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

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

- 1 Kordia thanks the Commerce Commission (**Commission**) for the opportunity to submit on the Treatment of Broadcasting Services Revenue in the Telecommunications Development Levy (TDL) Consultation Paper (**Consultation Paper**).
- 2 The principal issue that Kordia wishes to submit on is the Commission's interpretation of the Telecommunications Act 2001 (**Act**) in respect of services provided by Kordia for digital terrestrial television and radio broadcasting (**DTT**), for terrestrial analogue FM radio broadcasting (**FM Radio**), and for direct-to-home (or "satellite") television and radio broadcasting (**DTH**). Together we refer to these services as **Kordia's Broadcast Services**.
- 3 Kordia submits that Kordia's Broadcast Services:
 - 3.1 do not generate *qualified revenue*, as those services are not provided via a Public Telecommunications Network (**PTN**); and/or
 - 3.2 fall within the exemption from the TDL under section 85A of the Act, as the revenue from those services arises in relation to free-to-air broadcasting services.
- 4 Kordia's reasons for these views are set out below. Kordia considers the above position is consistent with the purpose of the Telecommunications (New Regulatory Framework) Amendment Act 2018 (**Amendment**).
- 5 Kordia's responses to the questions posed by the Commission and relevant to Kordia are set out in the **attached** Appendix.
- 6 First, we provide further detail of Kordia's Broadcast Services.

Kordia's Broadcast Services

- 7 Kordia owns and operates terrestrial DTT and FM Radio networks in New Zealand (as do others). Kordia also has the head lease for one satellite transponder for DTH broadcasting for New Zealand. Free-to-air radio programmes are broadcast via all of these platforms and free-to-air television programmes are broadcast via the DTT and DTH platforms.
- 8 Using these networks, Kordia provides Broadcast Services to national and regional free-to-air television and radio broadcasters. Kordia also carries out production, aggregation and broadcast services to the Clerk of the House, as well as operating the live streaming, for the free-to-air Parliament TV service. Kordia also broadcasts the free-to-air Kordia TV channel on DTT.
- 9 The End User Terminals¹ for the DTT, FM Radio and DTH services (including aerials, dishes, coaxial cable or fibre, set top boxes, and TV, radio, tablet, computer, cellular mobile device or other end user device) are not part of Kordia's network because:
 - 9.1 they are owned by viewers and listeners themselves and not by Kordia;

¹ As described in the Analysys Mason Introduction to Broadcasting Technologies report, Figure 1.1.



- 9.2 they are not operated nor controlled by Kordia;
- 9.3 Kordia does not prescribe the technical standards for any of them (this is done by others – for example for TVs in NZ by Freeview, and by the equipment manufacturers according to international standards); and
- 9.4 there is no return-path connectivity between the End User Terminals and Kordia’s network, and no end-user-generated traffic traverses the network that Kordia uses to provide Kordia’s Broadcast Services.
- 10 Kordia does not have any contractual relationship with viewers or listeners.
- 11 Kordia notes that DTT, FM (and AM) Radio and DTH value chains and systems are described in the Analysys Mason Introduction to Broadcasting Technologies report along with Cable TV, IPTV and OTT.²
- 12 While Kordia generally agrees with those descriptions there is perhaps a degree of oversimplification, in particular that the lines between the various elements of the system in practice are not always as clearly delineated as suggested by the diagrams.
- 13 Kordia notes the complexity involved in comparing a fully integrated broadcaster with one who outsources one or more of the elements and functions of the system or value chain. Kordia provides outsourced broadcast services to free-to-air broadcasters. However, not all free-to-air broadcasters operate under the same model. []
- 14 Kordia submits that the same regulatory outcomes should apply to fully vertically integrated broadcasters (and their supply chains) as apply to non-fully integrated broadcasters (and their supply chains), and irrespective of differences in supply chain model (including which elements of the service are outsourced). The interpretation of the Act must have this principle at its centre, in order to avoid market distortion.

Definition of qualified revenue and PTN

- 15 As submitted above, Kordia considers that Kordia’s Broadcast Services do not come within the definition of *qualified revenue*, and therefore there is no liability for the TDL in respect of them.
- 16 The reasons for this view are set out below:
- 16.1 *Qualified revenue*, as defined at section 5 of the Act, includes revenue that a liable person receives for supplying telecommunications services by means of its PTN and/or by means that rely primarily on the existence of its or any other PTN.
- 16.2 Kordia agrees with the Commission’s view at paragraph 66 of the Consultation Paper that the change to the definition of *telecommunication* is not determinative of qualified revenue, and that the further requirements of that definition must be met.
- 16.3 *PTN* is defined as a network used, or intended to be used, in whole or in part, by the public for the purpose of telecommunication, and includes a PSTN and PDN.³
- 16.4 Kordia’s DTT, FM Radio and DTH broadcasting services are not, in Kordia’s view, supplied by means, or by means that rely primarily on the existence of, any PTN. This is primarily

² Kordia notes it would describe some elements differently. For example Kordia would say that signals are not sent to end-users (as this implies that a “demand” has been made for those signals in a video-on-demand sense) – rather they are propagated in free space and end-users receive them when they wish to via their devices. Also, FM Radio is analogue in NZ and there is no head-end as depicted in Figure 3.10.

³ Telecommunications Act 2001, section 5.



because DTT, FM Radio and DTH broadcasts cannot be described as *a network used, or intended to be used, in whole or in part, by the public for the purposes of telecommunication.*

- 16.5 The term *network* is defined as a system comprising telecommunication links to permit telecommunication.⁴ DTT, FM Radio and DTH systems are used by Kordia to broadcast content provided to it by its broadcasting customers. That content is sent by Kordia via virtual circuits on its backbone network to either its broadcast towers or the Optus satellite (by means of the satellite uplink) and then broadcast from antennas or transponders situated on broadcasting towers and the satellite respectively. The broadcasting towers' and the satellite's signals emanate into free space. The public can passively receive and use those signals via their reception equipment.⁵
- 16.6 The public, however, cannot *use* the DTT, FM Radio and DTH networks for the purposes of telecommunication. There is no possible return path, or network, which the public can physically access or *use*. The public cannot force, demand or initiate any sign, signal or other intelligence to traverse those networks, nor use those networks to communicate with any other person⁶.
- 16.7 Kordia notes that the Commission has previously been of the view that for a network to be a PTN, "*There must be means by which a member of the public ...can feasibly obtain access to the network and use it to communicate with other persons*".⁷
- 16.8 Additionally, members of the public who may have the required device to receive DTT, FM Radio and/or DTH signals are essentially passive receivers of those broadcasts, incapable of using the network for the purpose of telecommunications.⁸
- 16.9 Kordia notes that the proper interpretation and application of the definition of *PTN* was the focus of the *REANNZ* case, where the Court held that the *REANNZ* network was not a PTN.⁹ The Court in that case noted that the *REANNZ* network was designed for use by a specific and identifiable group of individuals and/or entities, and access to the network was limited to that specific and identifiable group¹⁰. The Court said that there was no means by which a member of the public could feasibly obtain access to the *REANNZ* network to communicate with other persons.¹¹ The Court held that the element of intention required to use a network is that the relevant use (by the public) must be "for the purpose" of telecommunication.¹²
- 16.10 The Commission has adopted this approach in paragraph 25 of the discussion paper.
- 16.11 Kordia considers that its DTT, FM Radio and DTH broadcast networks have many of the same features as the *REANNZ* network and are not PTNs. Those networks were designed, and are operated for, the use of broadcasters (via the services that Kordia provides only to that group and to itself for Kordia TV). As noted above, members of the public cannot obtain access to Kordia's DTT, FM Radio or DTH broadcast network to communicate with other persons, and nor can it be said that the public can *use* the broadcast network for the

⁴ As above.

⁵ Refer to the definition of 'broadcasting' in the Broadcasting Act 1989, section 2.

⁶ We note also that (unlike a traditional telecommunications service provider) Kordia has no contractual relationship with the viewer or listener in relation to Kordia's Broadcast Services.

⁷ See Commerce Commission *Draft Notification of Potential Liability for the Telecommunications Development Levy 2012* (19 April 2012) at 72.

⁸ The Commission has previously considered that similar receiving devices cannot be a component of any *PTN* (see Commerce Commission *Draft Notification of Potential Liability for the Telecommunications Development Levy 2012* (19 April 2012) at 73).

⁹ *REANNZ v New Zealand Commerce Commission* [2018] NZHC 2724.

¹⁰ As above, at [73].

¹¹ As above, at [75].

¹² As above, at [76].



purpose of telecommunication. At best the public can use the *signals* which are broadcast into free space from those networks, upon the receipt of those signals by their equipment.

- 16.12 Passive receipt of DTT, FM Radio and DTH broadcasts can be distinguished from, for example, the public using cellular or fibre networks for the purposes of telecommunications, or for VOD where the public actively *uses* the network to convey information relating to the broadcast (e.g. the programme request), by electromagnetic means from one device to another. There is no return path, and the End User Terminals are not part of the network.
- 16.13 If the same transmission system were used directly by a broadcaster to transmit its programmes to customers rather than contracted out to a service provider such as Kordia, then Kordia suspects that there would be common agreement that it is not a PTN. As noted above, the supply-chain model chosen should not be determinative of whether or not a broadcasting network is a PTN.
- 17 Kordia considers that this view is consistent with the purpose of the Amendment, which was to provide regulatory change in view of the major growth in fibre network services and the relative decline in copper fixed line services.¹³ Kordia notes that the purpose of amending the definition of *telecommunication* was to prevent anomalies in the future because of the way technological change is breaking down the boundaries between providers of broadcasting and telecommunications services.¹⁴
- 18 On this basis, it appears that the Amendment was introduced to prevent operators of traditional telecommunications networks arguing that revenue derived from traditional broadcast content that is delivered to end users via their telecommunications networks (e.g. via IPTV or OTT) is outside the scope of the Act and the TDL. Parliament's purpose, in Kordia's view, was not to impose the TDL on traditional free to air broadcast content, services and supporting networks. (Kordia notes that section 85A was inserted as a consequence of including broadcasting within the definition of telecommunications).¹⁵
- 19 Kordia further notes that the TDL is to be used for the payment of TSO charges, non-urban telecommunications infrastructure development, and upgrades to the emergency services calling system.¹⁶ Such matters are unrelated to the broadcasting of programmes by way of DTT, FM Radio and DTH methods.
- 20 Additionally, it was intended that those subject to TDL should recover the levy from end-users (being the beneficiaries of the telecommunications services).¹⁷ It is not possible for Kordia to do this in relation to its DTT, FM Radio and DTH services as it has no contractual relationship with viewers or listeners. Nor is there any physical connection between its networks and the End User Terminals. Further, Kordia's customers (free-to-air broadcasters) also could not recover this charge from viewers or listeners if it was passed on to them by Kordia because Kordia's customers, like Kordia, have no contractual relationship with the viewers or listeners.
- 21 Kordia notes that live-streaming (such as for the Parliament TV service) most likely is provided over a PTN, and therefore would come within the definition of *qualified revenue*. However any live-streaming services provided by Kordia, in respect of free-to-air services fall within the exclusion under section 85A and therefore must be excluded from the calculation of qualified revenue.

¹³ Telecommunications (New Regulatory Framework) Amendment Bill, as reported from the Economic Development, Science and Innovation Committee, at 293-2, page 1.

¹⁴ See above at Part 1 – Definition of “telecommunication”.

¹⁵ Supplementary Order Paper, Telecommunications (New Regulatory Framework) Amendment Bill, 16 October 2018, at 293-2/SOP No 118, page 4.

¹⁶ Telecommunications Act 2001, section 90.

¹⁷ See the Ministry of Economic Development *Regulatory Impact Statement: Reform of the Telecommunications Service Obligation Framework and Industry Levy* (23 November 2010) at [194].



Exemption from TDL for broadcasting services related to free-to-air services

- 22 The Commission asks at paragraph 134 of the Consultation Paper whether revenue derived from the supply of broadcasting services to free-to-air broadcasters should be subject to section 85A(1)(a), and specifically refers to the transmission services provided by Kordia in this context.
- 23 Kordia's response to this question, and without detracting from its view on the definition of qualified revenue above, is "yes".
- 24 Kordia considers that any DTT, FM Radio, DTH and live-streaming services that it supplies to free-to-air broadcasters "relate" to those services and clearly and unambiguously come within the exemption for free-to-air services. On that basis, no TDL would be payable by Kordia in relation to those services whether those services are provided over a PTN or not.

Statutory framework

- 25 The Amendment amended the definition of *telecommunication* to remove the broadcasting exclusion. Telecommunication is now defined as:

The conveyance by electromagnetic means from one device to the other of any encrypted or non-encrypted sign, signal, impulse, writing, image, sound, instruction, information, or intelligence of any nature, whether for the information of any person using the device or not.

- 26 Section 85A of the Act, which was inserted into the Amendment by Supplementary Order Paper at the Committee stage of the Amendment, provides:

Certain revenue from broadcasting services must be excluded from qualified revenue

- (1) For the purposes of this subpart, the amount of a liable person's qualified revenue must exclude the following amounts (as determined in accordance with any specifications set by the Commission):
- (a) Any amount of revenue that is received by a liable person in relation to a broadcasting service that is supplied to end-users free of charge (for example, revenue derived from a free-to-air radio or television service);
 - (b) Any amount of revenue that is received before 1 July 2020 by a liable person in relation to any other broadcasting service.
- (2) The specifications set by the Commission may (without limitation) provide for the apportionment of any amount of revenue if the amount is received in connection with a service referred to in subsection (1) and 1 or more other services.

- 27 The Supplementary Order Paper which inserted section 85A outlined the purpose for this addition:¹⁸

The amendment relates to the telecommunications development levy that is payable under subpart 2 of Part 3 of the Act. The amount of the levy is determined by reference to a liable person's qualified revenue. The amendment excludes from this revenue certain revenue derived from broadcasting services. The change is a consequence of a change made at select committee to include broadcasting within the definition of telecommunications.

- 28 Kordia submits that, on a plain reading of the words "in relation to", the transmission services it provides to free to air services come within the exception in section 85A.

¹⁸ Supplementary Order Paper No 118 at 3.



Commission's proposed approach to section 85A

- 29 Kordia submits that the Commission's preliminary interpretation of the term "in relation to" for the purposes of section 85A(1) as set out in paragraphs 121 – 122 of the Consultation Paper is too narrow.
- 30 Kordia reads the Commission's proposed approach as potentially excluding from the exception revenue earned by Kordia (and others) from transmission services provided to free-to-air broadcasters for free to air broadcast services. If this is the outcome the Commission intends, Kordia submits that this is not the correct result.
- 31 A narrow interpretation is not supported by the wording of the exception itself – transmission of free-to-air services is clearly *related* to the broadcasting of those same free-to-air services. The latter could not occur without the former. If that is not within the definition of "in relation to" then nothing is and the exemption is meaningless (as it is the transmission or broadcasting of a signal that is covered by the definition of *telecommunication*). This cannot have been Parliament's intention.
- 32 The Commission appears to be reading down the phrase "in relation to" in section 85A on the basis of the example given in section 85A. Kordia submits that is not the correct or appropriate use of that example. It is a non-exhaustive example, and in any event there is no textual nor contextual justification for treating the example as defining or limiting the scope of the preceding clear words of the section.
- 33 Also, based on Kordia's understanding of the process, a narrow interpretation is not supported by the process which resulted in the exception – 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 from the Select Committee's decision to remove the exclusion of broadcasting from the definition of telecommunications.
- 34 A narrow approach to this section would be inconsistent with the Commission's approach elsewhere in the consultation paper. For example at para 62 the Commission takes a broad approach to the terms "*enable*" and "*facilitate*" - noting they can be construed broadly enough to include both physical equipment involved in the conveyance or transmission of radio waves and potentially technical and engineering support services to support conveyance. Kordia agrees with this broad interpretation, and submits that similarly a broad and natural interpretation of the phrase "in relation to" was intended by Parliament.
- 35 The Commission's proposed narrow approach is likely to result in artificial and inconsistent distinctions depending on the commercial model applied – for example revenue arising from a transmission provided by the broadcaster of a free-to-air service (a fully integrated model) is likely to be exempt revenue for section 85A purposes, but on a narrow view revenue arising from the transmission of that same free-to-air service provided under contract to a broadcaster (outsourced model) arguably may not. A narrow interpretation could lead to an absurd result which may encourage industry players to structure their commercial dealings in an artificial manner in order to avoid the logical inconsistencies which would inevitably arise from the Commission's proposal, distorting the market.
- 36 The interpretation that should be adopted is one which results in the same regulatory outcomes for free to air broadcasters that use a fully integrated model and for those that use a partially or completely outsourced model.
- 37 Kordia therefore submits the interpretation of section 85A(1) is that Kordia's Broadcasting Services it (and others) provides to free-to-air broadcasters and in relation to free-to-air services must fall within the scope of the section 85A(1) exclusion. Section 85A(1) must be interpreted accordingly.

Final comments

- 38 Kordia requests that the Commission keep the information identified in square brackets and yellow highlight in paragraph 13 above confidential. This information is commercially sensitive and its



release could prejudice Kordia's commercial interests. A non-confidential version of Kordia's submission is provided alongside the confidential version.

39 Kordia's contact person for this submission is:

Michael Jamieson
EGM Legal and Risk
Kordia Group Limited

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

About Kordia

40 Kordia is a subsidiary of Kordia Group Limited, a state-owned enterprise whose shareholders are the Minister of Finance and the Minister for State-owned Enterprises, on behalf of the Crown. Kordia is bound by the requirements of the State Owned Enterprises Act 1986. The Act requires that state-owned enterprises operate as successful businesses. State-owned enterprises must be profitable and efficient, good employers and exhibit a sense of social responsibility by having regard to the interests of the community in which they operate. Kordia Group's consolidated financial statements form part of the Crown's consolidated financial statements.

Yours sincerely



Michael Jamieson
EGM Legal and Risk



Appendix of responses to consultation paper questions

Commerce Commission question	Kordia response in respect of Kordia's Broadcast Services
1. Do you agree that <i>telecommunications service</i> does not include content and content aggregation services?	Yes.
2. Do you agree with the views expressed in Table 5 [and titled <i>Potential for parties involved in DTT to be liable persons</i>]?	No, the compression and multiplexing, signal distribution, and signal broadcasting services provided by Kordia are not provided over a PTN or a component thereof. The viewer's or listener's equipment which receives the signals broadcast by Kordia is also not part of a PTN. See reasons in paragraph 9 of Kordia's submission.
3. Should DTT aerials and set-top-boxes be regarded as part of a PTN?	No, for the reasons set out in paragraph 9 of Kordia's submission.
4. Do you agree with the views expressed in Table 6 [and titled <i>Potential for parties involved in satellite broadcasting to be liable persons</i>]?	No, compression and multiplexing, satellite uplink and satellite transmission services ¹⁹ provided by Kordia are not provided over a PTN or a component thereof. The viewer's or listener's equipment which receives the signals broadcast by Kordia is also not part of a PTN. See reasons in paragraph 9 of Kordia's submission. The Act also does not apply to the signals from satellite transponders, which occur outside New Zealand.
5. Do you agree that, where a satellite is transmitting signals to New Zealand, the satellite operator is providing a telecommunications service in New Zealand?	No, due to questions of territorial application. However, in any event and in Kordia's case, such transmissions are not provided over a PTN or a component thereof.
6. Should satellite dishes and decoders be regarded as part of a PTN?	No, for the reasons set out in paragraph 9 of Kordia's submission.
7. Do you agree with the views expressed in Table 7 [and titled <i>Potential for parties involved in radio broadcasting to be liable persons</i>]?	No, the compression and multiplexing and signal broadcasting services provided by Kordia are not provided over a PTN or a component thereof.

¹⁹ Provided over a transponder leased by Kordia.



8. Do you agree with the views expressed in Table 8 [and titled <i>Potential for parties involved in IPTV to be liable persons</i>]?	The answer to this question will depend on how and over what system the services are transmitted.
9. Do you agree with the views expressed in Table 9 [and titled <i>Potential for parties involved in OTT to be liable persons</i>]?	The answer to this question will depend on how and over what system the services are transmitted.
10. Do you agree that <i>broadcasting services</i> means “any goods, services, equipment, and facilities that enable or facilitate broadcasting”?	Yes, Kordia agrees that a broad interpretation is intended by Parliament.
11. Do you agree that anything that enables or facilitates the transmission of advertising programmes is a broadcasting service, and therefore falls within the exclusion in section 85A(1)?	Yes, an advertising programme is a ‘programme’ as defined in the Broadcasting Act 1989 and accordingly is within the scope of the exclusion under section 85A.
12. Do you agree that all revenue received from the transmission of on demand programmes should be treated as non-broadcasting services revenue (i.e. not be subject to section 85A)?	This question is not relevant to Kordia’s current services and Kordia reserves its position.
13. Should revenue received from the supply of broadcasting services to free-to-air broadcasters be subject to section 85A(1)(a)?	Yes. Without limiting this response, Kordia’s (and other’s) broadcast transmission services provided to free-to-air broadcasters clearly are “in relation to” free-to-air broadcast services and are within the exclusion under section 85A.
14. Should the Commission set specifications under section 85A(2)? If yes, please give reasons why and explain what the specifications should address. The Commission identifies that a possible situation where they could be useful is where a provider receives revenue for the provision of services relating to a free-to-air service and for another service, but it is practically difficult to apportion that revenue.	Kordia has no objection in principle to specifications being set, but does not see this as necessary in relation to its operations. Any specifications would need to be consulted on.
15. Do you expect that your company will meet the revised definition of liable person?	Yes, for existing telecommunications revenue only. No, in respect of broadcasting services revenue, as it relates to free-to-air services and is not provided over a PTN.
16. Do you expect that your company will earn qualified revenue (under the new definition)?	Yes, for existing telecommunications revenue only.



	No, in respect of broadcasting services revenue, as it relates to free-to-air services and is not provided over a PTN.
17. If you are a 2018/2019 QLP do you expect that your qualified revenue will change in future TDL disclosures due to the Amendment Act?	No, not to any material extent in respect of current revenue streams. There may be a future increase depending on future services offered.
18. Are you expecting that a portion of your gross telecommunications revenue will meet the criteria for section 85A(1)(a)?	Yes.

