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Security of Tenure for Radio Licences
Radio Spectrum Policy and Planning
Ministry of Economic Development
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WELLINGTON

By email: radiospectrum@med.govt.nz

ORION NEW ZEALAND LIMITED SUBMISSION ON SECURITY OF TENURE FOR RADIO LICENCES

A: ORION

- 1 Orion New Zealand Limited (Orion) is an electricity operator for the purpose of the Electricity Act 1992. It is the electricity network provider for Christchurch and central Canterbury, including Banks Peninsula. Its network currently includes 14,000 kilometres of overhead lines and underground cables which deliver electricity to more than 180,000 home and businesses. The Orion network is slightly larger than Transpower's nationwide network of transmission lines. Orion is owned by the Christchurch City and Selwyn District councils.
- 2 **Orion's radio network**
Orion's radio network communicates data between Orion's control centre and its electricity substations, including over 70 remote rural substations. At an operational level, this communication contributes significantly to Orion's consistent ranking as one of the country's most reliable electricity distribution networks, as it allows real-time control of the electricity network and real-time line and cable protection. This communication is critical to how Orion manages its network.
- 3 The radio network is of fundamental importance to Orion's staff and customers. The sophistication of the radio network directly contributes to the safety of Orion's staff working on the network. It is also crucial to Orion's ability to "keep the lights on", as demonstrated by Orion's ability to recover from the 2006 South Island snow storm (where Orion recovered its service in four days, while other providers took significantly longer).
- 4 Historically, Orion has used low levels of slow speed data for this communication. This is no longer sufficient. Effective communication within an area of 8,000 square kilometres, which includes thousands of kilometres of lines and cables, requires fast

and efficient radio spectrum based communications. Higher data rates are essential if Orion is to make the most of continually evolving technology deployed in substations and modern computer tools that are available to control and manage the electricity network.

- 5 To provide this communication, Orion has partnered with a leading technology company to deploy a world first 'multiple input multiple output' (MIMO) true internet protocol radio network that is based on computer communications. This technology is 'spectrally efficient' (that is, it can convey a large amount of data over a small amount of spectrum). It is also 'spectrum specific'. That is, it is engineered to work within both Orion's allocated spectrum and projected future adjacent spectrum (Orion has spectrum allocation requests currently being engineered, or that we anticipate engineering over the next 6 months). It will be very difficult and expensive to move this technology from one spectrum to another. Orion is investing millions of dollars in deploying this leading edge technology; therefore radio licence security of tenure has become a significant issue.

B: SUMMARY OF ORION'S SUBMISSION

- 6 Orion appreciates the opportunity to respond to *Radio Licences Security of Tenure, Discussion Paper 2006* (the Discussion Paper). The Discussion Paper raises important questions about investment and security of tenure. Orion submits changes in technology and commercial needs means that the balance between flexibility in the administration of radio licences and the security of tenure of the radio licence holder needs to be adjusted.
- 7 The security of tenure of a radio licence holder can be removed in (broadly) two ways. First, decisions can be made under Regulation 15 to transfer, suspend or revoke a radio licence. Second, registration of a management right on the same frequency extinguishes a radio licence.
- 8 Orion acknowledges MED has administered the Regulation 15 powers in ways that recognise the security of tenure and investment consequences. Nevertheless, lead times and transition paths do not guarantee the radio licence holder security of tenure. Nor do they "keep whole" an affected radio licence holder.
- 9 As illustrated by the significant investments Orion is making, technology and commercial developments mean firms are now considering making much larger investments on the basis of radio licences. Currently accepted limits on security of tenure are going to be unacceptable in the future. For this reason, Orion's principal submission is the balance between flexibility in the administration of radio licences and the security of tenure of the radio licence holder needs to be adjusted.

- 10 The Discussion Paper seeks feedback on a number of options for improving the security of tenure within the radio licence regime. As a general comment, all practical improvements would be welcomed. More detailed comments on each option are made below. Standing back, however, it appears difficult to improve the security of tenure of the radio licence holder by a significant degree. In particular, the risk of the creation of an overriding management right remains.
- 11 The Discussion Paper also asks whether improvements in the security of tenure of the current radio licence holder might create a consequential need for other changes in the regime. In Orion's view, there may be a need for clear "use it or lose it" rules to prevent hoarding. Any time period would have to be sensitive to the greater investments now contemplated. Orion does not anticipate there will be a need for the other potential measures noted in the Discussion Paper (competitive allocation, resource rentals, tradability of licences).
- 12 Orion submits the option of converting some or all of the radio licences to spectrum licences under Crown-owned management rights shows the greatest promise for significantly improving the security of tenure of the licence holder, and should be the subject of more detailed consultation. This would remove a significant defect in the current security of tenure (the risk of the creation of an overlapping management right) and leverage off the protections in the management right regime. Crown ownership of the management rights would allow for administration of the radio licences as a resource, and avoid the drawbacks of asking radio licence holders to deal with private management right holders (discussed below).

C: THE ISSUES – INVESTMENT AND SECURITY OF TENURE

- 13 The Discussion Paper identifies the impact that defects in security of tenure can have on levels of investment over time. If tenure is not secure, less investment will be made, and / or it will occur later than would otherwise be the case. The Discussion Paper also rightly identifies there is a balance to be struck: increasing security of tenure may have consequences for administrative flexibility, the need for rules to prevent hoarding, and compliance costs.
- 14 Orion acknowledges that the MED has administered the current regime in ways that recognise that security of tenure is a factor, including:
- 14.1 exercising its Regulation 15 revocation power only in limited circumstances;
 - 14.2 allowing long lead times if it proposes to shift licensees to a different band or change frequencies; and

14.3 usually not registering a management right without first having found a transition path for licensees (irrespective of whether the licensee has a statutory transition right).

15 Orion also agrees it is difficult to assess the impact of the current defects in the security of tenure by reference to the level of investment that has occurred under the current regime. What we cannot know is the level of investment that would have occurred if the level of security of tenure had been greater.

16 However, as discussed above, concerns around security of tenure are becoming more significant as the cost and sophistication of technology is increasing. The balance between flexibility in the administration of radio licences and the security of tenure of the radio licence holder needs to be adjusted. With the cost of technology increasing, the government would be asking businesses to take on a greater degree of risk if the current regime prevailed.

Q1 – Should radio licences have greater security of tenure? Why?

17 Yes, for the reasons given above.

Q2 – What is more important to your business: rapid access to radio spectrum to implement new services, or security of tenure for investment?

18 Orion's experience has been that a good level of access to radio spectrum is available under the current regime, both where the spectrum is available (i.e. not in use), and where someone already uses the bandwidth. Where the spectrum is already in use, we have found a commercial arrangement with the current radio licence holder to deal with migration incentives and costs is usually possible.

19 We do not anticipate that improving the security of tenure of radio licence holders would impact materially on the current level of access to radio spectrum. In the event, however, that it did mean access took longer, this cost would be outweighed by the benefits of greater security of tenure.

Q3 – Could changes to security of tenure be made in isolation from other reforms of radio licences? Might there be unintended consequences?

20 Orion accepts an increase in security of tenure, and the increasing commercial value of the radio licence / spectrum, may create a need for mechanisms to prevent hoarding. Orion would support the introduction of "use it or lose it" provisions. For this reason, Orion submits the key here is for the rules to be clear, and the use it or lose it period to be set with regard to the likely scale of investment being made in reliance on the licence. We believe a 24-month period would be appropriate.

21 Beyond such "use it or lose it" provisions, Orion believes that any lessening of flexibility would be acceptable and appropriate in the likely future market conditions. The

Discussion Paper asks whether one unintended consequence might be increased compliance costs. It is difficult to see where these costs may arise, and in any event the size of investments and projects means the compliance costs to the radio licence holder will be trivial in the context of the project.

Q4 – Should all (or most) radio spectrum be moved to the management rights regime? Why?

- 22 On the basis of past experience, Orion believes moving most or all radio spectrum to the management rights regime, where the management rights were in private ownership, would inhibit timely access to spectrum. Orion has previously tried to obtain spectrum rights from management holders and experienced real difficulty in finding a commercial party that would grant licences at a reasonable price and without onerous constraints.
- 23 Orion also believes that the MED must be cautious, if it grants management of the spectrum to another party, of any bias that party might have. Management rights should not be able to be exercised in a way that restricts competitive behaviour.
- 24 As discussed below, Orion does see real potential in the option of converting some or all of the radio licences to spectrum licences under Crown-owned management rights.

D: SPECTRUM ALLOCATION

- 25 Orion would not support a greater degree of prescription in the spectrum allocation process as our experience in dealing with other radio licence holders is that a commercial arrangement is always possible.
- 26 For example, when Orion required additional 25khz E band spectrum, we reached a financial arrangement with a courier company under which the company moved channels in return for Orion funding the software change required to the company's radio equipment.
- 27 In contrast, Orion's experience is that it is very difficult to reach acceptable commercial arrangements with management right holders. We approached two management rights holders with a view to obtaining a spectrum licence for a point-to-multipoint radio network.
- 28 The two companies told us they wanted to keep their spectrum "whole" rather than splitting it into geographical licences. They had paid high prices for their management rights and wanted to maximise their return, so did not want to forgo their ability to licence their whole spectrum to one party or to use the spectrum themselves. Orion sensed that our request fell into the "too hard" category.

- 29 While we did not have formal discussions with either company as to what the appropriate licence cost for the requested amount of spectrum would be, we felt that the suggested costs were disproportionate to what the companies had paid for the management rights.
- 30 A further area of concern was the onerous conditions proposed by the management rights holders. In one case, the rights holder sought to specify the equipment to be used and wished to supply and maintain that equipment itself.

Q5 – Would a defined methodology for determining when spectrum is to be reallocated improve the security of tenure for radio licences? How and why?

- 31 A defined methodology might be useful in providing licence holders greater clarity around the MED's considerations when formulating government decisions. Improved transparency is always helpful. However, increased certainty and understanding around the process for spectrum reallocation will not remove the problem that licence holders remain vulnerable to a reallocation decision.

Q6 – What steps and considerations would a defined methodology incorporate?

- 32 A defined methodology would provide greater detail around the inputs that the MED considers in preparing a discussion paper on the best use of a particular spectrum band, and would indicate the degree of importance placed on each input.

E: SECURITY OF TENURE WITHIN THE RADIO LICENCE REGIME

- 33 The MED has suggested five ways in which security of tenure could be improved under the current regime. These are:
- 33.1 making revocation of a licence by the MED subject to a notice period (five years is suggested);
 - 33.2 making a statement of policy to ensure that a transition path is found to replace revoked radio licences;
 - 33.3 amending the Radiocommunications Regulations 2001 or issuing a statement of policy outlining the revocation framework and the circumstances in which the MED would exercise its power;
 - 33.4 including a condition in licences which specifies the MED's revocation rights (with a possible amendment to the Regulations to give effect to such conditions); and
 - 33.5 offering licences for a minimum period.

Summary of Orion's response to the options

- 34 Orion comments below on each of the options outlined. In summary, however, we note that it appears difficult to significantly improve the security of tenure of licensees. This is largely due to the fact that the risk of the creation of an overriding management right remains under each of the options outlined.

Revocation subject to notice period

- 35 It is clear that licence holders' security of tenure would be greater if revocation was subject to a notice period of around five years. This option is likely to offer licensees more security than the current use of transitional plans, which seems to be a looser commitment by the Ministry to attempt to find alternative spectrum if a licence is revoked.
- 36 Another advantage of this option is that the minimum notice period would be known to licensees upfront, whereas the length of any notice period is left to the MED's discretion under the current regime.

Statement of policy to ensure transition paths are found

- 37 Orion sees the transitional rights provided to some licence holders when a management right is created as an important safety net under the current regime. In Orion's experience, the duration of transitional rights averages around 10 years, which we believe is acceptable.
- 38 However, a policy that requires transition paths to be provided in all cases where management rights are created is not a complete solution. Transition paths are imperfect as the licence holder incurs the costs of transferring to a new licence or right, as well as the risks that an alternative or suitable band will not be found.

Amendment of Regulations or statement of policy around framework

- 39 The Discussion Paper does not detail how the Regulations would be amended. Orion would like to see the MED consult on any amendment proposed to increase security of tenure (for example, the specification of a minimum licence period).
- 40 A clear policy statement may lead to a greater awareness of the circumstances in which the MED can exercise its powers of revocation. However, a policy statement has no legal effect. It would merely preserve the status quo in terms of security of tenure, with licensees remaining susceptible to a change in policy or revocation of their licence upon registration of a management right.

Adding conditions to licences

- 41 The inclusion in radio licences of conditions setting out the MED's revocation rights may also make the existing rules more explicit.

- 42 However, the implementation of this proposal would not change that fact that radio licences can currently be revoked and, consequently, licence conditions would be unlikely to significantly increase security of tenure.

Offering licences for minimum periods

- 43 Specifying a minimum licence period is likely to increase security of tenure, as the MED's current revocation powers would (presumably) be suspended for the duration of the minimum period. Of the options identified for amending the radio licence regime, this is the only one that has the potential to materially improve the status quo (if implemented via regulation).

Q7 – Should radio licences be allocated with more certainty over their term?

How and why?

- 44 Orion has submitted above that currently accepted limits on security of tenure will be unacceptable in the future. Allocating licences with more concrete terms is one way in which the MED could achieve greater security of tenure for licence holders.
- 45 We would like to see the MED consider granting longer term licences (say, up to 20 years' duration) for complex radio projects, in recognition of the increasing investment businesses are making in reliance on spectrum.

- 46 We accept that appropriate mechanisms would need to be put in place to prevent the hoarding of spectrum.

Q8 – If security of tenure should be provided, should different services be treated differently? What criteria might be considered in determining a suitable period for security of tenure?

- 47 We believe that different services should be treated differently, taking into account the different attributes of licence holders and factors such as:

- 47.1 the value of the investment in the spectrum and the costs of shifting;
- 47.2 the degree of difficulty to shift, both technically and operationally; and
- 47.3 any negative change in the communications performance that would result from a shift.

Q9 – In what circumstances would immediate revocation be appropriate?

- 48 Orion submits that licences should only be revoked in accordance with clear rules and with appropriate notice being given to the licence holder.

Q10 – Would a change to the licence or regulation be effective to give security of tenure? Is either option preferable?

49 We believe that regulation (with corresponding notice to licence holders) would be a more effective mechanism to give security of tenure. Regulation is likely to better ensure that all new and existing licence holders are subject to the same rules.

Q11 – Which of the options of a set term or minimum notice for revocation is preferable? Why?

50 A set term would allow for greater security of tenure than a minimum notice period and for that reason, Orion would favour that option. The difficulty that might be raised in relation to a set term is that it creates a risk of unused spectrum being tied up.

51 However in Orion's experience we have had no problem in reaching agreements with other licence holders to access additional spectrum. As noted above, we think that any perceived increase in risk of hoarding could be dealt with through mechanisms such as "use it or lose it" provisions.

F: THE MANAGEMENT RIGHTS REGIME

52 A key defect in the security of tenure of a radio licence holder is the potential for the creation of an overlapping management right. If this occurs, the radio licence is extinguished. The changes discussed in the section on the radio licence regime, above, do not address this issue.

53 Current practice is to grant the affected radio licence holder transition rights, such as the provision of a similar spectrum licence at a predetermined cost. The Discussion Paper seeks feedback on whether this approach to transition rights should be revised to give greater certainty. Options include:

53.1 extending the statutory transition rights to all radio licence holders;

53.2 making existing radio licence holders compete in an open allocation process when a management right is created in a band; and

53.3 a statement of government policy that transition rights will be granted.

54 The very fact that creation of a management right extinguishes a radio licence is a key defect in the current radio licence regime. For so long as this remains the case, transitional rights will be an important part of the current radio licence regime. Greater certainty around transitional rights will at least minimise the impact on investment incentives from the risk of revocation of an existing licence.

55 What that means in relation to security of tenure is that the extension of the statutory transition rights and a policy statement that transition rights will be granted should help to minimise any impact on investment incentives, but within a context where the potential for the creation of a management right is a significant risk for a radio licence holder, and where the transition regimes do not keep the issued licence whole.

56 Orion submits that the second option – the creation of an open allocation process – would take the regime backwards. We currently have an administrative regime that allows licence holders some transitional rights. The second option seems to us to be completely at odds with the where the regime should be heading, which is to provide greater security of tenure in order to drive investment.

Crown-owned management rights

57 As an alternative to reforming the radio licence regime, the Discussion Paper raises the possibility of converting all radio licences to spectrum licences under Crown-owned management rights. The Discussion Paper suggests this might improve coherence by managing all the radio spectrum under one regime, which might be better suited to providing security of tenure.

58 Orion sees this option as having real promise. The major attraction is that all spectrum would already have been brought under the purview of the management rights regime. This would avoid what Orion, as noted above, sees as the overriding defect in the security of tenure of radio licenses.

59 The option could also drive off the established features of that regime, such as security of tenure and the competitive method of spectrum licence assignment, without current licensees having to deal with the Crown in the way they currently deal with commercial third parties.

60 Orion submits it would be of real value if MED consulted on more specific details and proposals around this option.

Q12 – Should holders of radio licences have defined transitional rights in the event of conversion to the management rights regime? Why?

61 In the event of conversion to the management rights regime, defined transitional rights would be beneficial in providing a clear framework around the conversion process.

Q13 – Should such rights be to a guaranteed replacement spectrum licence for a set period, or to be provided a suitable transition path? Are there other options?

62 Orion believes that guaranteed replacement spectrum would be more appropriate than a transition path. This would provide the licence holder certainty in the short to medium term and allow it to plan ahead accordingly.

Q14 – Which options out of changes to licence conditions or regulations, a statement of government policy or legislative change is preferable to provide security of tenure on conversion of spectrum to the management rights regime? Why?

- 63 We believe that legislative change would be the preferable option as it is legally enforceable and would ensure universal treatment of licence holders.

G: FINANCIAL ARRANGEMENTS

- 64 The Discussion Paper notes that under both the current management rights and radio licence regimes, the previous holder bears the costs of transferring to any new licence or right they wish to use.
- 65 The Discussion Paper raises the possibility of providing financial incentives to radio licensees to assist with the costs of transition (such as equipment changes). It notes that the efficiency of band planning could be decreased through licensees “holding out” for payment and that it is unclear where the funding for financial incentives would come from.
- 66 A possible option is to raise radio licence fees in order to establish a fund to assist licensees with any transition costs.

15 – Should financial incentives be payable for changes to radio licences imposed on licensees? Why?

16 – How would you see such funds being supplied and allocated?

- 67 This comes back to Orion’s concern that while a number of changes to increase security of tenure that are proposed in this Discussion Paper are positive steps, the fact remains that if the Regulation 15 power is used to revoke a licence or a licence is extinguished due to the registration of a management right, then notice periods or transitional paths will not keep the licence holder whole.
- 68 This is always going to have a detrimental impact on investment incentives and, as the scale and costs of projects increase, this issue will become more important and the amount of financial compensation needed to keep the licence whole will go up, not down.
- 69 We think these questions are hard ones, which reinforces Orion’s view that the proposal to convert all radio licences to spectrum licences under Crown-owned management rights is a sound one.

H: OTHER ISSUES

17 – Are there any other issues in the context of this discussion paper that you wish to bring to the attention of the Ministry?

70 No. Orion has appreciated the opportunity to respond to this Discussion Paper.

71 If you have any questions about the responses outlined in this submission, please contact Neville Digby (System Engineer), DDI 03 363 9881, email neville.digby@oriongroup.co.nz.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'Rob Jamieson', with a stylized flourish at the end.

Rob Jamieson

General Manager - Commercial