

21 November 2013

Commerce Commission
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Dear Commissioners,

Telecommunications Development Levy (TDL) – submission on draft liability allocation determination for 1 July 2012 to 30 June 2013

We would like to raise with the Commission our concerns around the assessment of Northpower Fibre Ltd (NPF) as a qualifying liable person by virtue of the Commission's interpretation of the aggregation provisions in s79 of the Telecommunications Act (the Act). The impact of this approach is that disparate companies are being grouped together solely by reference to an ultimate individual shareholder (the Minister of Finance).

The purpose of s79 is to aggregate related companies, ostensibly to catch those business who might seek to spread their revenue amongst related companies in order to individually fall below the \$10m threshold. However, the current interpretation aggregates six entirely unrelated companies because an ultimate shareholder of all six is the Minister of Finance. In our view, these six business would not usually be considered related body corporates.

In the case of NPF, it has one share owned by the Minister of Finance (as does Enable and UFF). While CFH (50% owned by the Minister of Finance), currently has a shareholding in excess of 20%, this is largely a funding arrangement to give effect to the UFB build and this shareholding will change over time in accordance with the transaction documents.

While NPF, Enable and UFF have a common shareholder (CFH) who may control in excess of 20% of the shares in each, NPF should not be treated as 'one person' together with Kordia, Transpower or REANNZ as on our reading of the Act none of the limbs of s79(1)(a) to (e) are met. As between NPF and Kordia, there is no common third party that controls more than 20% of their respective shares, neither are they subsidiaries of the same body corporate nor are they associates of each other. To the extent that the Commission is relying on the 50% shareholding of the Minister of Finance as 'controlling' CFH who in turn 'controls' NPF, we understand that to "control" (as defined in the Companies Act) one must hold more than 50% of the voting shares.

We therefore request that you reconsider the inclusion of Kordia, Transpower and REANNZ as parties related to NPF for the purposes of the 2012/2013 TDL levy.

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Another consequence of these aggregation provisions is that even where a liable person has very modest revenues they still bear the cost of providing audited disclosures, which imposes a disproportionate burden on smaller operators like NPF. This year NPF's cost of having its disclosures audited was over half the cost of the TDL levy in the draft determination. This is despite the fact that the information sought by the TDL was included (and clearly identifiable) in the audited statutory accounts. As a company still in start-up mode and subject to price caps, this is a cost which is unable to be recovered from NPF's customers. This restricts cash flow that could otherwise be used on marketing UFB and ultimately increasing take-up and providing customers with a real choice in the market for telecommunications.

We submit that a fairer approach would be that if the liable person's revenue is under \$10m, submitting audited financial statements (provided they clearly identify the qualifying revenue) is sufficient to comply with section 83(2) of the Act.

Thank you for the opportunity to make submissions on these issues and we are happy to provide any further information that may assist the Commission.

Yours sincerely



Darren Mason
Chief Executive Officer