons who have complied with the Auctioneer’s registration process in accordance with clause 6 and place a bid in the auction;
“Chief Executive”	The Chief Executive of the Ministry of Business, Innovation and Employment and his or her delegate;
“Clause”	A clause of these Terms and Conditions;
“Conditions of Sale”	The rules on which the auction will be conducted, which are unless otherwise stated on the Auctioneer’s website at www.turners.co.nz as available on Trade Me Limited’s web page at: http://www.trademe.co.nz/help/143/terms-and-conditions;
“Contract”	The contract attached as Schedule 3 to these Terms and Conditions, that all Provisionally Successful Bidders must enter into, as part of the settlement requirements (at clause 12), before any relevant licences are transferred to them;

“GST”	Goods and services tax within the meaning of the Goods and Services Act 1985;
“Lot”	A lot comprising a spectrum licence described in Schedule 1;
“Ministry”	The Ministry of Business, Innovation and Employment, and any other government department given responsibility for the auction from time to time;
“Programme”	Has the meaning given to that term by section 2 of the Broadcasting Act 1989;
“Provisionally Successful Bidder”	The Bidder with the highest valid bid accepted by the Auctioneer in accordance with clause 10;
“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.
“Schedule”	A Schedule to these terms and conditions;
“Terms and Conditions”	These Terms and Conditions, including the Schedules attached to it; and
“Working Day”	A 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 a public holiday within the meaning of section 44 of the Holidays Act 2003 or 27, 28 or 29 December 2017.

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, or body corporate;
- 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 Catalogue

This catalogue, 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.

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. Overdue licence annual administration fees under the Act pertaining to any other licences held by the Purchaser must be paid in full before the Chief Executive will accept settlement has been completed and transfer any spectrum licence from the Lot's in Schedule 1 to the Purchaser.

4. Licence subject to service requirement

4.1 Service Requirement

Any licence acquired under these Terms and Conditions is subject to the service requirement set out in the Contract. The service requirement requires that (no later than 2 calendar years after the date on which the transfer of the relevant spectrum licence(s) to the Provisionally Successful Bidder is Registered) the Provisionally Successful Bidder must have implemented a continuous and on-going sound broadcasting service that utilises each of the licence(s) to which their Contract relates, and that:

- (a) operates each licence by transmitting a Programme 24 hours per day, 7 days per week (excluding reasonable outages including those for maintenance and construction); and
- (b) has operated continuously for the entire 3 month period before the date on which the purchaser submits a statutory declaration in accordance with the Contract.

4.2 Consequences of not meeting Service Requirement

If the service requirement set out in the Contract is not met in respect of all relevant licences, in accordance with the Contract:

- (a) the Chief Executive may use the power of attorney granted to them to transfer any licence(s) in respect of which the service requirement has not been met to the Crown under section 56 of the Act; and
- (b) the Provisionally Successful Bidder who is party to the Contract will not be entitled to any refund (partial or otherwise) of the settlement amount paid for the relevant licence(s).

5. Commerce Act 1986

5.1 Provisionally Successful Bidder's responsibility regarding Commerce Act

Every Provisionally Successful Bidder warrants that the acquisition of the relevant Lot by the Provisionally Successful Bidder will not breach section 47 of the Commerce Act 1986.

5.2 Effect of Commerce Act breach

The Provisionally 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 Provisionally Successful Bidder breaches, or is alleged to breach, the Commerce Act 1986.

6. Registration as a Bidder

6.1 Who may bid

Persons may bid only if they comply with the registration process of the Auctioneer.

6.2 Registration process of the Auctioneer

Persons wishing to place a bid in this auction must:

if they wish to bid, register an online account with Trade Me Limited via the website www.trademe.co.nz;

before placing a bid on their desired Lot(s).

By placing a bid, the Bidder agrees to be bound by these Terms and Conditions.

7. The Licences

7.1 Schedule 1 contains details of the Lots

Lots are described in Schedule 1. Full details of each licence that corresponds to each Lot on offer can be found in the Register. The Register can be accessed via:
<http://www.rsm.govt.nz/smart-web/smart/page/-smart/WelcomePage.wdk>

7.2 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.

7.3 No representation regarding suitability

It is the responsibility of 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, including any representation regarding transmit location facilities or accessibility.

7.4 Caveat

As set out in the Contract, where the transfer of any licence to the Provisionally Successful Bidder is to be Registered, each licence will contain a caveat that will have the effect of prohibiting the registrar from making any entry on the Register charging, modifying, or transferring the licence(s), other than with the consent of the Crown.

8. The Auction

8.1 Online bidding auction

The auction will be conducted as an online auction via Trade Me Limited's website (www.trademe.co.nz) in accordance with the Conditions of Sale.

The Conditions of Sale are available on Trade Me Limited's web page at <http://www.trademe.co.nz/help/143/terms-and-conditions>. In the event of any conflict between the Conditions of Sale and these Terms and Conditions, these Terms and Conditions will prevail.

8.2 GST

All bids are deemed to be inclusive of GST.

8.3 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.

9. Withdrawal of Lots

9.1 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.

9.2 Withdrawals to be announced

If the Chief Executive exercises his or her discretion to withdraw all or any of the Lots 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.

9.3 No claims if Lot withdrawn

No 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.

10. Completion of Auction

10.1 Bidding closes when Auctioneer declares completion

Bidding for a Lot will close when the Auctioneer declares the auction for that Lot is completed.

10.2 Provisionally Successful Bidder is highest bidder

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

10.3 Provisionally Successful Bidders

When the Auctioneer is satisfied that the auction is complete:

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

11. Post Auction Processes

11.1 Publication

Within five Working Days following the completion of the Auction the Auction Manager will publish the details of the Auction results (including successful bids and Provisionally Successful Bidders) on the Auction Information Page.

12. Settlement Requirements

12.1 Payment of successful bid and delivery of Contract

Each Provisionally Successful Bidder must, within 10 Working Days of completion of the auction:

- a) pay the full amount of its successful bid to the Auctioneer under the Conditions of Sale; and
- b) provide a copy of the Contract and power of attorney in the form set out in Appendix 2 of the Contract signed for and on behalf of the that Provisionally Successful Bidder addressed to the Chief Executive via the contact details set out in Schedule 2, and
- c) pay all overdue annual administration fees on any other radio or spectrum licence held by the Purchaser.

12.2 Transfer of Licences to Provisionally Successful Bidders

Subject to any law and to prior receipt of the signed Contract and power of attorney in the form set out in Appendix 2 of the Contract in accordance with clause 12.1, the Chief Executive will, within 10 Working Days of the Auction Manager receiving confirmation from the Auctioneer that the Provisionally Successful Bidder has paid in full the amount of its successful bid, transfer the registration of the relevant licences comprising a Lot in the name of the Provisionally Successful Bidder.

To enable the Chief Executive to make the transfer, Provisionally Successful Bidders must register as a client of the registry (if they are not already a client of the registry) by completing an online “new RSM client request”, which is accessible via the Auction Information Page.

13. Cancellation and Liability

13.1 Cancellation events

A cancellation event occurs if:

- a) a Provisionally Successful Bidder fails to settle in terms of clause 12.1; or
- b) the Auctioneer receives no bid on a Lot above the reserve price.

13.2 Effect of cancellation event

Without limiting the Ministry's other legal rights and remedies and despite anything to the contrary in these Terms and Conditions:

- a) if clause 13.1(a) applies, the contract for the purchase of the relevant Lot by the Provisionally Successful Bidder is deemed to be cancelled; and
- b) if clause 13.1(a) or (b) applies, the Ministry will be free to dispose of the relevant Lot at its discretion, including by offering the relevant Lot to the Bidder who placed the second highest bid or by cancelling the relevant licence.

14. Announcement of Final Results and Publishing Other Information

14.1 Results published

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

14.2 Information of interest may be published on Internet

Bidders agree that the results of the auction (including the names and details of Provisionally 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.

15. Crown Not Liable

The Crown will not be liable in any way to a Bidder (including a Provisionally 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.

Schedule 1 - Schedule of Lots

This auction, Radio Frequency Auction No. 14, comprises five (5) spectrum licences, full details of which are set out in the Register. Each Lot is generally described as follows:

Auction ID	Spectrum Licence Number	Transmit Location	Frequency (MHz)	Reserve Price (NZD)
1	258295	91 Centennial Drive Whitianga	95.10	\$ 4,761
2	258269	Lower Rataroa	106.00	\$ 10,579
3	258268	Grampians	105.60	\$ 74,602
4	258270	Hollow Top (Marl Lines)	105.90	\$ 1,150
5	258414	Wallace Peak	106.10	\$ 1,615

Schedule 2 - Contact Details

Peter Gent
Auction 14 Manager
Radio Spectrum Policy and Planning
Ministry of Business Innovation and Employment
PO Box 2847
15 Stout Street
WELLINGTON

DDI: 04 462 4279

email: radio.spectrum@mbie.govt.nz

Schedule 3 – Contract

See pages attached.



MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT
HIKINA WHAKATUTUKI



Sound Broadcasting Spectrum Licence Agreement with [*insert name*]

[*insert month*] 2017

SPECTRUM LICENCE AGREEMENT

This agreement dated the day of **[insert month]** 2017

BETWEEN HER MAJESTY THE QUEEN, in right of the Government of New Zealand acting by and through the Manager Radio Spectrum Policy and Planning, Building, Resources and Markets Group, Ministry of Business, Innovation and Employment, acting under the authority of the Chief Executive of the Ministry of Business, Innovation and Employment (“**Ministry**”)

AND **[INSERT NAME]** (“**Purchaser**”)

BACKGROUND

- A The Ministry conducted an auction of spectrum licences for frequencies suitable for FM sound broadcasting, in which the Purchaser was a Provisionally Successful Bidder.
- B The auction rules require this agreement to be entered into by the Purchaser as a condition of settlement of the sale and purchase of Spectrum Licence(s) in the auction. Its purpose is to implement Government policies in relation to acquisition and usage of the Spectrum Licence(s) acquired by the Purchaser in the auction.

AGREEMENT

In respect of the spectrum licence(s) identified in Schedule 1 that are the subject of this agreement and for the consideration referred to in this agreement, the Purchaser and the Crown agree to comply with the terms and conditions in Schedule 2 (Terms and Conditions).

Signed for and on behalf of **HER MAJESTY THE QUEEN** in right of the Government of New Zealand acting by and through the Manager Radio Spectrum Policy and Planning, Building, Resources and Markets Group, Ministry of Business, Innovation and Employment, acting under the authority of the Chief Executive of the Ministry of Business, Innovation and Employment ("**Ministry**").

Signature

Date

Signed for and on behalf of **[INSERT NAME]** ("**Purchaser**")

Signature

Signature

Date

SCHEDULE 1 - DETAILS

Auction ID	Spectrum Licence Number	Transmit Location	Frequency (MHz)

SCHEDULE 2 - TERMS AND CONDITIONS

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1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this agreement, unless the context otherwise requires:

"Act"	means the Radiocommunications Act 1989;
"Auction"	means the Radio Frequency Auction No.14 conducted on behalf of the Crown in the 2017/18 year, and in which the Purchaser was the provisionally successful bidder for the Spectrum Licence(s) set out in Schedule 1, and "terms and conditions of the Auction" means the terms and conditions of the Auction as contained in the Auction Catalogue (as amended from time to time in accordance with that catalogue and auction terms and conditions);
"Auction Catalogue"	means the Auction Catalogue for Radio Frequency Auction No.14 dated 1 October 2017, as amended from time to time
"Auctioneer"	has the same meaning as set out in clause 1.1 of the Auction Catalogue
"Chief Executive"	means the Chief Executive of the Ministry of Business, Innovation and Employment from time to time and his or her delegate;
"Force Majeure Event"	means an event, occurrence or failure caused directly or indirectly by anything beyond the reasonable control of a party including forces of nature, acts of war or acts of public enemies;
"Programme"	means the meaning given to that term by section 2 of the Broadcasting Act 1989;
"Purchaser"	means the provisionally successful bidder in the Auction for the Spectrum Licence(s)
"Registered"	means recorded on the Register of Radio Frequencies established under section 5 of the Act;
"Service Requirement"	means the continuous and on-going service requirement set out in clause 5.2;
"Settlement Amount"	means the total amount, specified in clause 3.1, of all successful bid(s) made by the Purchaser in respect of the Spectrum Licence(s);
"Spectrum Licence(s)"	means the spectrum licence or spectrum licences, as the case may be, referred to in Schedule 1;

"Working Day" means a 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 a public holiday within the meaning of section 44 of the Holidays Act 2003, or 27, 28 or 29 December 2017;

1.2 Construction

In this agreement:

- (a) a reference to "including" or similar phrases does not imply any limitation;
- (b) a reference to a person includes an individual, or a body corporate;
- (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 subclause headings in this agreement 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. TERM OF THIS AGREEMENT

2.1 Term expires on date of notification from the Chief Executive

- (a) The term of this agreement commences from the date of this agreement and expires on the date on which—
 - (i) the Chief Executive notifies the Purchaser that he or she is satisfied that the Service Requirement has been met, in accordance with clause 5.7; or
 - (ii) the Spectrum Licence(s) are transferred to the Crown pursuant to the power of attorney referred to in clause 6.
- (b) Paragraph (a) has effect without prejudice to clause 6(b).

3. PURCHASE AND SETTLEMENT

3.1 Settlement amount

The Settlement Amount is NZ\$**[insert]** including GST.

Payment must be made in New Zealand dollars.

3.2 Settlement

Settlement must be undertaken by full payment of the Settlement Amount.

3.3 Settlement on invoice

Settlement is due within 10 Working Days of the completion of the Auction. Payment must be made to the Auctioneer with all funds cleared by the date of settlement.

4. TRANSFERS AND CREATION OF INTERESTS BY THE PURCHASER

4.1 Transfers and creation of interests prohibited

- (a) The Purchaser must not, during the term of this agreement, except as provided in clause 4.2, transfer, assign, or create, or purport to transfer, or assign or create, any Registered interest in the Spectrum Licence(s) in favour of any person other than the Purchaser itself or the Crown.
- (b) To avoid doubt, paragraph (a) does not prohibit the Purchaser from entering into any agreement for a transaction that is conditional upon receiving the consent of the Chief Executive and that will not take effect until the consent of the Chief Executive is received.

4.2 Chief Executive may give consent

- (a) The Purchaser may with the prior written consent of the Chief Executive, transfer, assign or create any Registered interest in the Spectrum Licence(s) (and if there are more than one Spectrum Licence, in any of them) in favour of any person other than the Purchaser itself.
- (b) Consent under paragraph (a) must be applied for no later than 20 Working Days prior to the date of the transaction.

4.3 Consent subject to conditions

- (a) If the Chief Executive's consent is sought under clause 4.2, the Purchaser must ensure that in the case of a transfer, assignment or other transaction in relation to the Spectrum Licence(s), the proposed transferee, assignee, or other party to such a transaction executes a Sound Broadcasting Spectrum Licence Agreement with the Crown in relation to the Spectrum Licence(s) for which consent to the transaction is sought.
- (b) The agreement must contain covenants to the same effect and with a term equal to the remaining term of this agreement, including the Service Requirement, the prohibition on transfers and creation of interests as set out in clause 4.1 and the retention of a Caveat on the Spectrum Licence(s) in favour of the Crown as set out in clause 7.1.

5. SERVICE AND COMPLIANCE REQUIREMENTS

5.1 Compliance with the Service Requirement

The Service Requirement must be met, in respect of each Spectrum Licence, no later than 2 years from the date on which the transfer of the Spectrum Licence(s) to the Purchaser is Registered.

5.2 Continuous On-going Service Requirement

The Purchaser must have implemented a continuous and on-going sound radio broadcasting service that utilises each of the Spectrum Licence(s) to which this agreement relates, and that;

- (a) operates by transmitting a Programme 24 hours per day, 7 days per week (excluding reasonable outages including those for maintenance and construction); and

- (b) has operated continuously for the entire 3 month period before the date on which the Purchaser submits its statutory declaration in accordance with clause 5.5.

5.3 Performance of obligations by third party

- (a) The Purchaser may perform any obligation it has under clause 5.2 by—
 - (i) providing a service itself; or
 - (ii) procuring that a service be provided by another person; or
 - (iii) using a combination of those methods.
- (b) Provision of a service by a person other than the Purchaser as contemplated by paragraph (a) is deemed, for the purposes of assessing the Purchaser's compliance with any obligation under clause 5.2, to be provision of that service by the Purchaser.
- (c) However, no arrangement under which a person other than the Purchaser provides a service as contemplated by paragraph (a) relieves the Purchaser from being solely responsible for the performance of the relevant obligation.

5.4 Chief Executive determination

Whether or not the Service Requirement has been met is a matter to be determined by the Chief Executive in his or her sole discretion based solely on information relating to whether the requirements in clause 5.2 have been satisfied.

5.5 Purchaser must submit a statutory declaration

To assist the Chief Executive with his or her determination under clause 5.4, the Purchaser must submit to the Chief Executive no later than the date referred to in clause 5.1 (time being of the essence), a statutory declaration in the form prescribed in Appendix 1:

- (a) stating that the Service Requirement is met in respect of each Spectrum Licence; and
- (b) attaching sufficient evidence to satisfy the Chief Executive that the Service Requirement is met.

5.6 Chief Executive may require Further Information

- (a) The Chief Executive may request further information ("Further Information") from the Purchaser that is reasonably required to assess compliance with clause 5.2 and make his or her determination under clause 5.4.
- (b) The Purchaser must respond promptly to such a request and in any event, must provide the Further Information within 10 Working Days of receiving the request.
- (c) The Ministry agrees to keep any Further Information strictly confidential unless disclosure is required by law, Ministers, or parliamentary convention. The Ministry acknowledges that for the purposes of the Official Information Act 1982, the withholding of the information may be necessary to avoid unreasonable commercial prejudice to the Purchaser in terms of section 9(2)(b)(ii) of the Official Information Act. The Ministry must consult with the Purchaser on any request made under the Official Information Act for any information provided by the Purchaser.

- (d) If:
 - (i) for any reason, it is not practicable for the Purchaser to provide the Further Information within the specified timeframe, the Purchaser must give notice to the Ministry of the reason for any delay and the Ministry may, taking into account the circumstances, determine a reasonable extension; or
 - (ii) the Further Information does not exist or cannot be compiled or found after due inquiry, the Purchaser may refuse the Chief Executive's request after giving notice within 10 Working Days of receiving the request to the Ministry of the reason for the refusal. The absence of the Further Information may be taken into account by the Chief Executive when determining whether the Service Requirement in clause 5.2 has been met and whether the Purchaser has complied with the terms of the agreement.

5.7 Chief Executive must notify if implemented

Within 30 Working Days of receiving the statutory declaration submitted under clause 5.5, or the Further Information requested under clause 5.6, the Chief Executive must provide written notice to the Purchaser as to whether or not he or she is satisfied, in accordance with clause 5.4, that the Service Requirement as set out in clause 5.2 has been met. Written notice from the Chief Executive that the Service Requirement has not been met is conclusive in the absence of manifest error.

5.8 Effect of failure to meet requirements

Subject to any extension of the date of the Service Requirement in accordance with clause 5.11, if an event in clause 5.9 occurs and is not remedied, then:

- (a) the Service Requirement is deemed to have not been met; and
- (b) the Purchaser is not entitled to any refund (partial or otherwise) of the Settlement Amount paid by the Purchaser for the Spectrum Licence(s).

5.9 Events leading to failure to implement

The events constituting failure to implement the Service Requirement are:

- (a) the Purchaser does not submit the statutory declaration under clause 5.5 (including not submitting it by the date referred to clause 5.1 or not submitting it because the Purchaser cannot declare that it has met the Service Requirement); or
- (b) the Chief Executive provides notice under clause 5.7 that the Service Requirement has not been met; or
- (c) the statutory declaration provided under clause 5.5 or any Further Information provided by the Purchaser under clause 5.6, is false, misleading or incomplete in any material respect.

5.10 No further obligation if implemented

- (a) To avoid doubt, if the Chief Executive gives notice under clause 5.7 that the Service Requirement has been met, the Purchaser is under no other obligation in respect of these requirements on or after the date of the notice.
- (b) Clause 5.10(a) only applies if the statutory declaration under clause 5.5 and any Further Information under clause 5.6 provided by the Purchaser are not incorrect,

misleading or incomplete in any material respect in relation to the Service Requirement.

5.11 Extension of Service Requirement

Notwithstanding any other provision in this agreement, the Purchaser must meet the Service Requirement by the date referred to in clause 5.1. However, this date may be extended at any time:

- (a) for any reason with the prior written consent of the Chief Executive; or
- (b) in accordance with clause 5.12(c).

5.12 Force majeure

If the Purchaser is affected, or likely to be affected, by a force majeure event:

- (a) the Purchaser must immediately give to the Ministry prompt notice of that fact, including:
 - (i) full particulars of the force majeure event;
 - (ii) an estimate of the likely duration of the force majeure event;
 - (iii) the obligations affected by the force majeure event and the extent of its effect on those obligations; and
 - (iv) the steps taken by the Purchaser to rectify it;
- (b) the Purchaser's obligations under this agreement are suspended to the extent to which they are affected by the relevant force majeure event and for as long as that force majeure event prevents the Purchaser from fulfilling its obligations; and
- (c) the date by which the Service Requirement must be met will be extended by such time as the Ministry and the Purchaser consider to be reasonable in the circumstances, such time to be no less than the duration of the period during which the Purchaser is prevented from fulfilling its obligations by the force majeure event.

6. TRANSFER OBLIGATION AND POWER OF ATTORNEY

The Purchaser must execute a power of attorney in the form prescribed in Appendix 2, irrevocably appointing the Chief Executive (or the Chief Executive's duly authorised delegate) as its attorney for the purpose of transferring any Spectrum Licence(s) to the Crown under section 56 of the Act:

- (a) if the Service Requirement is not met in respect of those Spectrum Licence(s) in accordance with clause 5.2; or
- (b) if the statutory declaration provided by the Purchaser under clause 5.5 or any Further Information under clause 5.6 are found to be false, misleading or incorrect in any material respect.

7. CROWN'S CAVEATABLE INTEREST

7.1 Caveat lodged by Crown

Pursuant to section 89 of the Act, the Crown will lodge with the Registrar of Radio Frequencies a caveat over the Spectrum Licence(s).

7.2 **Effect of Caveat**

The caveat will have the effect of prohibiting the Registrar from making any entry on the register charging, modifying, or transferring the Spectrum Licence(s), other than with the consent of the Crown.

7.3 **Duration of Caveat**

Any caveat lodged under clause 7.1 will remain in force until the date of expiry of this agreement.

7.4 **Crown consents to certain**

The Crown will consent as caveator to any dealing:

- (a) giving effect to a transaction that the Chief Executive has consented to under clause 4.3; or
- (b) for which the Chief Executive's consent under clause 4.3 is not required.

8. **DISPUTE RESOLUTION**

8.1 **Good faith**

The parties must attempt to resolve any dispute or difference that may arise under or in connection with this agreement amicably and in good faith, referring the dispute to the parties' senior managers if necessary.

8.2 **Inability to resolve**

If the parties' senior managers are unable to resolve a dispute within 10 Working Days of it being referred to them, the parties must refer the dispute to mediation or another form of alternative dispute resolution agreed between the parties.

8.3 **Mediation**

If a dispute is referred to mediation, the mediation must be conducted by a single mediator appointed by the parties (or, if they cannot agree, appointed by the Chair of LEADR New Zealand Inc.) and on the terms of the LEADR New Zealand Inc. standard mediation agreement (unless the parties agree otherwise). The parties must pay their own costs relating to any mediation or other form of alternative dispute resolution (unless they agree otherwise).

8.4 **Contractual obligations**

The parties must continue to perform their obligations under this agreement as far as possible as if no dispute had arisen pending final resolution of the dispute.

8.5 **Urgent relief**

Nothing in clause 8 precludes either party from taking immediate steps to seek urgent relief before a New Zealand Court.

9. **GENERAL**

9.1 **Purchaser's liability and indemnity**

- (a) Neither party will have any liability to the other party (in contract, tort (including negligence) or breach of statutory duty or otherwise), for any indirect or

consequential losses (including loss of profits, revenue, business or anticipated savings) arising out of or in connection with this agreement.

- (b) The Purchaser agrees to remedy any breach of clause 4.1 as soon as reasonably practicable and in any event within 3 months of becoming aware of such a breach.

9.2 **No amendment**

No variation to this agreement is effective unless it is in writing and signed by the parties.

9.3 **No waiver**

No party is deemed to have waived any rights under this agreement unless the waiver is in writing and signed by that party. A failure to exercise or a delay in exercising any right under this agreement will not operate as a waiver of that right. Any such waiver will not constitute a waiver of any subsequent or continuing right or of any other provision in this agreement.

9.4 **Severability**

Any unlawful or voidable provision in this agreement will be read down so as to be valid and enforceable or, if it cannot be read down, will be severed from this agreement without affecting the validity, legality, or enforceability of the remaining provisions, provided the reading down or severing does not materially affect the purpose of or frustrate this agreement.

9.5 **New Zealand law to apply**

This agreement will be governed by and construed in accordance with New Zealand law.

9.6 **Communications and notices**

- (a) Any notice to be given under this agreement must be in writing and must be delivered or sent by registered post to the parties' respective addresses as set out in clauses 9.6(c) and 9.6(d), or if a written notice of change of address is given in accordance with this clause 9.6, then to the new address.
- (b) Any notice will be deemed to be served on the date of delivery or the Business 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.
- (c) The address for the service of notices on the Crown is:

Ministry of Business, Innovation and Employment
PO Box 1473
WELLINGTON

Attention: Manager, Radio Spectrum Policy and Planning

- (d) The address for the service of notices on the Purchaser is:

[insert]

**APPENDIX 1
STATUTORY DECLARATION**

**STATUTORY DECLARATION IN ACCORDANCE WITH CLAUSE 5.5 OF SOUND
BROADCASTING SPECTRUM LICENCE AGREEMENT**

I, **[name]**, **[position]** of **[name]**, **[address]**, do solemnly and sincerely declare that:

1. I am a **[position]** of **[company name¹]** (the "Company") and authorised by the Company to make this declaration on its behalf.

2. The Company has, in accordance with clause 5.2 of the Sound Broadcasting Spectrum Licence Agreement between Her Majesty the Queen in right of the Government of New Zealand and the Company dated **[insert date]** ("the agreement"), implemented a continuous and on-going sound radio broadcasting service that utilises each of the Spectrum Licence(s) to which the agreement relates, and that:
 - (a) operates by transmitting a Programme 24 hours per day, 7 days per week (excluding reasonable outages including those for maintenance and construction); and
 - (b) has operated continuously for the entire 3 month period before the date on which this declaration is submitted.

And I make this solemn declaration conscientiously believing the same to be true and by virtue of the Oaths and Declarations Act 1957.

Signature:

Declared at **[location]** this **[XX]** day of **[month]** 201**[X]**.

[Signed by a Justice of the Peace or other person authorised to take a statutory declaration in terms of section 9 of the Oaths and Declarations Act 1957].

¹ The above draft will be suitably amended if the purchaser is not a Company

**APPENDIX 2
POWER OF ATTORNEY**

POWER OF ATTORNEY

THIS DEED is dated the _____ day of **[insert month]** 2017 and made pursuant to clause 6 of the Sound Broadcasting Spectrum Licence Agreement ('the agreement') between Her Majesty the Queen in right of the Government of New Zealand ('the Crown') and **[insert name of company]²** ('Company'),

BY [insert name], as directors of the Company:

1. We appoint the Chief Executive of the Ministry of Business, Innovation and Employment from time to time and his or her delegate as the Company's attorney ('the attorney') for the purpose of transferring the Spectrum Licence(s) referred to in the agreement to the Crown under section 56 of the Radiocommunications Act 1989:
 - (a) if the Service Requirement is not met in accordance with clause 5.2 of the agreement; or
 - (b) if the statutory declaration provided under clause 5.5 of the agreement or any Further Information under clause 5.6 of the agreement are found to be false, misleading or incorrect in any material respect.
2. This Power of Attorney is given for and subject to the purpose described above.
3. We give this this Power of Attorney irrevocably and for the duration of the agreement.
4. We agree to ratify and confirm everything that the attorney lawfully does or causes to be done under this Power of Attorney.

² The above draft will be suitably amended if the purchaser is not a Company

IN WITNESS WHEREOF this Deed has been executed on the date specified above:

SIGNED by **[insert name]**

SIGNED by **[insert name]**

in the presence of—

in the presence of—

Witness' signature:

Witness' signature:

Witness' full name:

Witness' full name:

Witness' occupation:

Witness' occupation:

Witness' address:

Witness' address: