Wigley & Company

BARRISTERS and SOLICITORS

28 March 2008

Attention: Dr Ross Patterson
Telecommunications Commissioner
Commerce Commission

Dear Commissioner

NGN Review: Scoping

Our submission only deals with whether the scope of the review should include, and/or more clearly articulate, the Commission's expected policy and regulatory settings for the NGN environment. This should not only be clearly articulated, but also be the primary outcome, as it is for Ofcom in its similar review.

The draft scoping document is unclear about the degree to which the Commission will squarely address those issues, although they are touched on in the draft.

If anything, the proposed scope shies away from dealing with them. This can be inferred, for example, from the fact that the draft scope chooses, as its single example, only a *trigger* for regulation, not regulation itself. The draft notes that the review should:

> Give increased certainty to end users and stakeholders by providing guidance as to likely regulatory responses to market developments – **for example, to identify likely triggers for regulatory forebearance or intervention.** [Highlighting added]

Having restrained objectives is understandable, to reduce scope creep and to contain the review. However, not dealing with the actual or likely policy approach will lead to substantial shortfall in the outcomes of this review. It will negatively impact on optimal NGN roll-out, particularly in terms of delay and uncertainty. Even with the success, in terms of timing, of the STD processes, the regulatory processes remain slow overall. For example, it can be expected that NGN developments will require Schedule 3 investigations. They are time consuming (mobile termination rates took over 4 years and roaming at over a year illustrate this). The more that can be done to expedite all steps in the regulatory process (including by what is accomplished in this review), and to send appropriate signals to the market, the less uncertainty there is and the quicker that resolution of the issues can be achieved.

Benchmarking against what over regulators are doing, the draft scope sets out unduly modest goals for this review. Other regulators are explicitly addressing prospective policy and regulatory settings

We give three examples of how other regulators are doing this. There is no reason why New Zealand should not progress in dealing with the NGN issues at a similar speed to other regulators. It is recognised that there are particular challenges with NGN from a policy and regulatory perspective. But there are nonetheless more advanced steps that can be taken than is currently proposed by the Commission. (Alternatively, the scope could be clarified so that it is unambiguously clear that policy settings and objectives will be included as outcomes of the review

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In any event, other regulatory reviews (such as the three to which we refer), provide excellent and detailed resource material for the Commission. This makes fulfilling a wider scope more manageable.

Our first example is Ofcom, which produced a report on NGA in 2006, followed by its major September 2007 report on NGA. The latter report notes:

> One important factor to achieve [positive NGA outcomes for consumers, and investment at the right time and in an efficient manner] is sharing our policy framework and clearly setting out the practical options for the regulation of these new networks where ex ante regulation may be appropriate at the earliest opportunity possible. This is a key objective of this consultation.[1]

The Questions asked by Ofcom[2] of submitters as part of the consultation include:

- whether the submitter agrees with the various remedies suggested by Ofcom;
- How should Ofcom reflect risk in regulated access terms?
- Is there a need for both passive (eg: LLU) and active (eg: bitstream) remedies to promote competition?
- Is there a role for public policy or regulatory intervention to create artificial incentives for earlier investment in NGA?

We submit that the currently proposed scope in New Zealand should be addressing the issues at this level, in addition to the matters currently proposed to be addressed. Not to do so leads to delay and uncertainty. If Ofcom can address these issues now it is hard to see why New Zealand shouldn't as well.

The September 2007 Ofcom report outlines a number of potential regulatory remedies, including a bitstream solution over which the access seeker has substantial control. In Q2 this year, following submissions on the September 2007 report, and other steps, Ofcom:

> …will publish a statement on Next Generation Access….It will set out the principles that we will apply to next generation access, as well as the way in which we will approach the application of those principles, in more detail.[3]

A similar outcome (adapted to our legislation) should be within scope for this review.

In Australia, ACCC has traversed many of the relevant issues in its G9 December 2007 draft decision. Although the circumstances differ to New Zealand's, the ACCC report has Australia advancing well ahead of the Commission's currently proposed review in terms of policy and regulatory settings. In particular, that draft decision, and later decisions, provide valuable insights for the New Zealand review, which will expedite the New Zealand work.

The following observation by ACCC in the G9 draft decision is the type of issue that the Commission should be confronting now not later (whether or not the Commerce Commission comes to the same view, or come to a view with such certainty):

1.2.1 The bitstream access service

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[1] Ofcom Sept 2007 Para 1.6
[2] Ofcom Sept 2007 Para 1.9
[3] Ofcom Sept 2007 Para 10.4

> A future bitstream access service would need to be at a much lower level in the network than a wholesale xDSL service. If end-users are to reap the benefits of next generation broadband, access seekers need to be able to directly control their own customer traffic so they can innovate on services and applications and avoid simply reselling the access provider’s product. The user of a wholesale xDSL service has little control over the service and is often able to do little more than add its own marketing and call centre. By contrast, the proposed replacement for ULLS should be designed to give access seekers as much control as possible over their own customer traffic. The UK communications regulator, Ofcom, similarly describes a future broadband access product as needing to offer very high levels of flexibility and configurability, allowing competitive operators as much control as possible.

The TelstraClear and InternetNZ submissions on Telecom’s draft separation plan highlight the importance of addressing bitstream given the challenges of the LLU business case and the increasing importance of bitstream services. Those submissions note that operational separation as currently structured, will not solve the bitstream challenge.

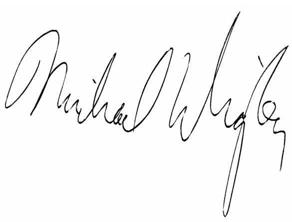
Additionally, both the Commerce Commission and InternetNZ, in submissions to the Finance and Expenditure Select Committee, expressed concern about the retail-minus pricing of bitstream. Going forward, this is likely to be an issue that will be reviewed, either as part of the current review, or at a later point.

The more comprehensive the immediate review, the sooner these bitstream and other issues will be confronted.

Finally, Comreg has addressed NGA issues in its review as to SLU in Dublin, and again there is much useful material, with Comreg also considering the remedy options (see also the Analysys report for Comreg at http://comreg.ie/_fileupload/publications/ComReg0810a.pdf).

In conclusion, we submit that the scope should not only address regulatory and policy issues, but also put them to the forefront, building on the other matters currently within scope.

Yours faithfully



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