

Appendix 4

AGREED DRAFTING FOR WHOLESALE NON-PRICE TERMS

1. BILLING: *The parties have agreed to the following provisions (and associated definition) in place of clauses 15.2 – 15.5 and clause 38 of the TelstraSaturn 2000 MCSA.*

Dealing with Invoice Errors

15.2 Except as expressly provided in this master agreement, if TelstraClear:

- (a) reasonably believes there is an erroneous duplication of the items charged in an invoice, or other error in a calculation of the amount of an invoice (“**an Invoice Error**”) which has resulted in Telecom overcharging TelstraClear on that invoice; and
- (b) on or before the due date for payment, gives notice setting out in full details of the invoice, the Invoice Error and the grounds for TelstraClear’s belief that the Invoice Error exists,

TelstraClear may withhold payment of the amount by which it reasonably believes Telecom may have overcharged it on that invoice by reason of that Invoice Error until the parties have settled in accordance with clause 15.4, 15.5 or 15.6 whether or not that Invoice Error exists and, if so, the amount of it and the amount properly payable on that invoice after correcting it.

15.3 If TelstraClear fails to follow the notice requirements set out in clause 15.2(b), then Telecom may treat any resulting withholding or deduction by TelstraClear as a breach of this master agreement.

15.4 Following the giving of any notice under clause 15.2(b), the parties must use reasonable endeavours to settle any claim of Invoice Error. If they do not settle any claim of Invoice Error within 20 Working Days after the due date for payment of the invoice, either party may give notice referring the matter directly to an independent telecommunications accounting expert (the “**Expert**”) to be finally resolved and, unless otherwise agreed in writing:

- (a) the parties must endeavour to appoint a single Expert. If, within 5 Working Days of the notice under this clause 15.4 being given, the parties are unable to agree on a single Expert, the Expert shall be appointed by the President of the Institute of Chartered Accountants of New Zealand;
- (b) the Expert must adopt a procedure which, in the Expert’s opinion, is the most simple and expeditious procedure possible in the circumstances;
- (c) the provisions of the Arbitration Act 1996 shall not apply to any procedure under this clause 15.4;
- (d) the parties will provide the Expert with any information that the Expert reasonably requires;
- (e) the Expert must use reasonable endeavours to make a decision on the claim of an Invoice Error within 30 Working Days of appointment; and
- (f) the costs of the Expert shall be paid as follows:

- (i) if the Expert decides that there is no Invoice Error or, as a result of an Invoice Error the amount of the invoice is increased after correction, then TelstraClear will pay the costs of the Expert;
- (ii) if the Expert decides that there is an Invoice Error and the amount of the invoice is reduced by 5% or less after correction, then TelstraClear and Telecom will equally share and pay the costs of the Expert; and
- (iii) if the Expert decides that there is an Invoice Error and the amount of the invoice is reduced by more than 5% after correction, then Telecom will pay the costs of the Expert.

15.5 If it is agreed by the parties or found by the Expert that an Invoice Error exists in the invoice then, depending on whether the amount properly payable by TelstraClear on that invoice after correction of that Invoice Error is more than the amount paid (an underpayment) or less than the amount paid (an overpayment), either TelstraClear or Telecom must forthwith pay to the other the amount of the difference between the amount paid and the amount properly payable by TelstraClear on the invoice after correction of that Invoice Error, plus:

- (a) in the case of an underpayment, interest on the amount of the difference at the Bill Rate (as at the day after the due date for payment of the invoice) plus 5% for the period from the due date for payment of the invoice to the date of payment of the amount of the difference, or the date clause 15.11 becomes applicable, whichever is earlier; or
- (b) in the case of an overpayment, interest on the amount of the difference at the Bill Rate (as at the date TelstraClear made the overpayment) plus 5% from the date it made the overpayment to the date of payment of the amount of the difference, or the date clause 15.11 becomes applicable, whichever is earlier.

15.6 If it is agreed by the parties or found by the Expert that there is not an Invoice Error in the invoice, TelstraClear must forthwith pay any amount withheld plus interest on the amount withheld at the Bill Rate (as at the date of the invoice) plus 5% for the period from the day after the due date for payment to the date of payment of the amount withheld, or the date clause 15.11 becomes applicable, whichever is earlier.

Settling other invoicing disputes

15.7 No later than 365 days after the due date for payment of any invoice, TelstraClear may give notice disputing any amount in that invoice, regardless of whether or not it has previously given notice of Invoice Error in relation to that invoice. The notice must set out details of the invoice, the disputed amount and the grounds for TelstraClear's belief together with any supporting evidence available from its records. The parties must settle the dispute in accordance with clause 15.8. For the avoidance of doubt, clauses 15.2 to 15.6 do not apply to any notice given under this clause 15.7, and clauses 15.8 and 15.9 do not apply to any notice given under clause 15.2(b).

15.8 The parties must use reasonable endeavours to settle promptly any dispute under clause 15.7. If they do not settle the dispute by agreement within 40 Working Days after notice was given under clause 15.7 either carrier may give notice referring the matter directly for settlement by arbitration under clause 38.4 without the need for prior negotiation. The arbitration must commence no earlier than 10 Working Days after the date the notice is given and the terms of the reference must be confined to that claim or dispute.

15.9 If a dispute under clause 15.7 is settled in favour of TelstraClear, Telecom must forthwith refund the amount agreed or found to have been overpaid plus interest at the Bill Rate plus 5% (as at the date of the overpayment) on the overpaid amount for the period from the date the overpayment was made to the date of payment of the refund or the date clause 15.11 becomes applicable, whichever is earlier.

Time limit for invoicing

15.10 Nothing in these terms or in any invoice or statement prejudices Telecom's right to invoice TelstraClear for charges for any Service provided under these terms up to the date 180 days after the date that Service was provided (after which date no charge may be made for that Service).

Interest on unpaid amounts

15.11 Where an amount due from either carrier under clause 15.5, 15.6 or 15.9 remains unpaid on the sixth Working Day after the date of settlement of the claim or dispute, that carrier must pay interest on that amount at the Bill Rate (as at the date 6 Working Days after the date of settlement of the claim or dispute) plus 10% for the period from that sixth Working Day to the date of payment of that amount, in addition to the amount due under clause 15.5, 15.6 or 15.9.

15.12 Except where interest is payable on an amount under clause 15.5, 15.6, 15.9 and/or 15.11, where an amount due from TelstraClear under these terms remains unpaid after its due date, TelstraClear must pay interest on that amount at the Bill Rate (as at the due date) plus 10% for the period from the due date to the date of payment of that amount.

15.13 Under no circumstances does payment of the amount of the difference under clause 15.5, the amount withheld under clause 15.6, the refund under clause 15.9, or the amount unpaid under clause 15.12, release TelstraClear from liability for any interest payable on that amount under this clause.

No prejudice to obligations, rights and remedies

15.14 TelstraClear remains liable to pay any charges incurred for any Service between the time of suspension or restriction of that Service, or termination of these terms, by Telecom and the actual discontinuance of that Service.

15.15 Each carrier must pay the other carrier's charges for any Service that has not been suspended, restricted or terminated by the other carrier even if the first carrier is unable to use that Service as a result of the suspension, restriction or termination of another Service.

15.16 Neither TelstraClear's obligation to pay interest under this clause, nor the performance of that obligation, prejudices Telecom's rights and remedies in respect of TelstraClear's non-payment of an amount on its due date.

Basis for interest rate formula

15.17 The parties record that interest payable under this clause constitutes liquidated damages and that the interest rate formulae set out in clauses 15.11 and 15.12 represent a genuine forecast of the approximate loss a carrier may suffer as the result of non-payment after taking into account the complexity of each carrier's business.

15.18 In this clause 15, "**Bill Rate**" means the average 90 day bank bill mid rate as quoted on Reuters Screen page BKBM or the equivalent page replacing page BKBM (known at the date of these terms as the FRA rate) at or about 10.45am on the relevant date or, if at that time page BKBM or the equivalent replacement page is not available, the last rate quoted on that page before it became unavailable.

Provision of information

- 15.19 Any invoice Telecom renders to TelstraClear for Services provided must include reasonable information in accordance with normal commercial practice between interconnected Network Operators to enable TelstraClear to ascertain the month in which invoiced Services were provided and to check the accuracy of all amounts charged.

“Network Operator” means the Carrier, an Other Carrier or Telecom.

Dispute resolution

- 38.1 For the purposes of the procedures set out in the rest of this clause (and incorporated by consent of the parties) and unless the parties expressly agree otherwise in writing (or the contrary is provided in this master agreement or any SDA), a “**dispute**” is any matter (other than a matter to which clause 15.5 applies) relating to this master agreement or any SDA (including any question regarding the existence, validity, interpretation, performance, breach or termination of this master agreement or any SDA) about which the parties disagree.
- 38.2 Either party may at any time give notice describing a dispute and invoking the procedures set out in the rest of this clause.
- 38.3 If notice describing a dispute is given, then:
- (a) during a maximum negotiation period of 20 Working Days from the date the notice was given, the parties must attempt in good faith to negotiate a resolution of the dispute;
 - (b) at any time during the negotiation period, either party may give 3 Working Days notice requiring a meeting, specifying a time and place for the meeting and designating its representative with authority to resolve the dispute;
 - (c) the other party must give 1 Working Day’s notice before the meeting designating its representative with authority to resolve the dispute;
 - (d) the authorised representatives must meet at the specified time and place and as many times as necessary during the negotiation period to attempt in good faith to resolve the dispute;
 - (e) at any time during the negotiation period, the parties may agree to refer the dispute to mediation;
 - (f) unless otherwise agreed in writing, the then current model mediation agreement issued by LEADR New Zealand Inc must be used and mediation must be completed within 20 Working Days of the parties agreeing to refer the dispute to mediation;
 - (g) unless otherwise agreed in writing, neither party may refer a dispute to arbitration before the end of the negotiation period and, if applicable, the mediation period.
- 38.4 These arbitration procedures apply if a dispute has not been resolved by the end of the negotiation period and, if applicable, the mediation period. Either party may then give notice requiring any part of the dispute to be referred to and finally resolved by arbitration and, unless otherwise agreed in writing:

- (a) the parties must endeavour to appoint a single arbitrator. If, within 10 Working Days of the notice being given, the parties are unable to agree on the single arbitrator, the arbitrator shall be appointed by the President of the New Zealand Law Society;
- (b) the arbitrator must adopt a procedure which, in the arbitrator's opinion, is the most simple and expeditious procedure possible in the circumstances;
- (c) the arbitrator may determine the dispute without a hearing unless either party gives notice requiring one, in which case the arbitrator must treat that as a material consideration in assessing costs;
- (d) the arbitrator may only appoint an expert under Article 26 of the First Schedule of the Arbitration Act 1996 (in this clause "**the Act**") if the parties agree;
- (e) the arbitrator must not adopt inquisitorial processes;
- (f) the arbitration must take place in Wellington;
- (g) the arbitrator must determine the dispute under New Zealand law;
- (h) if the arbitration is an international arbitration as defined in Article 1(3) of the First Schedule to the Act, the rules in the Second Schedule to the Act apply except to the extent that those rules are inconsistent with this clause 38.4;
- (i) the arbitration must, if reasonably practicable, be completed within 2 months of the arbitrator's appointment and otherwise be conducted in accordance with the Act; and
- (j) either party may appeal to the High Court on any question of law arising from an award.

38.5 Neither party may use, other than to attempt to resolve the dispute, any information disclosed by the other in the course of negotiation, mediation or arbitration under the above procedures.

38.6 Neither party may disclose any such information to anyone other than an adviser who has entered into a deed undertaking:

- (a) not to disclose any of the information, or any analysis of the information, other than to the parties, a mediator, the arbitrator or a court, except as compelled by law; and
- (b) to return all material on which such information is recorded on completion of the adviser's services.

38.7 For the avoidance of doubt, the parties agree that neither party is prevented by these arbitration procedures from, in respect of any matter relating to these terms, exercising any rights under Part 2 of the Telecommunications Act 2001, regardless of whether or not the matter is or has previously been the subject of these arbitration procedures.

2. CREDIT ARRANGEMENTS AND SECURITY: *The parties have agreed to the following new provisions (and associated definition).*

3. CONDITIONS OF PROVIDING SERVICES

- 3.1 Telecom is not obliged to continue to provide Services under this master agreement to the Carrier after the date 30 days after the Determination Date unless:
- (a) by that date, Telecom has received evidence reasonably satisfactory to Telecom that the Carrier has a long term credit rating for its senior unsecured indebtedness of at least A3 (Moody's Investor Services, Inc.), A- (Standard and Poor's Ratings Group) or B+ (AM Best) (in this clause 2, an "**acceptable credit rating**"); or, if such evidence is not received, then
 - (b) by that date, Telecom has been delivered the Carrier's choice of an unconditional (a) guarantee, (b) Bank guarantee or (c) letter of credit, in each case as credit enhancement for the Carrier's obligation to pay for Services (each a "**security**"). The security must be in a form reasonably acceptable to Telecom and from a Bank, or other person, which has an acceptable credit rating. The security must be for an amount to be agreed between the parties, each acting reasonably, that is equal to the total value of charges for services provided by Telecom to the Carrier that were reasonably equivalent to the Services over the three month period immediately prior to 1 June 2002 (calculated using the equivalent charges under this master agreement). The amount of the security shall be adjusted every six months after the Determination Date. The adjusted security amount shall be an amount agreed between the parties, each acting reasonably, that is equal to the total value of charges under these terms for Services over the three month period immediately preceding that adjustment date. If the adjusted security amount is greater, the Carrier must, within 30 days after that adjustment date, provide replacement or additional security that is equal to that new security amount, or, if the adjusted security amount is less, the Carrier may cause the security to be reduced accordingly;

and, in either case,

- (c) the Carrier at all times after the date 30 days after the Determination Date maintains either an acceptable credit rating or, failing that, a security that complies with clause 3.1(b).

"Determination Date" means the day on which public notice is given under section 27(c) of the Telecommunications Act 2001 of the Commission determination under section 27 that relates to the wholesale services part of the Carrier's 16 May 2002 application to the Commission.

3. NON-DISCRIMINATION: *The parties have agreed to the following new provisions.*

- 3.2 The following principles apply to the Services:
- (a) Telecom must provide its Service to the Carrier in a timely manner;
 - (b) the Service must be supplied to a standard that is consistent with

international best practice;

- (c) Telecom must provide the Service on terms and conditions (excluding price) that are consistent with those terms and conditions on which Telecom provides the Service to itself.

3.3 The principles in clause 3.2 are limited by the following factors:

- (a) reasonable technical and operational practicability having regard to the Network of Telecom;
- (b) Network security and safety;
- (c) existing legal duties on Telecom to provide a defined level of service to users of the Service;
- (d) the inability, or likely inability, of the Carrier to comply with any reasonable conditions on which the Service is supplied;
- (e) any request for a lesser standard of Service from the Carrier.

4. SERVICE LEVELS: *The parties have agreed to the following new provisions.*

4. SERVICE LEVEL AGREEMENT

- 4.1 Telecom must provide TelstraClear with a draft of a new Service Level Agreement by Friday 4 April 2003. The parties will use reasonable endeavours to agree the terms of a new Service Level Agreement within 90 days from the Determination Date.
- 4.2 If a new Service Level Agreement is not agreed by the parties within 90 days from the Determination Date, then either party (in this clause 4, the “**first party**”) may ask the Commission to determine:
 - (a) whether the Commission itself is the appropriate body to determine the unresolved matters related to the Service Level Agreement, or whether those matters should be determined by the Forum or by some other means;
 - (b) if the Commission determines that the unresolved matters related to the Service Level Agreement will be referred to the Forum, the appropriate terms of reference (if any) for the Forum;
 - (c) if the Commission determines that it will itself determine the unresolved matters related to the Service Level Agreement, what should be the terms of that Service Level Agreement.
- 4.3 The first party must give the other party at least seven days' prior written notice of its intention to refer the matter to the Commission under clause 4.2. The other party will not object to the first party referring the matter to the Commission, provided that the other requirements of this clause 4 are met.
- 4.4 The service level agreement entered into between Telecom and TelstraSaturn Limited on 18 August 2000 shall apply to the provision of Services under this master agreement until a new Service Level Agreement is agreed or determined in accordance with this clause 4.