

DEED RELATING TO PQP2 INDEPENDENT VERIFICATION

PARTIES:

1. **CHORUS NEW ZEALAND LIMITED** of Level 10-11, 1 Willis Street, Wellington Central, Wellington 6011 (**Chorus**);
2. **COMMERCE COMMISSION** of Level 9, 44 The Terrace, Wellington Central, Wellington 6011 (**Commission**); and
3. **Synergies Economic Consulting Pty Ltd (Verifier)**

each a **Party** and together referred to as the **Parties**.

BACKGROUND:

- A. As part of the process for resetting Chorus' price-quality path (PQP) for its second regulatory period (**PQP2**) Chorus is required to submit an independent verifier report covering all expenditure, both capex and opex, with Chorus' proposal.
- B. The evaluation criteria and assessment factors relevant to the verification are contained within Section 2 of Subpart 8 of the Commission's Fibre Input Methodologies Determination 2020 (**Fibre IMs**). Chorus and the Commission have agreed on the terms of reference for the verification.
- C. Chorus has, with approval by the Commission, engaged Verifier to carry out the verification and prepare the verification report.
- D. This Deed sets out certain undertakings of the Parties relating to the verification.

THE PARTIES AGREE THAT:

1. DEFINITIONS AND INTERPRETATION

1.1 **Definitions:** In this Deed, unless the context requires otherwise:

- a. **Chorus Confidential Information** means, subject to clause 4.2, any information:
 - i. relating to the terms of the Engagement Agreement; or
 - ii. relating directly or indirectly to the business of Chorus or its suppliers or customers and disclosed to the Commission in connection with the Verification;
- b. **Engagement Agreement** means the Commercial Terms agreed between Chorus and Verifier, dated 1 May 2023, relating to the Verification;

- c. **Expenditure Proposal** means Chorus' Capex Proposals and opex proposals for PQP2, together with all supporting information submitted to the Commission with those proposals;
- d. **Fibre IMs** has the meaning given in recital B;
- e. **Good Independent Verification Practice** means the exercise of a degree of skill, diligence, prudence and foresight that would reasonably be expected from a skilled and experienced expert engaged in the Independent verification of an expenditure proposal (capex and opex) by the operator of a fibre network of similar size and complexity to Chorus' fibre network, taking into account domestic and international best practice and recognised independent verification standards;
- f. **Insurable Loss** means all losses, costs, expenses and liabilities for which professional indemnity insurance cover is commonly available in the New Zealand market to an established, reputable, skilled and experienced consultant in the position of the Verifier, in respect of services equivalent to the 'Services' defined in the Engagement Agreement;
- g. **Key Personnel** means those Verifier personnel specified in the Engagement Agreement as at the date of this Deed as responsible for carrying out the Verification;
- h. **PQP2** has the meaning given in recital A;
- i. **Terms of Reference** means the terms of reference for the Verification. The agreed Terms of Reference as at the commencement of this Deed are attached to this Deed;
- j. **Verification** means:
 - i. preparing and providing to the Commission the Verification Report; and
 - ii. all assessments, enquiries and other tasks necessary to prepare the Verification Report, including those specified or described in the Terms of Reference,and **Verify** has a corresponding meaning;
- k. **Verification Information** has the meaning given to that term in clause 3.4; and
- l. **Verification Report** means one or more written reports that include the contents specified or described in the Terms of Reference and otherwise provide the Commission with the appropriate Independent assurance needed to assess the Expenditure Proposal:
 - i. as to capex, under clause 3.8.5 of the Fibre IMs; and
 - ii. as to opex, under clause 3.8.5 of the Fibre IMs as if the references in that clause and clause 3.8.6 to "proposed capex" and "capital expenditure" were to "proposed operating expenditure" and "operating expenditure".

The Verification Report includes the Independent Verification Report.

1.2 Interpretation: In this Deed, unless the context otherwise requires:

- a. a capitalised term used but not defined in this Deed has the meaning given to it in the Terms of Reference or, if not defined in the Terms of Reference, in the Fibre IMs;
- b. a derivative expression of any defined expression will be construed in accordance with the relevant definition;
- c. clause and other headings are for ease of reference only and will not affect this Deed's interpretation;
- d. reference to a Party includes that Party's successors and permitted assigns;
- e. reference to the singular includes the plural and vice versa;
- f. references to clauses are to clauses in this Deed; and
- g. reference to any document (however described) are references to that document as modified, novated, supplemented, varied or replaced from time to time and in any form, whether on paper or in an electronic form.

1.3 Conflict: Verifier's and Chorus' obligations in favour of the Commission in this Deed must be complied with even where they conflict with any rights or obligations of Verifier and Chorus in the Engagement Agreement.

1.4 Not limiting on Commission: Nothing in this Deed or the Terms of Reference limits the Commission in the exercise of its functions under the Fibre IMs or Telecommunications Act 2001, including its assessment of the Expenditure Proposal and its determination of Capex Allowances or opex allowances for PQP2.

2. WARRANTIES, DUTIES OF CARE AND UNDERTAKINGS

2.1 Warranties: Verifier warrants to the Commission that Verifier:

- a. is, and at all times during the Verification will be, Independent; and
- b. is, and at all times during the Verification will be, fully authorised to enter into this Deed and carry out the Verification in accordance with its terms.

2.2 Duty of care to Commission: Verifier acknowledges that:

- a. Verifier owes the Commission an overriding duty of care to act reasonably in carrying out the Verification, including to act Independently; and
- b. any question as to whether Verifier has breached this duty of care must be assessed against the standard of Good Independent Verification Practice.

2.3 Specific undertakings by Verifier: Without limiting the duty of care acknowledged in clause 2.2, Verifier undertakes to the Commission:

- a. to carry out the Verification in accordance with the Terms of Reference and Good Independent Verification Practice;
- b. to use reasonable endeavours to obtain sufficient information from Chorus and other sources to allow Verifier to fully Verify the Expenditure Proposal; and

- c. for the purpose of maintaining Independence, to not seek to be engaged to provide any other services or advice to Chorus within 12 months from the date of the publication of the Commission's final PQP2 decision unless the Commission has provided prior written consent.

2.4 Duty of care to Chorus: Nothing in this clause 2 excludes or limits, or is excluded or limited by, any separate duty of care Verifier may owe to Chorus in respect of the Verification, provided that if Verifier's duty of care to Chorus conflicts with Verifier's duty of care to the Commission, Verifier's duty of care to the Commission takes precedence.

2.5 Specific undertaking by Chorus: Chorus undertakes to the Commission to use best endeavours to provide sufficient information to Verifier to allow Verifier to fully Verify the Expenditure Proposal.

3. DEALINGS WITH COMMISSION

3.1 Terms of Reference: In carrying out the Verification, Verifier must communicate with, attend meetings with, and provide reports to the Commission as set out in the Terms of Reference.

3.2 Amendments to the Terms of Reference: Chorus and Verifier must not amend the Terms of Reference without the Commission's prior written consent.

3.3 Other communications with the Commission: In addition to the meetings referred to in the Terms of Reference, either or both of Verifier and Chorus at the Commission's reasonable request must attend meetings with the Commission in order to keep the Commission informed of progress on the Verification and to assist the Commission's planning for how it will evaluate the Verification Report and Chorus' Expenditure Proposal. Chorus also agrees to provide the Commission within 10 Business Days of the commencement of this Deed with a draft schedule of meetings to be approved by mutual agreement between the Commission and Chorus.

3.4 Confidential Information: Chorus consents to Verifier disclosing any information to the Commission where such information was provided by Chorus to Verifier for purposes of the Verification (**Verification Information**). Clause 4 applies to the Verification Information the Commission receives from Verifier to the extent it is Chorus Confidential Information.

3.5 Preservation of records: Chorus and Verifier must keep copies of all communications between them relating to the Verification and preserve those records for a period of at least 1 year after the Verification Report is delivered to the Commission. Chorus or Verifier must provide any such communications to the Commission promptly on request. Clause 4 applies to any such communication the Commission receives from Chorus or Verifier to the extent it is Chorus Confidential Information.

3.6 Senior/technical review of provided information: Chorus shall ensure all information relevant to the Verification provided by Chorus to Verifier has been confirmed by a senior representative or technical expert of Chorus as being accurate at the time it is provided.

3.7 **Key Personnel:** Verifier must use the Key Personnel to perform the Verification. Verifier must not change the Key Personnel without the Commission's prior written consent. Any replacement personnel are to have a similar degree of qualifications and experience to the person they are replacing.

3.8 **Change of Verifier:** Chorus must not engage a person other than Verifier to carry out the Verification without the Commission's prior written consent. Without limitation, Chorus must not consent to an assignment of Verifier's interest in the Engagement Agreement without the Commission's prior written consent, which, if given, will be conditional on the assignee taking an assignment of Verifier's interest in this Deed.

4. CONFIDENTIALITY

4.1 **Obligation to keep confidential:** Subject to clause 4.3, the Commission must keep confidential all Chorus Confidential Information disclosed to it by Chorus or Verifier (the disclosing Party) and not disclose it in any form to any third party without Chorus' prior written consent.

4.2 **Information provided under Fibre IMs:** Information provided by Chorus to the Commission under subpart 7 of Part 3 of the Fibre IMs will not be Chorus Confidential Information unless Chorus identifies the information as confidential in accordance with clause 3.7.6(1) of the Fibre IMs. To avoid doubt, such information will not be Chorus Confidential Information, or may cease to be Chorus Confidential Information, if an exception in clause 4.3 applies to it.

4.3 **Exceptions:** Clause 4.1 does not apply to any Chorus Confidential Information:

- a. that is in the public domain or becomes publicly known otherwise than by breach of this Deed by the Commission or breach of the Engagement Agreement by Verifier (provided the latter is known to the Commission);
- b. that was in the Commission's possession prior to the Commission receiving it from the disclosing Party;
- c. that is or was acquired by the Commission from someone other than the disclosing Party who was entitled to disclose the Chorus Confidential Information to the Commission without imposing an obligation of confidence;
- d. that is required to be disclosed by any law, including under the Official Information Act 1982, or any court of competent jurisdiction, provided that:
 - i. the Commission gives Chorus at least 10 Business Days' notice of such required disclosure wherever practicable, which must include an explanation of the requirement to disclose; and
 - ii. the Confidential Information is only disclosed to the extent of the requirement to disclose; or
- e. if the Commission reasonably considers the disclosure of that Chorus Confidential Information to be necessary for the purposes of carrying out its functions in respect of PQP2, provided that:
 - i. the Commission gives Chorus at least 10 Business Days' notice of such disclosure, which must include an explanation of why the disclosure is necessary; and

- ii. the Chorus Confidential Information is only disclosed to the extent stated in the notice.

5. LIABILITY

- 5.1 The liability of Chorus to the Verifier, and the Verifier to Chorus, under or in connection with this Deed is subject to clause [28] of the Engagement Agreement, as that agreement stands at the commencement date of this Deed. Chorus and the Verifier each acknowledge that any liability they may have to each other under or in connection with this Deed will be treated as arising in connection with the Engagement Agreement.
- 5.2 The total aggregate liability of the Verifier to the Commission under or in connection with this Deed, excluding any liability for Insurable Loss, will not exceed 300% of the sum of all fees paid and/or payable by Chorus under the Engagement Agreement.
- 5.3 The total aggregate liability of Chorus to the Commission under or in connection with this Deed will not exceed 300% of the sum of all fees paid and/or payable by Chorus under the Engagement Agreement.
- 5.4 The total aggregate liability of the Verifier to the Commission under in connection with this Deed for Insurable Loss will not exceed AUD10m in respect of any one event or series of related events, and will not exceed AUD20m in respect of all events that occur in any rolling 12 month period.
- 5.5 The limitations of liability in clauses 5.2, 5.3 and 5.4 do not apply to or take into account:
 - a. any liability that cannot lawfully be limited or excluded by contract; or
 - b. any liability for fraud, deceit or breach of confidentiality.
- 5.6 The Verifier and Chorus each acknowledge that nothing in clause 5 restricts any entitlement the Commission may have to injunction, specific performance and/or other mandatory relief available under this Deed, which includes the Commission's ability to:
 - 5.6.1 revoke its approval of Verifier to carry out the Verification; and
 - 5.6.2 refuse to approve Verifier to carry out any future independent verification for the purposes of the Fibre IMs or otherwise.

6. NOTICES

- 6.1 **Writing:** Any notice required or permitted to be given under this Deed will be of no effect unless given in writing and signed, whether electronically or by hand, by the Party giving or making it.
- 6.2 **Addresses:** In proving service of any notice, it is sufficient to prove that the notice was in writing and delivered by hand, mail or email to the applicable address and contact person set out in this clause (as that address or contact person may be updated from time to time, by notice to the other Parties). The Parties' addresses for notices at the commencement of this Deed are:

Chorus

Chorus
Level 10, 1 Willis Street
Wellington 6011
Attention: [REDACTED]
Email: [REDACTED]

Commission

Commerce Commission
Level 9, 44 The Terrace
Wellington 6011
New Zealand Attention: [REDACTED]
Email: [REDACTED]

Verifier

Synergies Economic Consulting Pty Ltd Level 3, 10 Felix Street, Brisbane Qld 4000
Attention: [REDACTED]
Email: [REDACTED]

6.3 When given: Any notice is deemed to be given:

- a. if delivered by hand, at the time it was actually delivered, but if after 5pm or on a day that is not a Business Day the notice is deemed to be given the next Business Day;
- b. if sent by mail, the fifth Business Day after the time it was mailed;
- c. if emailed, no later than 1 Business Day after sending, unless within that time the sender receives an automated notification that the message has either not been delivered or that the intended recipient is out of office or on leave, and in any case if sent after 5pm or on day that is not a Business Day the notice is treated as having been emailed at 9am on the next Business Day.

7. GENERAL

7.1 Third party rights: Subject to the rights of any successor or permitted assigns of the Parties, no provision of this Deed creates any rights enforceable by a third party. All third party rights enforceable or implied by law are, to the extent permissible by law, excluded from this Deed.

7.2 Partial invalidity/severance: If any provision of this Deed is or becomes invalid or unenforceable, that provision will be deemed deleted from this Deed. The invalidity or unenforceability of that provision will not affect the other provisions of this Deed, all of which will remain in full force and effect to the extent permitted by law, subject to any modifications made necessary by the deletion of the invalid or unenforceable provision.

7.3 Assignment: No Party may assign any of its rights or obligations under this Deed without the prior written consent of the other Parties.

7.4 Waiver: Any waiver by a Party of any of its rights or remedies under this Deed will be effective only if recorded in writing and signed by that Party. If the waiver relates to a breach of any provision of this Deed, this will not (unless stated otherwise) operate as a

waiver of any other breach of that provision. No waiver of any breach, or failure to enforce any provision, of this Deed at any time by either Party will in any way affect limit or waive that Party's right to subsequently require strict compliance with this Deed.

7.5 Amendment: Any amendment to this Deed must be in writing and executed by all Parties.

7.6 Commencement and Termination: This deed commences upon execution and delivery by all parties and may be terminated by mutual agreement of the parties in writing. Clauses 3.4, 3.5, 4 and 5 will survive termination of this Deed.

7.7 Entire agreement: This Deed records the entire understanding and agreement of the Parties relating to the matters dealt with in this Deed. This Deed supersedes all previous understandings or agreements (whether written, oral or both) between the Parties relating to these matters.

7.8 Governing law and jurisdiction: This Deed is governed by and is to be construed in accordance with the laws of New Zealand. The Parties submit to the nonexclusive jurisdiction of the courts of New Zealand with respect to any claim, dispute or other matter arising out of or relating to this Deed.

7.9 Counterparts: This Deed may be executed in any number of counterparts. Once the Parties have executed the counterparts, and each party has received a copy of each signed counterpart which that party did not execute, each counterpart will be deemed to be as valid and binding on the party executing it as if it had been executed by all the Parties.

EXECUTED AS A DEED FOR:

Chorus New Zealand Limited by authorised representative(s):

Name(s): [REDACTED]

Title(s): Chief Corporate Officer & General Counsel

Date: 4 May 2023

Witness signature

Witness name: [REDACTED]

Witness occupation: Executive Assistant

Witness City/Town of residence: Auckland, New Zealand

Commerce Commission by authorised representative(s):

Name(s): Tristan Gilbertson

Title(s): Telecommunications Commissioner

Date: 03/05/2023

Witness signature

Witness name: [REDACTED]

Witness occupation: MANAGER, Commerce Commission

Witness City/Town of residence: [REDACTED]

Synergies Economic Consulting Pty Ltd by authorised representative(s):

[REDACTED]

Name(s): [REDACTED]

Title(s): Principal

Date: [REDACTED]

Witness signature

Witness name: [REDACTED]

Witness occupation: *Executive Assistant*

Witness City/Town of residence: [REDACTED]