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

[*insert month*] 2020

## SPECTRUM LICENCE AGREEMENT

This agreement dated the                      day of **[insert month]** 2020

**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**").

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Signature

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Date

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

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Signature

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Signature

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Date

**SCHEDULE 1 - DETAILS**

<b>Auction ID</b>	<b>Spectrum Licence Number</b>	<b>Transmit Location</b>	<b>Frequency (MHz)</b>
[X]	[XXXXXX]	[Transmit Location]	[XX.X] MHz (FM)

## SCHEDULE 2 - TERMS AND CONDITIONS

<b>1. DEFINITIONS AND INTERPRETATION .....</b>	<b>5</b>
1.1 Definitions.....	5
1.2 Construction.....	6
<b>2. TERM OF THIS AGREEMENT .....</b>	<b>6</b>
2.1 Term expires on date of notification from the Chief Executive .....	6
<b>3. PURCHASE AND SETTLEMENT .....</b>	<b>6</b>
3.1 Settlement amount.....	6
3.2 Settlement.....	6
3.3 Settlement on invoice .....	6
<b>4. TRANSFERS AND CREATION OF INTERESTS BY THE PURCHASER .....</b>	<b>7</b>
4.1 Transfers and creation of interests prohibited .....	7
4.2 Chief Executive may give consent.....	7
4.3 Consent subject to conditions.....	7
<b>5. SERVICE AND COMPLIANCE REQUIREMENTS .....</b>	<b>7</b>
5.1 Compliance with the Service Requirement.....	7
5.2 Continuous On-going Service Requirement .....	7
5.3 Performance of obligations by third party .....	8
5.4 Chief Executive determination.....	8
5.5 Purchaser must submit a statutory declaration.....	8
5.6 Chief Executive may require Further Information .....	8
5.7 Chief Executive must notify if implemented .....	9
5.8 Effect of failure to meet requirements.....	9
5.9 Events leading to failure to implement.....	9
5.10 No further obligation if implemented .....	9
5.11 Extension of Service Requirement .....	10
5.12 Force majeure.....	10
<b>6. TRANSFER OBLIGATION AND POWER OF ATTORNEY .....</b>	<b>10</b>
<b>7. CROWN'S CAVEATABLE INTEREST.....</b>	<b>10</b>
7.1 Caveat lodged by Crown .....	10
7.2 Effect of caveat.....	11
7.3 Duration of Caveat.....	11
7.4 Crown consents to certain .....	11
<b>8. DISPUTE RESOLUTION.....</b>	<b>11</b>
8.1 Good faith .....	11
8.2 Inability to resolve .....	11
8.3 Mediation .....	11
8.4 Contractual obligations .....	11
8.5 Urgent relief .....	11
<b>9. GENERAL .....</b>	<b>11</b>
9.1 Purchaser's liability and indemnity.....	11
9.2 No amendment .....	12
9.3 No waiver.....	12
9.4 Severability .....	12
9.5 New Zealand law to apply.....	12
9.6 Communications and notices.....	12
<b>APPENDIX 1 STATUTORY DECLARATION.....</b>	<b>13</b>
<b>APPENDIX 2 POWER OF ATTORNEY .....</b>	<b>14</b>

## 1. DEFINITIONS AND INTERPRETATION

### 1.1 Definitions

In this agreement, unless the context otherwise requires:

<b>"Act"</b>	means the Radiocommunications Act 1989;
<b>"Auction"</b>	means the Radio Frequency Auction No.19 conducted on behalf of the Crown in the 2019/20 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);
<b>"Auction Catalogue"</b>	means the Auction Catalogue for Radio Frequency Auction No.21 dated 15 July 2020, as amended from time to time
<b>"Auctioneer"</b>	has the same meaning as set out in clause 1.1 of the Auction Catalogue
<b>"Chief Executive"</b>	means the Chief Executive of the Ministry of Business, Innovation and Employment from time to time and his or her delegate;
<b>"Force Majeure Event"</b>	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;
<b>"Programme"</b>	means the meaning given to that term by section 2 of the Broadcasting Act 1989;
<b>"Purchaser"</b>	means the provisionally successful bidder in the Auction for the Spectrum Licence(s)
<b>"Registered"</b>	means recorded on the Register of Radio Frequencies established under section 5 of the Act;
<b>"Service Requirement"</b>	means the continuous and on-going service requirement set out in clause 5.2;
<b>"Settlement Amount"</b>	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);
<b>"Spectrum Licence(s)"</b>	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 29, 30, 31 December 2020;

## 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 name<sup>1</sup>]** (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]** 20**[XX]**.

[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].

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<sup>1</sup> 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]** 20**[XX]** 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]<sup>2</sup>** ('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.

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<sup>2</sup> 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: