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**Spark
New Zealand**

[REDACTED]
Chief Adviser
Competition
Commerce Commission New Zealand

By email: [REDACTED]@comcom.govt.nz

27 August 2015

Dear [REDACTED]

Spark New Zealand Trading Limited ("Spark") Standard Form Consumer Contracts

We refer to the Commerce Commission's ("Commission") letter of 29 July 2015 in relation to Spark's standard form consumer contracts and the unfair contract terms provisions in the Fair Trading Act 1986 ("FTA"). Thank you for giving Spark the opportunity to provide the Commission with further information on this matter.

We set out our responses to the additional information sought below.

Unilateral alteration of services

1. We agree with the Commission that clause 3 of the Residential Terms and Conditions can be made fairer by ensuring that any assessment of whether there is a negative impact on customers is made in good faith. As such we are amending the clause to include words to that effect.

Limitation of liability

2. We have carried out a further assessment of our liability position in our Residential, Mobile Postpaid and Prepaid customer contracts and we have made the decision to amend the respective agreements to make the liability cap position mutual between Spark and its customers.
3. We will be amending clause 13.3 of our Residential Terms and Conditions and the equivalent clauses in our Mobile Postpaid and Prepaid customer contracts to read:
 - You accept your liability to us for breach of contract or negligence; and
 - You are not liable for any loss to the extent it is caused by us (for example through our breach of contract or negligence).
 - If you are ever liable to us your liability is limited to:
 - o \$5,000 for any event of any series of related events; and
 - o A total of \$10,000 in respect of all events in any 12 month period.

Provided we notify you of our claim within 12 months after we reasonably became aware of the occurrence of the relevant event or series of events that gave rise to our claim. These limitations do not apply to your obligation to pay any charges, or for any loss or damage caused by fraud, gross negligence, wilful breach or wilful damage.

We may become aware that we have suffered loss before you do. If we suffer any loss as a result of this agreement, we agree to take reasonable steps to avoid or minimise our loss and that you are not liable for any loss that results from our failure to take reasonable steps to do so.

4. Spark's liability cap will mirror that of the customer's liability cap clause, with the exception that Spark's limitation of liability does not apply to any rights consumer customers may have under the Consumer Guarantees Act 1993 and the FTA.

5. We consider that the level of the mutual liability cap is fair and reasonable. [REDACTED]

6. As we have decided to make our liability caps mutual we consider that the further information requested by the Commission at 10.a to 10.d of your letter may now not be relevant to the Commission's assessment. However, please advise me if you consider that the information is still required by the Commission.

Responsibility for charges

7. We remain of the view that it is fair and balanced that customers are responsible for the charges incurred on their account. [REDACTED]

8. We have further considered the drafting of clause 8 of the Residential Terms and Conditions, taking into account the process followed by Spark when we are made aware of charges and/or usage resulting from fraud or unauthorised use. [REDACTED]

9. Following this further review we have decided to amend clause 8 of the Residential Terms and Conditions to read:

Your responsibility for paying our charges

You agree to pay for the Services we provide for you, no matter who uses them. For example, you are responsible for the charges for anyone else's use of your telephone or internet. However, if you have any unexplained usage and/or charges on your account please contact us as soon as you become aware of them and we will investigate for you. If acting in good faith we consider the usage and/or charges are a result of fraud by another person or by someone outside of your reasonable control we will provide you with an appropriate resolution, which may include providing you with a credit or refund.

10. We consider that the change to clause 8 makes the term fairer and as such is not an unfair term in terms of the FTA.

Intellectual property rights

11. We take on board the Commission's comments and propose to further amend clause 23 of our Residential Terms and Conditions to read:

Spark does not claim ownership of any content or material you provide or make available through the Services ("Customer Material"). However, by posting any Customer Material on online forums operated or approved by Spark, you grant Spark a perpetual, royalty-free, non-exclusive, irrevocable, unrestricted, worldwide licence to use, copy sub-licence, redistribute, adapt, transmit, publish, delete, edit and/or broadcast, publicly perform or display the Customer Material. Provided that Spark may not derive any direct financial gain from the exploitation of any right under such licence, unless otherwise agreed with you.

Unused credit following termination

12. We have considered the Commission's comments in relation to whether it is fair for Spark to retain the balance of those identifiable customers who are not transferring to a Spark postpaid or fixed line account when the customer's account is terminated by Spark in accordance with clause 10.2.

[REDACTED]

13. As such we will be amending clause 10.3 of the Mobile Prepaid Agreement to read:

Any unused credit on your Spark Prepaid Account will lapse (unless you are upgrading to one of our Spark Postpaid plans or you have a Spark landline or broadband account in which case we can transfer the credit to your Spark account). Where we have terminated your account in accordance with clause 10.2 and you have any unused credit on your Spark Prepaid Account we will provide you with a refund provided you contact us and advise us how you wish to receive your refund.

14. We consider that the amendment makes the term fairer and as such is not an unfair term in terms of the FTA.

As you will appreciate, much of the information supplied in this letter is confidential, commercially sensitive and is of a nature that Spark considers may be protected from disclosure under the Official Information Act 1982. Spark would therefore appreciate the opportunity to discuss with you in advance of any proposed disclosure of the information supplied.

Please do not hesitate to contact me if you have any further questions. In addition we would be happy to meet with the Commission to discuss further.

Yours sincerely

[REDACTED]

[REDACTED]

Senior Counsel Customer

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