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Dear Sharoon,

SUBMISSION ON THE DRAFT REGULATORY GUIDELINES FOR THE TELECOMMUNICATIONS SECTOR

1. Vector Communications welcomes the opportunity to submit on the discussion paper: *A Guide to Regulatory Decision Making by the Commerce Commission for the Telecommunications Sector*. We appreciate the Commerce Commission's ("the Commission") initiative in providing greater clarity to industry participants on how it discharges its powers and functions under the Telecommunications Act 2001 ("the Act"), including its exercise of discretion at various stages of the regulatory process.
2. This submission articulates the views of Vector Communications, on behalf of the Vector group, in respect of issues raised in the discussion paper that are of particular interest and relevance to us, and what we would like the final version of the guidelines to reflect.

The value of the guidelines

3. The development of regulatory guidelines for the telecommunications sector is timely, as regulatory certainty becomes ever more important in the current economic and investment climate. Infrastructure operators are making, or are planning to make, huge investments in fibre-to-the-node ("FTTN"), fibre-to-the-premises ("FTTP"), and in new mobile and wireless technology and are subsequently likely to seek a greater degree of comfort from the Commission in how it intends to regulate these investments. In our opinion, the investment decisions made over the next few years will be

Vector Communications' submission on the Draft Regulatory Guidelines for the Telecommunications Sector

crucial for New Zealand if it is to catch up with its OECD peers in broadband performance.

4. Vector generally supports the adoption of the guidelines. At the outset, however, the Commission states that these guidelines are not binding on the Commission. However, the value of these guidelines would be questionable if they were not to be applied rigorously and consistently by the Commission in fulfilling its obligations under the Act. Though we recognise the Commission needs reasonable flexibility in discharging its obligations under the Telecommunications Act, there should be greater reliance on these guidelines if they are to have any value in promoting regulatory certainty for the telecommunications industry.
5. We therefore seek a higher level of commitment from the Commission in adhering to the guidelines than is currently indicated in the discussion paper. We propose that they be relied upon unless the Commission and/or relevant parties can argue, on a case-by-case basis, that there is a compelling reason not to do so. This would best promote regulatory certainty.

The Commission's new focus

6. The Commission indicates that it is shifting its focus from determining terms and conditions of regulated services to monitoring and assessing new market developments, in light of emerging technologies and changing consumer demand. Vector Communications supports this forward-looking strategy.
7. We are mindful that the Commission not lose focus on the considerable change expected in the telecommunications sector. The emerging products and technologies, when harnessed effectively, will represent a step change in New Zealand's economic performance, so the Commission's regulatory framework and guidelines need to be ready and flexible enough to accommodate this change.
8. It is critical for the Commission to recognise that investments in telecommunications infrastructure are risky. It is uncertain what take-up there will be of new technologies or the timeframes for which they will be commercially attractive to consumers before being displaced by further technological developments. In Vector's view, the Commission needs to be much more alert to the risks borne by investors and ensure that sufficient returns are available from successful investments to compensate investors for taking risks in the first place.

Vector Communications' submission on the Draft Regulatory Guidelines for the Telecommunications Sector

9. In particular, cost-based regulation of successful new investments must be approached with extreme caution, particularly in an environment where technological progress is rapid and fixed and wireless communications are increasingly converging as technical and economic substitutes. Regulatory forbearance for new investments is likely to be particularly important, and the guidelines also need to recognise the potentially high costs of regulatory error, which in the telecommunications sector can be higher in the longer term than the market failures that the regulator is seeking to correct.
10. In monitoring and assessing emerging markets and technologies, the Commission should be mindful of making regulatory decisions that would prejudge market outcomes and could stifle incentives to invest. This recognises that it will be difficult to obtain a full understanding of the nature of the market, and any limits on competition, before it has developed. Efficiencies gained in a competitive market are generally observed only over the long run.
11. In thinking about new regulation, particularly for emerging markets, the Commission should err on the side of caution and exercise regulatory forbearance. The cost of regulatory mistakes on investment decisions can only be realised with hindsight (if at all), and this can be substantial for both regulated firms and end users.
12. Further to this, Vector Communications agrees with the Commission that where there is a conflict between static efficiency and dynamic efficiency, the Commission should give greater weight to dynamic efficiency, and therefore, to incentives for innovation and investment which provide greater benefits to end users in the long run.
13. Also, in considering investment incentives, the Commission should continue to be mindful of the uniqueness of telecommunications infrastructure due to the presence of multiple network layers (e.g. backbone infrastructure, access node, and the service layer). As each layer has its own complexities, different life span, and different investment timeframes, it is important that the Commission is mindful of this in its monitoring function, and in any regulation or de-regulation that results.
14. A major aspect of the Commission's monitoring activity is the disclosure of industry information. Vector, as a competitive network provider, has noticed that it has been required to disclose an increasing amount of information to the Commission. Although we recognise the importance of this information in assessing industry-wide competition, the Commission should ensure that its monitoring activities, particularly industry disclosure requirements, are cost effective (preferably least-cost) and fit for the purposes of the market assessment being undertaken.

Vector Communications' submission on the Draft Regulatory Guidelines for the Telecommunications Sector

15. In Vector Communications' view, the Commission should focus its monitoring activities on removing bottlenecks that are still likely to be in network interconnection. We believe there is evidence of access seekers experiencing difficulty in connecting with key incumbent interconnection points, which impedes market performance and competition.
16. Overall, in fulfilling its regulatory function (whether monitoring or setting regulation) the Commission should adopt principles of consistency, transparency, least cost to achieve the objectives of the Act, cost effectiveness, and bias towards minimal regulation.

'Non-standard' solutions

17. Vector strongly supports the Commission's preference for commercial solutions over regulatory ones. Competitive commercial arrangements are more efficient and enable the early uptake of more innovative services that meet customer demand. They are more flexible to change and are able to be amended more quickly compared to regulated arrangements that are often subject to long consultation processes. The pursuit of deregulation is, therefore, an important goal for the Commission where workable competition exists or is expected to develop.
18. In this context, Vector also considers that adopting undertakings that are acceptable to the Commission and other relevant parties is preferable to stricter regulated outcomes even where the risk to the regulator of adopting that tool may be higher. This is more consistent with the Commission's preference for commercial solutions.
19. The Commission will also need to factor the shadow-regulated nature of the Government's Ultra Fast Broadband Initiative ("UFB") approach into its decision making, where regulatory principles are effectively taken account of in the tender framework (e.g. through regulatory standards of open access and equivalence etc.) and through the competitive bid process. There should be little or no need for the Commission to duplicate the effective regulation coming through this process.

Competition assessment

20. Initiating a Schedule 3 investigation is an area of great discretion to the Commission, with highly significant implications for some market participants. Greater clarity should be provided in the guidelines on how investigations are approached and decided and how different services/markets are ranked and chosen for investigation.

Vector Communications' submission on the Draft Regulatory Guidelines for the Telecommunications Sector

21. The guidelines should also provide some explanation of the qualitative considerations that the Commission takes into account, and how these might influence decisions made under the Act.
22. In facilitating competition, we agree with the Commission that it needs to reconcile the various objectives of access seekers and access providers in pursuit of the long-term benefit of consumers. Again, we highlight the Commission's view, which we agree with, that dynamic efficiency arguments should be given greater weight when put in balance with allocative efficiency arguments.

NGN

23. The regulatory framework needs to recognise that NGN investment is risky, and that regulation by contract under the UFB public-private partnership will form part of the competitive bid process (as discussed above). Accordingly, there should be a presumption of regulatory forbearance in respect of any new NGN technologies complemented by increased market monitoring (as it appears the Commission is doing).
24. The guidelines should also emphasise the importance of demand side initiatives in stimulating uptake on the NGN. This point has been raised in submissions to the Commission's first NGN paper and by presenters at the Commission's NGN Conference in February 2009. We seek the Commission's view on how it will factor this into its overall assessment of NGN markets.
25. The Commission should also take into full consideration the expected new Government Policy Statement on FTTP in its guidelines, as indicated in the recent UFB Final Decision document¹.

Industry bodies

26. As a member of the Telecommunications Carriers' Forum ("TCF"), Vector Communications supports the development of industry codes and documents by the TCF for the Commission's consideration and approval. However, other industry groups such as the New Zealand Regional Fibre Group ("NZRFG") and Telecommunications Industry Group ("TIG") may also come to play prominent roles in developing industry-wide arrangements.
27. As an example, we note that the Commission has expressed a willingness to assist the Ministry of Economic Development in the development of open access standards for UFB, given the expertise that it has developed through

¹ MED, Ultrafast Broadband Initiative Overview paper, Paragraph 91

Vector Communications' submission on the Draft Regulatory Guidelines for the Telecommunications Sector

the implementation of the Act over the past eight years. In September 2009, the NZRFG announced that it has adopted a set of technical and service standards, based on Ofcom's open access 'Ethernet Active Line Access Principles', to ensure consistency in the group over the national rollout of fibre networks. This work would seem complementary to the Commission's own role.

28. For these processes to be effective, the Commission should not take industry recommendations lightly, particularly where industry participants may have compromised to reach a mutually agreeable solution.

A consultation charter

29. A key part of the regulatory decision-making process is engagement with industry. Confidence in regulatory outcomes is engendered where consultation is transparent, open, fair, timely and meaningful. Vector suggests that as part of the guidelines, the Commission develop a 'Consultation Charter', which sets out what stakeholders can reasonably expect from the Commission in terms of access to information, role and use of experts, consultation timeframes, and what it expects from stakeholder submissions and engagement.
30. Regarding consultation timeframes, Vector supports the use of more efficient means of consultation including conferences, workshops and the use of industry groups where there is consensus. The Commission should consider other efficiencies to shorten the regulatory development process to that which is necessary.

Closing comment

31. It is important that these guidelines, and Vector's suggestion for a consultation charter, become live documents and demonstrably underpin the Commission's analysis. We would welcome opportunities in future to submit on future evolutions of these guidelines, and see further detail being developed in the implementation of the general principles set out in the guidelines.

Kind regards



Nathan Strong

Manager Regulatory Affairs