

27 February 2020

Aidan Winder-Speed
c/o – regulation.branch@comcom.govt.nz

Cross-Submission on Consultation paper: Treatment of broadcasting services revenue in the Telecommunications Development Levy (TDL)

- 1 Kordia lodged a submission to the Commerce Commission (**Commission**) on the Treatment of Broadcasting Services Revenue in the Telecommunications Development Levy (TDL) Consultation Paper (**Consultation Paper**) on 12 February 2020.
- 2 Kordia thanks the Commission for the opportunity to provide cross-submissions in response to submissions of other parties on the Consultation Paper. Kordia's brief cross-submissions are set out below.
- 3 The submissions made by other parties do not alter Kordia's views as set out in its submission dated 12 February 2020.
- 4 We would welcome the opportunity to discuss our main submission and cross-submissions with the Commission if that may be of assistance to the Commission.

Cross-submissions in relation to the submissions of Television New Zealand Limited (TVNZ)

- 5 Kordia agrees with paragraph 8 of TVNZ's submission that the fee paid to Kordia by TVNZ is in relation to a broadcasting service that is provided to end-users free of charge and [to the extent that any revenue derived from that service may be defined as qualified revenue,] is therefore within the section 85A exclusion.
- 6 Kordia agrees with TVNZ's observation in paragraph 5 of its submission that whether a network is a PTN depends on whether the network is used or intended to be used in whole or in part by the public. Kordia submits that Kordia's DTT, DTH and FM radio broadcasting services do not generate qualified revenue as those services are not provided via a PTN.

Cross-submissions in relation to the submissions of Chorus

- 7 Kordia has submitted in paragraph 34 of its submission that "enable" and "facilitate" have broad meanings in relation the definition of telecommunications services.
- 8 Kordia notes the submission of Chorus in paragraph 4 of its submission that the interpretation of these terms should not be overly broad.
- 9 Kordia agrees with the Commission's interpretation at paragraph 62 of the Consultation Paper and the submission of Chorus in paragraph 5 of its submission that the relevant activities (e.g. technical/engineering support) must support the conveyance. In other words, there must be a nexus between the activities and the conveyance of telecommunications services provided by that person in order for those activities to be "telecommunications services", and for the revenue from those activities to potentially be qualifying revenue (if the other relevant criteria are met).
- 10 Kordia submits that such an interpretation provides a balanced approach without being overly narrow nor overly broad.

Cross-submissions in relation to the submissions of Optus

- 11 Kordia agrees with the submission of Optus that Optus' services are provided outside of New Zealand and are not licensed by the New Zealand authorities (Radio Spectrum Management group within MBIE).



- 12 If the Optus services are not provided in New Zealand then, while the uplink services provided by Kordia arguably may be a telecommunications service when viewed in isolation, it would be an unusual and logically unsatisfactory outcome for the end to end DTH (satellite) broadcasting service or value chain, or components of it, to be deemed a telecommunications service in New Zealand when the key component of that service (the satellite transmission services) was not. We submit that this cannot have been Parliament's intention.
- 13 Kordia also agrees with the submission of Optus in relation to question 10 (on page 3 of the Optus submission) to the effect that the prescribed uses of the TDL are unconnected with the services Optus provides. It follows that those prescribed uses are unconnected with the DTH services that Kordia provides using the Optus service.
- 14 If the Optus service is not within the scope of the TDL and, contrary to Kordia's submissions, Kordia's DTH service (and similar services of others) is within the scope of the TDL, then Kordia and others might not be able to claim a deduction from the TDL for the Optus input costs (which are considerable). This would be a final tax on Kordia (and potentially others) as it cannot pass this cost on to end-users, either directly or via Kordia's customers, as neither it nor they have a contractual relationship with end users.

Cross-submissions in relation to the submissions of MediaWorks

- 15 In respect of Kordia's Broadcast Services (as defined in our submission), Kordia disagrees with MediaWorks' submission (in MediaWorks' answers to questions 2, 4, 7, 8 and 9 and Appendix A) that signal broadcasting is a telecommunications service by means of a PTN, for the reasons set out in Kordia's main submission. Kordia submits that Kordia's DTT, DTH and FM radio broadcasting services do not generate qualified revenue as those services are not provided via a PTN.
- 16 Kordia agrees with the MediaWorks' submissions (in MediaWorks' answers to questions 2, 4, 7, 8 and 9 and Appendix A) that compression and multiplexing are not a telecommunications service nor part of a PTN, and that signal distribution is not part of a PTN.
- 17 We disagree with the MediaWorks' analysis in response to question 10 (although we agree that the amendments cause confusion in relation to previously clearly understood concepts and definitions). As per Kordia's submission, the key issue is whether Kordia's network is a PTN. Kordia disagrees that broadcast services only commence at the air interface, noting MediaWorks reference to its mux which is part of the value chain. We consider it unhelpful to disaggregate portions of the free-to-air broadcast value chain and consider each in isolation – for the purposes of the exemption in section 85A all parts of the value chain are "in relation to" the broadcasting service that is free to the end user.

Cross-submissions in relation to the submissions of RBA

- 18 In respect of Kordia's Broadcast Services (as defined in our main submission), Kordia disagrees with RBA's submission (in RBA's answers to questions 2, 4, and 7) that signal broadcasting is a telecommunications service by means of a PTN, for the reasons set out in Kordia's main submission. As noted above, Kordia's view is that its DTT, DTH and FM radio broadcasting services do not generate qualified revenue as those services are not provided via a PTN.
- 19 Kordia agrees with the RBA submissions (in RBA's answers to questions 2, 4, and 7) that compression and multiplexing are not a telecommunications service nor part of a PTN, and that signal distribution is not part of a PTN.

Cross-submissions in relation to the submissions of NZME

- 20 In respect of Kordia's Broadcast Services (as defined in our main submission), Kordia disagrees with NZME's submission (in NZME's answers to question 7) that signal broadcasting is a telecommunications service by means of a PTN, for the reasons set out in Kordia's main submission. As noted above, Kordia's view is that its DTT, DTH and FM radio broadcasting services do not generate qualified revenue as those services are not provided via a PTN.



- 21 Kordia agrees with the NZME submissions (in NZME's answer to question 7) that compression and multiplexing are not a telecommunications service.
- 22 While we agree with NZME's submission in response to question 10 that the amendments create confusion around previously commonly understood terms, Kordia does not agree with the NZME submission that the proposed definition of broadcasting services is too broad. In Kordia's submission a broad definition is required to give full effect to Parliament's intention to exclude all revenue within the whole free-to-air broadcast value chain from the scope of the TDL.

Cross-submissions in relation to the submissions of Sky

- 23 Kordia broadly agrees with many of Sky's submissions in respect of the questions posed by the Commission.
- 24 Notably, Kordia agrees with Sky's analysis of the definition of PTN, including that for a network to be a PTN it requires that members of the public use the network for the purpose of telecommunication (such that the public can cause or make that network to convey signals or content to another person).¹ Kordia submits that the public cannot use the DTT, DTH and FM Radio networks used by Kordia, for the reasons set out in Kordia's submission.
- 25 However, Kordia disagrees with the Sky submission in respect of question 10, and submits that a broad definition of "broadcasting services" is intended by Parliament. A narrow interpretation is not supported by the process which resulted in the exception. Kordia's understanding, as set out in Kordia's main submission, is that the decision to exclude free-to-air broadcasting services from the TDL was made deliberately and following submissions to Government on the issue. This was to avoid anomalies that might otherwise arise following the removal of the broadcasting exclusion from the interpretation of "telecommunication". Kordia sets out a fuller view in relation to this matter at paragraphs 29 to 37 of its main submission.
- 26 Kordia also notes Sky's reference in paragraph 13 of its submission to the Departmental Report on the Telecommunications Bill, which referred at paragraph 172 to the possibility of regulation of traditional broadcasting services such as DTT, and the possibility that Kordia may be required to contribute more to industry levies.
- 27 The comment about the possible regulation of DTT was not, however, carried across to the Select Committee Report on the Bill. The Select Committee focused on technological change as a reason for the proposed amendment to the definition of "telecommunication"².
- 28 Further, comment about Kordia possibly being required to pay more levies predated the insertion of the free-to-air related exception (now in section 85A of the Telecommunications Act) in the Amendment Bill. Section 85A was inserted by SOP after the report-back from the Select Committee. In any case, none of SKY's points nor the comments in paragraph 172 of the Departmental Report affect the meaning of the term "PTN" in the Telecommunications Act, which was not amended by the Amendment Bill.
- 29 Accordingly, Kordia submits that it would not be appropriate for the Commission to use those comments regarding a potential consequence to draw an inference that Kordia's Broadcast Services were intended to be brought within the scope of the TDL or are not within the section 85A exclusion.
- 30 Kordia agrees with Sky's comment in its response to question 5 in Attachment A to its submission in respect of the jurisdictional question regarding a satellite transmitting signals to New Zealand from a position which is not above New Zealand.

¹ See Sky's submission at paragraph 17.

² See footnote 14 of Kordia's main submission of 12 February 2020.



Final comments

- 31 Kordia thanks the Commission for the opportunity to provide cross-submissions in response to submissions of other parties. We thank the other parties for their submissions and thank the Commission for its work.
- 32 We would welcome the opportunity to discuss our submissions and cross-submissions with the Commission if that may be of assistance to the Commission.
- 33 Kordia's contact person for these cross-submissions is:

Michael Jamieson
EGM Legal and Risk
Kordia Group Limited

DDI: 09 551 7032
Mob: 021 544 434
Email: michael.jamieson@kordia.co.nz

Yours sincerely



Michael Jamieson
EGM Legal and Risk

