

DEED RELATING TO RCP3 INDEPENDENT VERIFICATION

PARTIES:

1. **TRANSPOWER NEW ZEALAND LIMITED** of Waikoukou, 22 Boulcott Street, Wellington Central, Wellington 6011 (**Transpower**);
2. **COMMERCE COMMISSION** of Level 9, 44 The Terrace, Wellington Central, Wellington 6011 (**Commission**); and
3. **SYNERGIES ECONOMIC CONSULTING** of Level 8, 10 Felix Street, Brisbane, Queensland 4000, Australia (**Verifier**),

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

BACKGROUND:

- A. As part of the process for resetting Transpower's individual price-quality path for its regulatory control period 3 (**RCP3** and **RCP3 reset**), Transpower and the Commission have agreed that Transpower will have its base capex and opex proposal for RCP3 independently verified and that Transpower will submit a verification report with the proposal.
- B. Transpower and the Commission have agreed on the terms of reference for the verification.
- C. Transpower has, in consultation with 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:

Engagement Agreement means the General Services Agreement between Transpower and Verifier, dated 16 April 2018, relating to the Verification, which is attached in the Schedule;

RCP and **RCP3 Reset** have the meanings given to those terms in recital A;

Terms of Reference means the terms of reference for the Verification attached to the Engagement Agreement;

Verification means the verification of Transpower's base capex and opex proposal for RCP3 by Verifier;

Verification Information has the meaning given to that term in clause 3.3; and

Verification Report means the final report prepared by Verifier in respect of the Verification.

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 Engagement Agreement;
- (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) reference to clauses and the Schedule are to clauses in, and the Schedule to, 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 Transpower's 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 Transpower in the Engagement Agreement.

2. **DUTY TO COMMISSION**

2.1 **Duty of care:** Verifier acknowledges that, in carrying out the Verification, Verifier owes a duty of care to the Commission (as well as to Transpower) to act as an independent expert and with reasonable care.

2.2 **Commission's enforcement rights:**

- (a) The Commission acknowledges that it does not have any rights to enforce Verifier's obligations under the Engagement Agreement under the Contract and Commercial Law Act 2017 or otherwise.

- (b) For the avoidance of doubt, the Commission may enforce Verifier's and Transpower's obligations under this Deed.

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 **Other communications with the Commission:** In addition to the meetings referred to in the Terms of Reference, either or both of Verifier and Transpower at the Commission's reasonable request must attend meetings with the Commission in order to keep the Commission informed of progress on the Verification Report and to assist the Commission's planning for how it will evaluate the Verification Report and Transpower's base capex and opex proposal for RCP3.
- 3.3 **Confidential Information:** Transpower consents to Verifier disclosing any of Transpower's Confidential Information to the Commission where such information was provided by Transpower to Verifier for purposes of the Verification (**Verification Information**).
- 3.4 **Preservation of records:** Transpower must keep copies of all communications between it and Verifier 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.

4. ENGAGEMENT AGREEMENT

- 4.1 **Terms of Reference:** Transpower and Verifier must not amend the Terms of Reference without the Commission's prior written consent.
- 4.2 **Key Personnel:** Verifier must use the Key Personnel to perform the Verification. Transpower and Verifier must not change the Key Personnel without the Commission's prior written consent.
- 4.3 **Assignment:** Transpower must not consent to an assignment of Verifier's interest in the Engagement Agreement without the Commission's prior written consent. Any such assignment will be of no effect unless the assignee also takes an assignment of Verifier's interest in this Deed.

5. CONFIDENTIALITY

- 5.1 **Obligation to keep confidential:** Subject to clause 5.2, the Commission must keep confidential all Transpower Confidential Information disclosed to it by Transpower or Verifier (the disclosing Party) relating to the Verification (including the Verification Information) and not disclose it in any form to any third party without Transpower's prior written consent.

5.2 **Exceptions:** Clause 5.1 does not apply to any 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;
- (b) that the Commission can show by its written records was in its possession prior to 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 Confidential Information to the Commission without imposing an obligation of confidence;
- (d) that is required to be disclosed by any law or any court of competent jurisdiction, provided that:
 - (i) the Commission gives Transpower 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;
- (e) that is contained in the Verification Report; or
- (f) if the Commission reasonably considers the disclosure of that Confidential Information to be necessary for the purposes of carrying out its functions in respect of the RCP3 Reset, provided that:
 - (i) the Commission gives Transpower at least 10 Business Days' notice of such disclosure, which must include an explanation of why the disclosure is necessary; and
 - (ii) the Confidential Information is only disclosed to the extent stated in the notice.

If Transpower notifies the Commission that it disputes the necessity to disclose any Confidential Information under subclause (f) before the Commission discloses it, the Commission must not disclose the Confidential Information if Transpower commences legal proceedings to injunct the disclosure within a further 10 Business Days from the end of notice period in subclause (f)(i). The Commission may disclose the Confidential Information if Transpower's application for an injunction is not successful or is not progressed by the court on an urgent basis.

6. **LIABILITY**

Verifier's and Transpower's liability for breach of this Deed or (in the case of Verifier) the duty of care referred to in clause 2.1 is subject to the exclusions and limitations of liability in the Engagement Agreement as if the breach were a breach of the Engagement Agreement by the relevant Party.

7. **NOTICES**

7.1 **Writing:** Any notice required or permitted to be given under this Deed will be of no effect unless given in writing and signed by the Party giving or making it.

7.2 **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 date of this Deed are:

Transpower

As set out in Engagement Agreement

Commission

Commerce Commission

Level 9, 44 The Terrace

Wellington 6011

New Zealand

Attention: Karen Smith, Senior Analyst, Regulation Branch

E-mail: Karen.Smith@comcom.govt.nz

Verifier

As set out in Engagement Agreement

7.3 **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 not been delivered, 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.

8. GENERAL

- 8.1 **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.
- 8.2 **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.
- 8.3 **Assignment:** No Party may assign any of its rights or obligations under this Deed without the prior written consent of the other Parties.
- 8.4 **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.
- 8.5 **Amendment:** Any amendment to this Deed must be in writing and signed by all Parties.
- 8.6 **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.
- 8.7 **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 non-exclusive jurisdiction of the courts of New Zealand with respect to any claim, dispute or other matter arising out of or relating to this Deed.

8.8 **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:

Transpower New Zealand Limited by
authorised representative(s):

Commerce Commission by authorised
representative(s):

Name(s):

Name(s):

Title(s):

Title(s):

Date:

Date:

Witness signature

Witness signature

Witness name:

Witness name:

Witness address:

Witness address:

Synergies Economic Consulting by
authorised representative(s):

Name(s):

Title(s):

Date:

Witness signature

Witness name:

Witness address:

SCHEDULE: ENGAGEMENT AGREEMENT