

Attachment 2: ICL Draft Exceptions Terms

TELECOMMUNICATIONS EXCEPTION

Pursuant to the powers conferred on the Telecommunications and Radiocommunications Regulator (“TRR”) under the Telecommunications and Radiocommunications Regulation Act No.30 of 2009 (“the Act”), including Sections, 7, 12 and 14 of the Act, TRR hereby grants [insert name of wholesale service provider] (“the Wholesale Service Provider”) an Exception permitting and authorizing the supply by the Wholesale Service Provider of the wholesale telecommunications services referred to herein, and subject to other terms and conditions specified in this Exception.

Made at Port Vila this ___ day of _____ 2014.

Ronald Box
Telecommunications and Radiocommunications Regulator

1. Short title and commencement

- 1.1 This exception may be cited as the “Telecommunications Exception For The Supply Of Wholesale Telecommunications Services by [insert name of wholesale service provider] 2014”.
- 1.2 This Exception commences on the date of its execution by TRR.

2. General Terms and Conditions

- 2.1 The wholesale telecommunications services that are included within this Exception are limited to:
 - (a) wholesale internet services, including capacity (whether supplied using submarine cable or satellite facilities);
 - (b) Services and/or access to facilities necessary to provide the above services, including normal or stand-by services on a short or long term basis for the purpose of emergency, backhaul or backup service.
- 2.2 This Exception is a unilateral grant of permission from TRR and shall not be regarded as a contract or bilateral agreement.
- 2.3 The wholesale services under this Exception shall be supplied in accordance with any applicable law, regulation, order or rule under Vanuatu law, including as provided in the Act.
- 2.4 Nothing in this Exception shall be construed to allow the Wholesale Service Provider or any other person to begin or continue any activities in breach of any applicable law, regulation, order or rule under Vanuatu law.
- 2.5 This Exception is granted on a non-exclusive basis.
- 2.6 This Exception does not allow the Wholesale Service Provider to supply any telecommunications services directly to the public or directly to any end-user, or to any person in Vanuatu that does not at the time of supply hold a valid and subsisting license or exception under the Act to supply telecommunications services in Vanuatu.
- 2.7 Neither this Exception, nor any rights or obligations under it, may be ceded transferred, assigned, pledged or otherwise disposed of without the prior written consent of TRR, which consent may be made subject to such terms and conditions and TRR may impose.
- 2.8 No transfer of control or ownership of the Wholesale Service Provider that includes rights or obligations under this Exception shall be completed or have any legal force or effect unless the transfer of control has received written approval from TRR (such approval not to be unreasonably withheld). TRR may make such approval subject to reasonable terms and conditions. If TRR receives a written request for such approval and does not make a written decision within 30 days, approval will be deemed to have been given by TRR within this Clause.

3. Exception Fees

- 3.1 TRR may (but is not required to), within 60 days following the end of each calendar year, or part thereof, in which this Exception has been in effect, require the Wholesale Service Provider to pay an Exception Fee to TRR in an amount of up to 2.25% of Net Revenues of the Wholesale Service Provider in that calendar year, or part thereof.
- 3.2 For the purpose of this Clause 3, “Net Revenues” means, in respect of any relevant calendar year or part thereof:
- (a) the gross revenue (including all interconnection revenue) received by the Wholesale Service Provider from the provision of wholesale telecommunications services encompassed by this Exception; less
 - (b) the sum of:
 - a. any interconnection charges paid to any licensed network operator or service provider in Vanuatu during the relevant period;
 - b. any outpayments made by the Wholesale Service Provider, on an arm’s length basis, to any persons outside Vanuatu for the carriage of telecommunications traffic that originates in Vanuatu to destinations outside Vanuatu during the relevant period, or that originates outside Vanuatu and terminates in Vanuatu during the relevant period;
 - c. any general license fees paid by the Wholesale Service Provider to the Government or TRR during the relevant period, and any amounts paid in Value Added Tax (VAT) to the Government of Vanuatu for supply of the Wholesale Services encompassed by this Exception.

4. Term, Revocation, Or Amendment Of Exception

- 4.1 This Exception is granted for a minimum period of one year commencing on the day it is made, and continues unless revoked by TRR pursuant to the Act. Unless exigent circumstances make it impracticable, TRR shall give at least 30 days advance written notice to the Wholesale Service Provider of, and opportunity to comment on, any revocation of this Exception.
- 4.2 TRR may amend the terms and conditions of, or revoke, this Exception, if:
- (a) the amendment or revocation has been requested or agreed by the Wholesale Service Provider; or
 - (b) the Wholesale Service Provider has materially failed to comply with a term or condition of this Exception, the Act, or a regulation, rule or order made under the Act and has not remedied that failure within a period of 30 days after notice by TRR under clause 4.3; or
 - (c) changes to international treaties, commitments by the Government to other governmental organisations or international agencies or the laws of Vanuatu require an amendment or a revocation, and then the amendment or revocation shall only be to the extent that is reasonably required as a result of such changes; or

- (d) the Wholesale Service Provider enters into receivership or liquidation, takes any action for its voluntary winding-up or dissolution, or is the subject of an order by a competent court or tribunal for its compulsory winding-up or dissolution.

In the case of paragraph (b) above, the Regulator shall consider amending the terms and conditions of this Exception, before considering revoking this Exception, as a means of addressing the failure to comply.

4.3 Prior to any amendment or revocation of this Exception under clause 4.2, TRR shall notify the Wholesale Service Provider in writing that it is considering the relevant action, and consider any comments made by the Wholesale Service Provider within the timeframe stated by TRR for comments. The notice:

- (a) shall give the Wholesale Service Provider sufficient time to prepare comments on the relevant action, taking into account the nature of the proposed action;
- (b) shall set out any procedures TRR will follow in considering the relevant action; and
- (c) may invite comments from other interested parties or the general public, at TRR's discretion.

4.4 If TRR amends or revokes this Exception pursuant to this Clause 4, it shall provide the Wholesale Service Provider with sufficient time to comply with the amendment or revocation: Where this Exception is revoked or not renewed, TRR shall take into account continuity of service to customers and include in its order such terms and conditions as it deems appropriate.

5. Prices, Rates & Charges

- 5.1 The Wholesale Service Provider Executive shall, at the end of each calendar quarter, provide TRR in writing with a list of all prices, rates, charges or tariffs in effect during any part of that calendar quarter for all wholesale services supplied pursuant to the Exception.
- 5.2 For the avoidance of doubt, Clause 5.1 requires the Wholesale Service Provider to inform TRR of the actual prices, rates, or charges in effect (i.e. charged to or incurred by any customer of the Wholesale Service Provider) during any part of that calendar quarter for all wholesale services supplied pursuant to the Exception.

6. Designation of Dominance

- 6.1 The Regulator may designate the Wholesale Service Provider dominant if;
 - (a) it owns a bottleneck facility; or
 - (b) the Regulator reasonably considers that, either individually or acting together with others,
 - (i) the wholesale service provider enjoys a position of economic strength or controls an essential facility in the relevant telecommunication market(s) and

- (ii) such strength or control affords it the power to behave to an appreciable extent independently of its competitors, customers or potential competitors in that market.

6.2 More than one wholesale service provider may be designated dominant in the same telecommunications market.

6.3 If the Regulator has designated the Wholesale Service Provider to be a dominant service provider in any telecommunication market in Vanuatu that designation shall remain in force until revoked by the Regulator.

6.4 The Regulator will specify the reasons relied on by the Regulator to support its findings regarding dominance.

7. Anti-competitive practices

7.1 Abuse of a dominant position

If the Wholesale Service Provider is a dominant service provider in any telecommunications market in Vanuatu, the Wholesale Service Provider shall not abuse its dominant position in that market. Without limitation, the following types of actions, activities and practices shall be deemed a prima facie abuse of a dominant position:

- (a) failing to supply essential facilities to a competitor within a reasonable time after a request and on reasonable conditions, or discriminating in the provision of telecommunications services or facilities to Licensed Operators or other service providers; except under circumstances that are objectively justified based on differences in supply conditions, including different costs or a shortage of available facilities or resources;
- (b) bundling of telecommunications services, whereby the Wholesale Service Provider requires, as a condition of supplying a service to a competitor, that the competitor acquire another service that it does not require, where it is technically and economically feasible to unbundle the telecommunications service required by the competitor;
- (c) offering a Licensed Operator or other service provider more favourable terms or conditions that are not justified by cost differences if it acquires another service that it does not require;
- (d) supplying competitive telecommunications services at prices below variable costs (or such other cost standard as is established by the Regulator) for an extended period of time as determined by the Regulator;
- (e) using revenues or the allocation of costs from one telecommunications service to cross-subsidise a more competitive telecommunications service, except where such cross subsidy is specifically approved by order of the Regulator or by approval of tariffs for relevant telecommunications services; and

- (f) deliberately and intentionally reducing the margin of profit available to a Licensed Operator or service provider that acquires or seeks wholesale telecommunications services from the Wholesale Service Provider, by increasing the prices for the wholesale telecommunications services provided to that Licensed Operator or service provider, or decreasing the prices of the retail telecommunications services in markets where they compete, or both; and
- (g) failing to make available to a Licensed Operator or a service provider within a reasonable period of time technical specifications, information about essential facilities, or other commercially relevant information which is required by such Licensed Operator or service provider to provide telecommunications services and which is not available from other sources.

7.2 Other anti-competitive practices

The Wholesale Service Provider shall not engage in conduct or a practice which has the purpose, effect, or is likely to have the effect, of substantially lessening competition in a telecommunications market. Without limitation, activities which prima facie have the purpose, effect, or are likely to have the effect, of substantially lessening competition in a telecommunications market include the following:

- (a) contracts, arrangements or understandings between the Wholesale Service Provider and one or more Licensed Operators or service providers that directly or indirectly fix the prices or other terms or conditions of a telecommunications service in telecommunications markets;
- (b) contracts, arrangements or understandings between the Wholesale Service Provider and one or more Licensed Operators or service providers that directly or indirectly determine which person will win a contract or business opportunity in a telecommunications market;
- (c) contracts, arrangements or understandings between the Wholesale Service Provider and one or more Licensed Operators or service providers to apportion, share or allocate telecommunications markets among themselves;
- (d) adopting technical specifications for networks or systems to deliberately prevent interoperability with a network or system of the Wholesale Service Provider;
- (e) using information obtained from a Licensed Operator or service provider, for purposes related to supply of telecommunications services by the Wholesale Service Provider, to compete with such a Licensed Operator or wholesale service provider; and
- (f) requiring or inducing a supplier to refrain from selling to a Licensed Operator or service provider.

7.3 Determination of abuse of dominance and anti-competitive practices

The Regulator may, on application by any person, or on its own initiative, determine:

- (a) whether or not the actions, activities or practices of the Wholesale Service Provider, if the Wholesale Service Provider is a dominant service provider, constitute abuse of its dominant position, within the meaning of clause 7.1;
- (b) whether or not the actions, activities or practices of the Wholesale Service Provider amount to an anticompetitive practice within the meaning of clause 7.2; and
- (c) that an action, activity or practice of the Wholesale Service Provider under clauses 7.1 or 7.2 is authorised and shall not be considered to contravene this Exception, on the grounds that such actions, activities or practices are in the public interest and are otherwise consistent with the objectives listed in section 14 of the Act.

7.4 Remedies for abuse of dominance and anti-competitive practices

If the Regulator determines that, in a particular case, or in a number of cases, the conduct, activities or practices of the Wholesale Service Provider constitute an abuse of its dominant position under clause 12.1 or an anti-competitive practice under clause 12.2, the Regulator may issue an order to require the Wholesale Service Provider to take one or more of the following actions:

- (a) cease the actions, activities or practices specified in the order immediately, or at such time prescribed in the order, and subject to such conditions prescribed in the order; and/or make specific changes in actions, activities or practices specified in the order, as a means of eliminating or reducing the abusive or anti-competitive impact of the actions, activities or practices;
- (b) impose a fine for breach of this Exception pursuant to clause 10;
- (c) require the Wholesale Service Provider, and the persons affected by such actions, activities or practices to meet and attempt to determine remedies to prevent or eliminate continuation of such actions, activities or practices, and to resolve any remaining dispute;
- (d) require the Wholesale Service Provider to publish an acknowledgement and apology for such actions activities or practices in Bislama, French and English languages in the Vanuatu Daily Post and one other newspaper of general circulation in Vanuatu, in such a form and at such times as the Regulator specifies in the order;
- (d) require the Wholesale Service Provider to provide periodic reports to the Regulator to assist in determining whether the actions, activities or practices are continuing and to determine their impact on telecommunications markets, competitors and customers.

8. False and misleading claims

8.1 The Wholesale Service Provider shall not make, or cause to be made, any false or misleading claim regarding:

- (a) the availability, price or quality of its telecommunications services or equipment; or
- (b) the telecommunications services or equipment of a Licensed Operator or wholesale service provider.

8.2 For the purposes of this clause, a claim is false or misleading if, at the time it was made, the Wholesale Service Provider knew or reasonably ought to have known that it was false or misleading in any material respect or that it was reasonably likely to confuse or mislead the persons to whom it was published.

9. Disputes

9.1 Disputes with other Licensed Operators or wholesale service providers

If, the Wholesale Service Provider and other Licensed Operator, or another wholesale service provider have been unable to agree on the resolution of a matter governed by this Exception or the laws of Vanuatu, then, following reasonable efforts to reach an amicable settlement, the Wholesale Service Provider or one or more of the other parties involved in the dispute may apply to the Regulator for assistance in resolving the dispute.

9.2 Customer disputes

Where a customer of the Wholesale service provider has a dispute with the Wholesale Service Provider that the parties have been unable to resolve among themselves, by means of the Wholesale Service Provider's customer complaint process or otherwise, either party may apply to the Regulator for assistance in resolving the dispute.

10. Monitoring and Enforcement

10.1 Monitoring

In addition to any other powers contained in this Exception, any regulations, rules, Exceptions or orders, or under any other laws, the Regulator shall, for the purposes of exercising his or her responsibilities, functions and powers under this Exception, have the power to make orders to:

- (a) require the production of documents and information by the Wholesale Service Provider and any other persons, subject to reasonable restrictions on the making public of any such documents or information;
- (b) search the Wholesale Service Provider's premises and seize documents, equipment and other item;
- (c) require attendance and examination of personnel of the Wholesale Service Provider as witnesses; and

- (d) require the Wholesale Service Provider to undertake specific actions or to cease specific actions in the event of a breach of this Exception, any regulation, rule or order.

10.2 Maintaining Books

- (a) The Wholesale Service Provider shall at all times, at its principal place of business in Vanuatu, keep accurate and up-to-date all proper books of account in accordance with international generally accepted accounting principles (GAAP), Vanuatu law and good business practices;
- (b) All financial information submitted by the Wholesale Service Provider to the Regulator for any purpose shall be prepared and presented in accordance with GAAP or as the Regulator shall direct, provided that such direction does not result in any unreasonable additional costs incurred by the Wholesale Service Provider.

10.3 Fines

- (a) Without limiting any other right or remedy available to the Regulator at law, if the Wholesale Service Provider fails to comply with any of its material obligations under this Exception, the Wholesale Service Provider shall be subject to a maximum fine payable to the Regulator in an amount not to exceed 100 million vatu (which will be increased at the end of each calendar year by the rate of inflation) in respect of each such compliance failure.
- (b) The amount of any sanction imposed pursuant to this clause 10.3 shall be, among other things:
 - (i) proportionate to the compliance failure or failures; and
 - (ii) determined with reference to the severity, frequency and, if applicable, any willfulness of the non-compliance and any cooperation the Wholesale Service Provider has provided to the Regulator in relation to the non-compliance.

10.4 Interest

Without limiting any other right or remedy available to the Regulator at law, if the Wholesale Service Provider fails to make payment of any amount of fee, fine or penalty to the Regulator pursuant to this Exception, interest shall accrue and be payable monthly in arrears on the outstanding amount, including any accrued interest, at the rate of 12% per annum.

10.5 Rights of appeal or review

Nothing in this Exception is intended to limit in any way rights of appeal or review which the Wholesale Service Provider may have available to it under the laws of Vanuatu.

11. Force Majeure

Subject to the other provisions of this clause, if the Wholesale Service Provider fails to observe or perform any of its obligations under this Exception (other than an obligation to make payment), and such failure shall have been caused by reason of Force Majeure, such failure shall be deemed not to be a breach of such obligation.

11.1 Meaning of Force Majeure

In this Exception, **Force Majeure** means any:

- (a) act of God;
- (b) confiscation or expropriation;
- (c) embargo;
- (d) public mains electricity supply failure;
- (e) fire, flood or storm;
- (f) explosion or nuclear accident;
- (g) sabotage, revolution, riot, terrorism, act of war (whether declared or not) or warlike operations;
- (h) requirement or restriction of governmental authorities (but, for the avoidance of doubt, not including any determination of the Regulator);
- (i) by which, or as a result of which, it is illegal for a party to observe or perform an obligation under this Exception; or
- (ii) which frustrates the observance or performance of that obligation;
- (i) earthquake, land slide or volcanic eruption;
- (j) epidemic or quarantine restriction;
- (k) strike, lockout, work stoppage or other labour hindrance.

in each case, beyond the reasonable control of the Wholesale service provider.

11.2 Circumstances where cannot claim benefit of Force Majeure

The Wholesale Service Provider shall not be entitled to the benefit of the provisions of this Force Majeure clause under any or all of the following circumstances:

- (a) to the extent that the failure was caused by, or reasonably could have been prevented if it were not for, the contributory negligence of the Wholesale Service Provider;

- (b) to the extent that the failure was caused by, or reasonably could have been prevented if it were not for, a failure or omission of the Wholesale service provider, and the Wholesale Service Provider has failed to mitigate or remedy the event relied upon, and to resume the observance or performance of the particular obligation, with reasonable dispatch.
- (c) the Wholesale Service Provider has failed to mitigate or remedy the event relied upon, and to resume the observance or performance of the particular obligation, with reasonable dispatch;
- (d) if the failure was caused by, or reasonably could have been prevented if it were not for, lack of funds of the Wholesale Service Provider or its group;
- (e) unless, as soon as possible after the happening of the event relied upon or as soon as possible after determining that the event was in the nature of Force Majeure and would affect the ability of the Wholesale Service Provider to observe or perform the particular obligation, the Wholesale Service Provider shall have served on the Regulator notice to the effect that it is unable by reason of Force Majeure (the nature of which shall be specified in the notice) to observe or perform the particular obligation (the nature of which shall also be specified in the notice); or
- (f) if, and to the extent that, the particular obligation may be observed or performed notwithstanding the Force Majeure event.

11.3 Remedy of the Force Majeure event

The Wholesale Service Provider shall:

- (a) Immediately use all reasonable endeavours to remedy the Force Majeure event;
- (b) serve notice on the Regulator of the Force Majeure event and the likely effect of the event as soon as reasonably practicable after it becomes aware of the event; and
- (c) serve notice on the Regulator, as soon as possible after the Force Majeure event shall have been remedied, to the effect that the event has been remedied and the Wholesale Service Provider has resumed, or is then in a position to resume, the observance or performance of the particular obligation.

12. Governing Law

This Exception shall be governed in all respects by and construed in accordance with the laws of Vanuatu.