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Submission to the ICT Regulatory Team Ministry of Economic Development

In the matter of

Broadband Investment Fund: Draft Criteria and Proposed Process for Consultation

From Auckland City Council

Economic Development Group

30 June 2008

Based on current Auckland City Council policy, the council's Economic Development Officers value the opportunity to provide a submission regarding the Broadband Investment Fund (BIF) draft criteria and process for assessment of applications as outlined in the document *New Zealand's Digital Pathway: A Fast Broadband Future*. Please find below our views on the matters as sought.

Questions on the Urban Criteria

1. *Will the proposed timeframes provide Applicants with sufficient time to fully complete the application requirements?*

Response: Auckland City Council considers that the proposed timeframes are more than sufficient to complete the application requirements provided that the final criteria are made available by the end of July 2008, and that they are generally consistent with the draft criteria. We would actually like to see the timeframes compressed as the current dates present some difficulties with regard to the council's planning process as discussed in section 7 below.

2. *Are any amendments needed to the draft criteria to improve the outcome of the Urban Fund?*

Response: Auckland City Council is of the view that the criteria as they stand do not sufficiently take into account the importance of the access network (or "last mile") and that a primary focus of the Broadband Investment Fund should be on this component of the network as distinct from the core or distribution network. Auckland City Council considers that mechanisms are required to encourage last mile deployment, particularly for commercial precincts outside of the main CBD's and high-density areas.

This aspect is discussed in the report on *Open Access Broadband in Auckland* prepared for the Auckland Regional Broadband Advisory and funded by the Ministry of Economic Development. Specifically this report states:

In our view, if there is a role for government along the lines of the sponsors' vision, then it primarily concerns the access network, not the core. This is consistent with the original motivation for public intervention in telecommunications networks, which was to offset market power arising from ownership of the access network.¹ The closer one gets to the core of the network, the greater is the volume of traffic, the more attractive is the business case for competitive commercial investment and the weaker is any rationale for government intervention (beyond ensuring that competition is not unduly thwarted).

The council would like therefore to see last mile deployment recognized as a key aspect in the assessment criteria.

Auckland City Council is also concerned that restricting the open access criteria to ducts and fibre, to the exclusion of cost effective managed services, may limit involvement from existing industry participants. There are significant challenges in providing open access at the passive infrastructure layer except where the requirements are for short distances. Even then, without a high level of

¹ For a modern analysis of last mile issues, see T.R. Beard, G.S. Ford and L.J. Spiwak, Why ACo? Why Now? An Economic Exploration into the Future of Industry Structure for the "Last Mile" in *Local Telecommunications Markets*, *Federal Communications Law Journal*, Vol. 54, p. 421, 2002.

certainty around demand, investments in open access, passive infrastructure are risky. There needs, therefore, to be a balance between access to passive infrastructure and enabling industry investors to make an adequate return on infrastructure deployed, otherwise there is a very real possibility that the required investment will not occur even with contributions from the public sector. As Auckland City Council favours focusing on the outcome rather than mandating a specific approach, it is our recommendation that BIF puts in place measures to ensure fair pricing while still allowing adequate return on investment. Lastly, we request that consideration also be given to mechanisms that will ensure fair pricing at the wholesale level is passed through to final end-user pricing.

3. Should successful Applicants be prevented from offering Application Services across the supported broadband infrastructure?

Response: Auckland City Council is of the opinion that the “grantee” entity itself should not be allowed to profit from Application Services across the supported infrastructure. However a related “entity” (e.g. two independent subsidiaries of a holding company) should be allowed to do so. This should be subject to the “grantee” entity meeting the criteria of providing services on an open basis.

4. The draft urban criteria include absolute criteria and weighted criteria. Are there any absolute criteria that you consider are too onerous and should instead be classed as percentage weighted criteria?

Response: In general, we consider the absolute criteria for eligibility are appropriate for achieving the desired outcomes of improved high speed broadband services to businesses and key MUSH users. We are concerned however that the detail of some aspect such as the Interconnection Requirements as specified in Appendix A are likely to be problematic and it may therefore be appropriate to deal with some of these aspects in terms of weighted criteria. Specific comments are as follows:

- The requirement for “*An interconnection facility between sites connected to the Network and **any** Third Party Service Provider;*” may be problematic because some third party service providers may place unrealistic conditions for interconnection, such as compliance with particular protocols or interconnecting at a physical location that the Network does not have a presence. Moreover, some third party service providers may not wish to be party to a connection with the Network.
- Given that the network could be Infrastructure only there will be a dependency on third parties to offer end user access, and it is possible that those third parties will only have a limited set of applications they offer. Therefore, “*Connections to other local, national and international networks to enable End-Users to access a wide variety of applications, locally, nationally and internationally*” is largely outside of the Applicants control. The issue here is really about understanding/defining what is the minimum set of applications that third parties will need to be able to access for different layers of network capability (Infrastructure, Bearer and Applications), otherwise this requirement as it stands is too open ended.
- The requirement “*Where appropriate, a facility for Bearer Service access that is well-located and that places no unreasonable restrictions on third-party service provider access or the type of service provided*” is seen as an issue as there are many types of service and it is unrealistic to expect the Network to support/interconnect with all, particularly legacy services.
- “*Where appropriate, a facility for Application Service access that is well located and that places no unreasonable restrictions on Third Party Service Provider access or the type of service provided*”. Our concern is the same as for the previous interconnection requirement – viz: some third party service providers may place unrealistic conditions for interconnection, such as interconnecting at a physical location that the Network does not have a presence or compliance with particular protocols (particularly legacy protocols).

5. Do you agree with the percentage weightings in the urban criteria?

While we see the four assessment criteria as relevant, we do have some questions and comments regarding a number of aspects and the percentage weightings. These are as follows:

- a) The matters identified as relevant to the Assessment Criteria for "*Demonstration of the Project's Benefits*" appear to place a higher value on Key Public Users than on Business Users. For the former the focus appears to be on the actual number of Key Public Users provided Passive Infrastructure connections, while for the latter it is just the "capability to service the broader community, including business users." In our view it is desirable to increase the emphasis placed on business users and rather than just the "capability to service" it should be the potential number of FTTP connections to business users for which FTTP will be of value (that is business that can deliver improved economic benefits as a consequence of FTTP). Assessment could then be on the robustness of the proposed model to achieve broadband delivery.

Our reasons for making this suggestion are two fold: Firstly, the economic benefits from fibre based broadband as a key enabler of the "weightless" economy need to be recognized in terms of some quantitative measure such as the number of potential business users participating in the weightless economy that are able to access fibre based broadband as a consequence of the proposed network build. Secondly, the business market provides the growth opportunities that are necessary to attract private sector investment.

- b) We feel consideration should be given to splitting the second assessment criteria, "*The Commitment of the Applicant*", into two separate criteria one for 7.1(a) and the other for 7.1(b), as these two aspects are fundamentally different and it is desirable to know the relative importance of those two distinct aspects.

We are also uncertain as to the intent of 7.1(b) - *the Applicant will have sufficient and evidenced aggregated demand to ensure the viability of the capital expenditure needed to complete the Project (and confirmed through the Business Plan)*. It appears to us that 7.1(b) is possibly more relevant to clause 8, *Capability of the Applicant*. It could therefore be positioned as a new clause 8.1(c) or alternatively, it could be seen as falling under clause 8.1(b) as this implicitly covers the need for sufficient funding to complete the project. Yet another option could be to create an additional assessment criteria such as *Sufficient Funding to Complete the Project* for which 7.1(b) is one possible aspect.

- c) For 7.2 (f) "the level of indicated aggregated demand, including commitments from current or potential broadband users in a given sector or geographical region"; we are unclear as to the relevance of this from two particular perspectives:
 - I. It appears to be more appropriate as an indicator of the Projects Benefits rather than an Applicant's Commitment. (note it could be part of a new assessment criteria around Sufficient Funding to Complete the Project)
 - II. For an infrastructure network, the offerings will be sold to other network operators and telco service providers; consequently, there is not a direct relationship with actual broadband users. Therefore, it is arguably inappropriate to seek commitments from current or potential broadband users, as they will be customers of other entities such as telco service providers.
- d) We would like clarification as to the specific definition of cash flow used in 9.2(f). Is this intended to be monthly revenue less monthly operational costs or is it actual cash flow where inwards-cash includes revenue as well as any equity or loan funding and cash-out includes various items such as CAPEX, operational costs, and tax payments.

- e) We feel further consideration should be given to the relative weighting of the assessment criteria. In particular we would like to see consideration given to increasing the weighting given to “Sustainability and Potential for Expansion”, with a corresponding reduction in the weighting for “Commitment of the Applicant”. Our rationale for this suggestion is that the weightings as they stand could encourage Applicants to seek lower BIF contributions and in so doing may compromise longer-term sustainability, growth and reinvestment. For example this may constrain the number of connection points installed for potential business users, which in turn compromises the ability to connect such users in the future.

6. *What do you consider to be an appropriate level of applicant assistance (e.g. a list of relevant experts, funding, case management)?*

Response: We see considerable value in the proposed involvement of MED to provide guidance and advice as to the completeness and suitability of EoI and any subsequent Applications as they are developed, and we welcome this involvement at an early stage.

The offer of funding to assist in the preparation of an Application (and the associated Business Model, demand qualification etc) is also of particular interest. Given it is desirable to ensure applications are received from those with direct mandate to represent the areas that will benefit from the funds, we consider that such assistance should only be provided to Territorial Local Authorities.

Additionally we believe it is important to establish guidelines, processes and undertakings regarding turn around time for questions to the MED (essentially the case management process that MED would adopt)

7. *Does the proposed timing raise any issues for your planning processes?*

Response: The proposed timing does raise planning issues as it is not aligned with the council annual plan or LTCCP timeline. The timeline for this current year is as follows:

18 April	Draft annual plan available for public consultation
20 May	Submissions close
3-5 June	Council meets to hear submissions
19 June	Annual plan adopted
18 July	Final annual plan released
28-30 July	First rates bills sent out for 2008/2009

Any major 2009/10 work has to be dealt with in the 2009/2010 planning process, which will go out around April 2009, but with the proposed BIF process, we would not know where we stand before May 2009. From the council’s perspective, it would be preferable if the timeline can be compressed so that a cabinet decision is made by March 2009.

8. *Further matters that we wish the Ministry to consider*

Response:

- a) Auckland City Council considers that the annual cap of 30% on allocations made from the Broadband Investment Fund may be problematic as proposals will in most instances be multi year and for the Auckland Region alone it is highly likely that for the first round the combined request for funds (for spending over multiple years) will exceed the 30% cap. We request that the BIF process allow for a greater percentage to be allocated in any one year so that fund arrangements can be clarified for multi-year projects. Year-by-year draw down of funds could however be made on the proviso that certain goals or criteria are being met.
- b) While the request for submissions relates to the eligibility/assessment criteria and the process for making applications for funding out of the Broadband Investment Fund we note that the total investment required to achieve ubiquitous broadband (all areas including residential) is significantly greater than the \$250M allocated as the urban component of BIF.
- c) In reading the document containing the BIF criteria we have felt that there is a potential for confusion arising from the various terms and expressions used around open access and “fair and non-discriminatory basis” as they are not formally defined and tend to be used interchangeably. To some extent these terms are open to interpretation. In our view the terms should either be formally defined and any contradictions removed or it should be stated that there is some flexibility in interpretation and that MED is willing to clarify any aspects that Applicants would like clarification on (with any such clarifications advised to all parties who have indicated an interest in submitting an EoI).

While Auckland City Council supports the “fair and non-discriminatory” provisions of the Wholesale and Open Access Eligibility Criteria (clause 3), we consider that further clarification of the expectations regarding “non discriminatory” would be useful. From a commercial perspective, we can see merit in pricing arrangements, which allow discounts, or preferential pricing for certain types of customers such as those making volume purchases or “take-or-pay” arrangements. Dealing with cherry picking situations is also something that needs to be considered.

- d) We would like to see some clarification around the Fit for Purpose Requirements (described in Section A, clause 4.1). In particular what is meant by “all reasonable endeavours”? and by the term “provide”? Given that for an infrastructure provider the relationship with the end user rests with a third party service provider, such applicants will for the most part be reliant on commitments from individual service providers regarding use they would make of the infrastructure to deliver services to their customers. For commercial reasons those service providers may be reluctant to identify particular end-users.
- e) The proposed Application process is silent on the timeframes for submissions beyond the first round. Auckland City Council considers that it would be desirable to specify timeframes for future submissions on say a quarterly or six monthly cycle.

Questions on the Rural criteria

1. *Do you agree with the proposed outcome of the Rural Fund?*

Response: In general we agree with the proposed outcomes for the rural fund, but are confused as to the definition of rural for the purpose of the Broadband Investment Fund given there are several definitions in the consultation document:

- a. On page 5 the table provides one definition that is anchored on *“Only for areas that have no current or planned terrestrial broadband (with an appropriate service defined as a minimum of 1Mbps)”*
- b. On pages 26/27 there is further discussion which appears to conclude *“It is proposed that the qualifying rural area criteria should be those communities that do not have terrestrial based broadband infrastructure capable of providing broadband service and for which there are no current commercial plans to provide such infrastructure (including reference to Telecom’s fibre enabled cabinet plans). In practice this approach will mean that qualifying rural areas will mainly be the more remote rural areas without terrestrial based broadband capable infrastructure.”*
- c. Finally, in appendix 2 it is stated that *“In practice the Broadband Investment Fund qualifying criteria in rural areas mainly relates to rural areas with low urban influence and highly rural/remote areas”* This is further defined in the appendix as *“ Rural area with low urban influence. Rural areas with a strong rural focus. The majority of the population in these areas work in a rural area. ~42% of total rural population, density ~2.6 people per square kilometer”*

It is our view that the definition of rural fund should be that expressed on pages 26/27.

2. *Do you consider that there should be a secondary outcome that relates to improving rural voice services?*

Response: Yes, voice is desirable application that should be delivered and therefore is reasonable as a secondary outcome.

3. *Given the significant cost increases to deploy high-speed broadband in rural and remote areas and the better potential coverage that may be provided at a lower cost but also at lower speeds (including potentially by wireless rather than fibre) should the rural criteria be set at a lower speed than urban?*

Response: No the criteria should not be set at a lower speed, as this could restrict the economic benefits that can be achieved, and given the size and importance of the rural economy, high speed broadband has the potential to deliver substantial economic benefits.

4. *Do you think that mobile/wireless solutions would provide the required level of broadband service?*

Response: Wireless will not provide the same bandwidth as the fibre services envisaged for the cities, and obviously an application that needs high speed, whether it is being used in an urban or rural environment, is not going to perform as well on wireless as it does over fibre. We believe speed targets should be application and sector based rather than geographic.

We note however that depending upon the specific requirements and applications an end-user (whether they are rural or urban) may well be willing to tradeoff data speed for mobility.

5. *Do you agree that rural applicants should be required to offer open access to their infrastructure, bearer and/or application services?*

Response: Yes, we believe they should provide fair and non-discriminatory access, as otherwise the rural sector could suffer from a lack of competition.

6. *The rural criteria do not specify percentage weightings but rather are ranked in order of priority. This has been proposed in order to retain the greater level of flexibility that is required in rural areas. Do you consider that percentage weightings should be specified at the expense of flexibility?*

Response: No, we do not consider that the percentage weightings should be applied as flexibility will be important to enable innovative solutions to broadband deployment in the rural sector

7. *Consideration is being given to limiting interim seed funding for a rural project to a maximum of \$500,000, with a proviso that neighbouring communities would be permitted to apply for a greater funding amount where a combined solution leads to a lower overall cost per new broadband access connection. Do you agree with this approach?*

Response: Yes we agree with this approach to accessing BIF funds for rural areas.

8. *What do you consider to be an appropriate level of applicant assistance (e.g. list of relevant experts, funding, case management)?*

Response: As noted for the Urban Fund we see considerable value in the proposed involvement of MED to provide guidance and advice as to the completeness and suitability of EoI and any subsequent Applications as they are developed.

We consider that funding to assist in the preparation of Applications should only be provided to Territorial Local Authorities.

We believe it is important to establish guidelines, processes and undertakings regarding turn around time for questions to the MED (essentially the case management process that MED would adopt)

9. *Will the proposed timeline provide applicants with sufficient time to fully complete the application requirements?*

Response: As noted for the Urban Fund we consider that the proposed timeframes are more than sufficient to complete the application requirements provided that the final criteria are made available by the end of July 2008, and that they are generally consistent with the draft criteria.

10. *Does the proposed timing raise any issues for your planning processes?*

Response: As noted for the Urban Fund the proposed timing could raise planning issues as it is not aligned with the council annual plan or LTCCP timelines.