



Telecom New Zealand Limited

Submission in respect of the

**Application by Vodafone for Determination of a
Designated Service**

Public Version

4 April 2006

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A EXECUTIVE SUMMARY

Introduction

- 1 Vodafone has now publicly announced its intention to launch a new service using its mobile network. Telecom is similarly considering its options for offering converged services using its fixed and mobile infrastructure. Similar services are being offered overseas, and are proving to be successful.
- 2 In order to offer its proposed service, all Vodafone requires from Telecom is interconnection with Telecom's fixed PSTN – in particular, call handover, and termination on Telecom's fixed PSTN. Similarly, if Telecom were to offer its own form of Vodafone's service, all it would require from Vodafone would be Vodafone's agreement to interconnect with its cellular network.
- 3 Telecom has always been (and remains) willing to agree call handover and termination with Vodafone. However, the parties have been unable to agree price and non price terms at this stage, and Telecom is happy to assist the Commission in resolving the impasse on these issues.
- 4 Telecom's key concern has always been (and continues to be) Vodafone's insistence on dictating Telecom's retail charging as a condition of any commercial arrangement or regulatory determination. Not only does Telecom believe that it cannot lawfully discuss such a condition with Vodafone, but such a condition would prevent Telecom from recovering its costs and from setting a competitive retail price. Further, such a condition is not necessary in order for Vodafone to offer its proposed service.
- 5 Telecom's second concern has been that Vodafone's proposed use of geographic/local numbers breaches the Number Administration Deed ("**NAD**"). From a numbering perspective, based on the information available, Vodafone's service is akin to a mobile (non-geographic) service.
- 6 These issues aside, Vodafone's application has been premised as an application for interconnection with Telecom's fixed PSTN. Insofar as Vodafone's application relates to the issue of termination on Telecom's fixed PSTN, and call handover, Telecom agrees that these are matters for the Commission to determine.

Interconnection – price and non-price terms

- 7 A key issue for the Commission to determine in this case will be the appropriate pricing methodology for interconnection. Under the Telecommunications Act 2001 ("**Act**"), there is a presumption that the Commission will apply a cost-based pricing methodology. If the Commission is to move away from cost-based pricing, it must first establish that cost-based pricing is not appropriate, and that bill and keep should instead be mandated to meet the section 18 purpose in the Act.
- 8 Bill and keep was initially established to address a specific fixed-to-fixed interconnection problem, namely a distortion created by the TSO. To date, Vodafone has provided no evidence that cost based pricing does not best meet the section 18 purpose, or that there is a problem/distortion to be addressed in the present case. Without greater clarity about Vodafone's proposed service, it is impossible to establish whether bill and keep is appropriate.
- 9 In addition to price, the Commission can determine non-price terms necessary for the interconnection arrangement. This might include terms relating to handover, for example.
- 10 However, Vodafone's application goes much further than simply seeking non-price terms related to interconnection. Vodafone is seeking determination of a number of matters that are clearly (and deliberately) outside the jurisdiction of the Act 'dressed up' as non-price terms.
- 11 The terms that Vodafone is seeking amount to asking the Commission to give Vodafone a leg up in a yet to be established retail market for converged services. Telecom accepts that the Commission can regulate the bottleneck inputs into this market (such as fixed PSTN interconnection) but not other aspects which differ between competitors and which, unregulated, will lead to consumer choice. Going further than this would unreasonably constrain Telecom (and potentially other service providers) from charging at retail, and would reduce incentives to innovate.
- 12 Amongst other things, Vodafone seeks:
 - *Reciprocity of terms* – which would in effect regulate interconnection with a mobile network, something which is clearly not within Schedule 1 of the Act;
 - *Non-discrimination of retail charging* – in effect, Vodafone is asking the Commission to set Telecom's retail pricing and prevent Telecom

from setting a competitive retail price. A non-discrimination term would be inappropriate for 4 reasons: 1) the Commission can't determine retail pricing; 2) Vodafone's service is not the same as a "local" or fixed PSTN service and it is therefore difficult to see how non-discrimination can be appropriate; 3) the TSO would prevent Telecom from recovering its costs if non-discrimination was mandated; and 4) it would also be inconsistent with Vodafone's own practices.

- *Approval of Vodafone's use of geographic numbers* – which is a matter for the NAD Management Committee's Independent Chair, not the Commission.
- 13 Vodafone asserts that the Commission can determine these matters as terms of supply of the interconnection service. However, section 30 of the Act does not give the Commission the power to determine matters outside its jurisdiction, nor does section 30 allow the Commission to determine terms that are not necessary or relevant to the supply of regulated interconnection under the Act.
- 14 It is not the Commission's role to seek to significantly change the scope of telecommunications regulation by determining the terms sought by Vodafone via a back door route. Such changes can only be made through the proper process in Schedule 3 of the Act or by Parliament.
- 15 That aside, Vodafone does not need the Commission to require Telecom to offer services, at Telecom's own cost, for example, in order for Vodafone to launch its proposed service. The Commission need only determine a regulated wholesale arrangement between Telecom and Vodafone (i.e. interconnection with Telecom's fixed PSTN). The Commission must focus on the relevant considerations necessary to determine interconnection, and should not be distracted by irrelevant considerations.
- 16 As a final note, Vodafone has provided a draft agreement ("**NISC**") that would form the terms that apply to interconnection between the parties. Again these terms go beyond the scope of what can be determined under the Act and should be discounted by the Commission on this basis. Further, the terms for interconnection between the parties will be largely driven by how Vodafone's service is defined. At present this is very unclear and, as such, we are unable to make detailed comments on what non-price terms should be mandated.

Conclusion

- 17 These submissions provide Telecom's initial views on Vodafone's application based on the information that is currently available. Telecom's submissions focus on promoting workable regulated terms for the wholesale interconnection service sought by Vodafone. In respect of the new and emerging converged services retail market, the Commission should not, and must not, go further than mandating the necessary wholesale inputs.
- 18 Telecom looks forward to having the opportunity to comment on the issue of bill and keep, and Vodafone's service itself, once Vodafone has provided further necessary information.

B THE COMMISSION'S JURISDICTION

- 19 Vodafone has presented its Application as an application for interconnection with Telecom's fixed PSTN. In particular, Vodafone seeks termination on Telecom's fixed PSTN, and call handover.
- 20 Insofar as Vodafone's application seeks interconnection with Telecom's fixed PSTN, it is clear that the Commission has jurisdiction to determine such interconnection.
- 21 In particular, Schedule 1, Part 2, Subpart 1 of the Act designates interconnection with Telecom's fixed PSTN as a designated access service:

Interconnection with Telecom's fixed PSTN

Description of service: *Origination and termination (and their associated functions) of voice and data calls (including dial-up internet calls) on Telecom's fixed PSTN.*

...

Initial pricing principle: *Benchmarking against interconnection prices in comparable countries that result from the application to networks that are similar to the access provider's fixed PSTN of –*

(a) a forward-looking cost-based pricing method; or

(b) if the Commission considers that a forward-looking cost-based pricing method does not best give effect to the purpose set out in section 18, whichever of the following methods that the Commission considers best gives effect to that purpose:

i. a pure bill and keep method; or

ii. a pure bill and keep method applied to two-way traffic in balance (or to a specified margin of out-of-balance traffic) and a forward-looking cost-based pricing method applied to out-of-balance traffic (or beyond a specified out-of-balance margin).

...

- 22 Further, Telecom can seek interconnection with another access provider's fixed PSTN under the Act. The service description and initial pricing principle for "interconnection with fixed PSTN other than Telecom's" under Schedule 1, Part 2, Subpart 1 is the same as those set out above in all material respects.

Termination on Telecom's fixed PSTN

23 Vodafone seeks termination on Telecom's PSTN and call handover. Telecom agrees that the Commission can determine termination on Telecom's fixed PSTN and Telecom is willing to provide such termination and handover.

24 The terms "fixed PSTN" and "PSTN" are clearly defined in the Act:

Fixed PSTN -

- (a) means a PSTN, or that part of a PSTN, that connects an end-user's building to the local switches or equivalent facilities; and
- (b) includes those local switches or equivalent facilities.

PSTN or public switched telephone network means a dial-up telephone network used, or intended for use, in whole or in part, by the public for the purposes of providing telecommunication between telephone devices.

25 Accordingly, any requirement on Telecom to terminate (or originate) a call is defined as termination on its PSTN that connects an end-user's building to the local switches or equivalent facilities.

26 Vodafone has also sought handover of calls from Telecom's network to Vodafone's network. Vodafone has requested that:

*"All Local Calls that originate in the Originating Party's Network shall be handed over or, where a free circuit is not available in the Terminating Party's Network, offered to be handed over from the Originating Party to the Terminating Party."*¹

27 Vodafone's proposal goes further and proposes that:

- Calls from a Telecom fixed PSTN customer to the Vodafone mobile local service customer must be handed over at a Telecom handover point in the Major LICA of the LICA Group in which the Telecom fixed PSTN customer is located;
- Calls from a Vodafone mobile local service customer to a Telecom fixed PSTN customer must be handed over at a Vodafone handover point in the Major LICA of the LICA Group in which the Vodafone mobile local service customer is located when initiating the call.

¹ Clause 5.2 of Vodafone's proposed NISC annexed to Vodafone's application, dated 13 January 2006

- 28 Telecom accepts, in general terms, Vodafone's handover proposal, and agrees that the Commission should determine handover.
- 29 Telecom does note that Vodafone's handover proposal only covers intra-LICA calls (subject to Telecom's comments below that these are not truly intra-LICA calls). The handover principles for other call types – such as toll and other calls to and from Vodafone's proposed service - will need to be agreed between the parties, and Telecom is happy to discuss this with Vodafone. The Commission must take great care not to limit the opportunity for these call types to be addressed commercially by the parties.

Appropriate initial price for termination is forward-looking cost

- 30 Vodafone has asked the Commission to determine bill and keep between Telecom's fixed PSTN and Vodafone's cellular network for the purpose of calls to and from its proposed service.
- 31 The Act provides that the Commission's starting point must be that a cost-based pricing method is the appropriate methodology for determining the initial termination rate.
- 32 The Commission can only consider the alternative methodology of bill and keep if it makes an explicit decision that cost-based pricing does not best give effect to the section 18 purpose which is:

“...to promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand by regulating, and providing for the regulation of, the supply of certain telecommunications services between service providers.”

- 33 When determining whether the section 18 purpose is met, the Commission must take into account efficiencies that will result from a particular action (section 18(2)). Further, the relevant designated service specification in Schedule 1 of the Act also requires the Commission to consider the effect of any obligation under the TSO (Schedule 1, first service specification, “Additional matters that must be considered regarding the application of section 18”).
- 34 The onus is on the Commission to be first satisfied that a cost-based approach does not best meet the section 18 purpose. Only if that is not satisfied should the Commission then consider bill and keep. While Vodafone has sought bill and keep, to date Vodafone has provided no evidence as to why the cost-based pricing does not best meet the section 18 purpose and why bill and keep should be mandated. Accordingly, we are currently only able to offer initial views on why we consider that

there do not appear to any reasons to move away from a cost based approach.

- 35 The bill and keep model was developed as an interconnection pricing methodology appropriate in certain circumstances. Generally, bill and keep is appropriate when the following conditions are met:
- The costs of the two interconnecting networks are comparable;
 - Traffic flows between the two interconnecting networks are comparable; and/or
 - There is a problem/distortion that would be created by adopting a cost-based pricing methodology.
- 36 There is no evidence that any of these conditions apply in the present circumstances. If the Commission is to consider a bill and keep pricing methodology, it must carry out a careful analysis and first explain why a cost-based methodology does not best give effect to the section 18 purpose. This would require at least information on the relative costs of the two networks, the likely traffic flows (which in turn will require a better understanding of Vodafone's service) and the rationale for bill and keep.
- 37 By way of comparison, bill and keep has been adopted as industry standard in New Zealand for calls between fixed PSTN network operators for calls within the same local interconnect calling area ("**LICA**"). The model is appropriate for this specific call type for a number of reasons. First, the costs between the network operators are comparable. Second, the TSO caused a unique problem/distortion in New Zealand that needed to be resolved. In particular, customers could call an ISP or other call sink for free, the terminating network could collect termination rates from the originating network operator, and share these with the ISP. There was an incentive to drive large volumes of calls to the ISP. This would increase the originating network operator's costs, but the network operator would be limited in its ability to recover any cost from its end-user as a result of the TSO.
- 38 By comparison, it is not clear whether there are likely to be comparable costs or call volumes between Telecom's network and Vodafone's service. The differences between a fixed PSTN telephone service and Vodafone's service suggests that neither costs nor call volumes would be comparable.
- 39 Based on Telecom's current understanding of Vodafone's proposed service, call volume comparability is unlikely. This is because the

question of whether a call is “intra-LICA” or something else depends on the location of the Vodafone customer at the time the call is placed. The “Home zone” remains undefined and is a home zone in name only. If, for example, a Vodafone customer can “divert²” a call from their local number to their mobile phone, the customer could receive calls to their local number anywhere in the country, or in fact internationally. From this perspective, Vodafone’s service is essentially a mobile service regardless of the defined “Home zone”. There is therefore a considerable difference between the services offered by the two parties using the interconnection inputs – the services are not reciprocal. This is not the type of scenario for which bill and keep would be appropriate.

- 40 It is not clear to Telecom why Vodafone considers that bill and keep is appropriate and, for the reasons set out above, Vodafone should provide evidence for its position so that Telecom can respond. Telecom has some concern that, in asking for bill and keep, Vodafone is attempting to take advantage of some arbitrage opportunity. However, without a better understanding of Vodafone’s service, this is impossible to assess. Neither Telecom nor the Commission has sufficient information about Vodafone’s service at this stage to be able to make further comment.
- 41 Finally, we note that, in order to mandate bill and keep, the Commission would need to regulate both Telecom and Vodafone’s networks. However, mobile networks are not currently regulated. Vodafone appears to be seeking reciprocity in order to sit with its request for bill and keep and to fill the gap in the Commission’s jurisdiction. The Commission’s ability to mandate bill and keep fits neatly with fixed-to-fixed interconnection (which can be regulated under the Act). However the Act, and the policy behind it, never envisaged that bill and keep be regulated as between a mobile and a fixed network.

Origination charge not appropriate

- 42 The Act gives the Commission the power to determine an origination charge. However, as Telecom agrees with Vodafone’s request for call handover, Telecom understands that Vodafone does not seek origination. Accordingly, Telecom does not provide further comment on the appropriateness of an origination charge.

² Telecom notes that the call would not be “diverted” as such as the call will be received on the same handset, irrespective of whether the call is “diverted” or not.

C MATTERS OUTSIDE THE COMMISSION'S JURISDICTION

43 While Vodafone has purported to make an application for interconnection with Telecom's fixed PSTN, the price and non-price terms sought by Vodafone extend Vodafone's application well beyond the Commission's jurisdiction under the Act. In particular:

- Vodafone seeks reciprocity of terms (i.e. termination on Vodafone's network);
- Determination of a "local service" when there is no such concept in the regulatory framework;
- Vodafone seeks a definition of a "local call" when this is a retail concept;
- Vodafone seeks an obligation on Telecom not to charge its customers any more to call a Vodafone "local number" than to call any other local number on a third party network, when in substance this will be a fixed to mobile call;
- Vodafone seeks that the Commission ignore the TSO when the Act makes the TSO a mandatory consideration; and
- Vodafone implicitly asks for the Commission's approval of its use of local numbers.

44 Vodafone relies on section 30 to argue that the Commission can determine these requested terms.

45 Telecom disagrees that section 30(a) and (d) gives the Commission power to extend regulation carte blanche in this way so as to bypass the Schedule 3 mechanism in the Act. If this approach were taken by the Commission, it would engage in a reviewable error.

46 The Canadian Supreme Court has recently ruled on this point. Giving the majority decision in *ATCO Gas Pipelines Ltd v Alberta (Energy & Utilities Board)* 2006 SCC4, Bastarache J held:

*The intended meaning of the Board's power pursuant to s.15(3) AEUBA to impose conditions on an order that the Board considers necessary in the public interest, as well as the general power in s.37 PUBA, is lost when the provisions are read in isolation. They are, on their own, vague and open-ended. **It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to any order it makes.** While the concept of "public interest" is very wide and elastic, the Board cannot be given total discretion over its limitations.*

*These seemingly broad powers **must be interpreted within the entire context of the statutes** which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognised in a free market economy. [emphasis added]*

- 47 Section 30 must similarly be read in the context of Part 2 of the Act – including the application under section 20, the requirements of section 20 and the service specification in Schedule 1. Section 30 should not be used as a mechanism to circumvent other processes in the Act – such as the TSO and Schedule 3.

Reciprocity of terms

- 48 Vodafone has sought, as a term of supply, reciprocity of the interconnection requirements placed on Telecom (i.e. that the same terms of termination and handover that apply to Telecom should apply to Vodafone for calls to and from its proposed service etc).
- 49 While Vodafone's proposed service would use local numbers, there can be no doubt that termination on Vodafone's proposed service is termination on a mobile network. If the Commission were to agree to reciprocity of terms, the Commission would, in effect, be regulating mobile termination. Mobile interconnection (termination and origination) is not a designated service under the Act, and determining mobile termination requirements is clearly outside the Commission's current jurisdiction.
- 50 While interconnection with a fixed PSTN other than Telecom's is a designated service under the Act, it is clear that Vodafone's proposed service is not covered within the designation. As noted in section B, "fixed PSTN" is clearly defined, and requires a fixed network connection to the end-user's building. Vodafone has provided no evidence that its service meets this requirement. The use of geographic numbers and purported creation of a "home zone" (as yet undefined and unconstrained) does not make Vodafone's network a "fixed PSTN".
- 51 Only if the Commission decides to recommend designation of mobile termination rates, and the Minister decides to accept the Commission's recommendation, could the Commission then determine the terms on which Telecom could terminate on Vodafone's network. Of course, a separate application would then be required in order to provide jurisdiction for such a determination.
- 52 The acceptance of reciprocity of terms (or bill and keep) would imply that Vodafone's mobile termination costs are close to Telecom's fixed PSTN termination costs. It seems strange to Telecom that Vodafone would

argue that the cost of termination on its mobile network is well above 15cpm in one scenario (as Vodafone argued in the Mobile Termination investigation), but close to 1cpm in the current circumstances. Telecom certainly does not agree that the cost of termination on its mobile network is close to 1cpm.

“local service” concept a red herring

- 53 Vodafone’s insistence that their service is a “local service”, and not a mobile service, is, to a certain extent, a red herring.
- 54 The Act only regulates interconnection with a fixed PSTN – which Vodafone’s service is not – and resale of services offered by means of Telecom’s fixed PSTN – which Vodafone is not seeking. For interconnection purposes, Vodafone’s network is a mobile network, and not a fixed PSTN. Vodafone calling its retail service a “local service” or using local numbers does not extend the Commission’s jurisdiction to regulate wholesale fixed PSTN interconnection under the Act
- 55 Despite this, Vodafone goes to great length in its application to argue that its service is a “local service”. Telecom submits that much of the detail in Vodafone’s application is irrelevant to the Commission’s task of determining interconnection with Telecom’s fixed PSTN.
- 56 The Commission cannot create a new category of determined service by, for example, redefining “fixed PSTN” to cover Vodafone’s proposed service.
- 57 At another level, Vodafone appears to be seeking a definition of a “local service” as a way of justifying bill and keep – i.e. because a call to or from a Vodafone local number that originates or terminates in the same LICA to which the Vodafone number is allocated is an “intra-LICA” or “local call”. However, this is not reflected in Vodafone’s proposed NISC, nor does it accord with Telecom’s understanding of Vodafone’s service.
- 58 For example, under the NISC, when a call is made from a Telecom fixed PSTN customer to a Vodafone mobile local service customer, the Vodafone customer does not need to be in the LICA to which the local number is allocated to receive the call. For a call to be an “intra-LICA” call, the caller need only be in the same LICA to which the Vodafone local number is “allocated”, but the receiving party can be anywhere in the country, or in fact the world. Accordingly, any suggestion that its service is a “local service” for bill and keep purposes does not hold true.
- 59 At a wholesale level, the only clear difference between Vodafone’s mobile service, and its proposed “local service” appears to be the use of

local/geographic numbers (which Telecom submits is not permitted under the NAD). Otherwise, Vodafone customers can receive calls anywhere in the country. Moreover, there is no suggestion that a call will drop if a customer moves outside the home zone during a call.

- 60 The only purpose for which the Commission needs to clearly understand and define Vodafone's service is to give certainty around the calls Telecom must terminate and handover (as detailed below), and to ensure that appropriate terms are put in place for the supply of interconnection. In that respect, greater certainty of Vodafone's service is required.

Extension of "local call" concept

- 61 Throughout its application, Vodafone has asked the Commission to define a "local call".
- 62 This appears to be linked to Vodafone's request for the Commission to limit Telecom's ability to charge its retail customers for calls to Vodafone's network – because it wishes to argue that there should be no discrimination between a fixed local call and calls to its service. It also appears to tie into Vodafone's request for bill and keep (discussed above).
- 63 The net effect of Vodafone's proposal appears to be an extension of Telecom's TSO obligations. The TSO establishes that Telecom must offer local free calling to Telecom residential customers. Calls made to cellular networks are specifically excluded from the local free calling requirement.
- 64 Vodafone appears to be seeking an extension to the local free calling requirement under the TSO by asking the Commission to determine that a "local call" includes a call from Telecom's fixed network to Vodafone's cellular network. However, the TSO is an agreement between Telecom and the Crown and the Commission does not have jurisdiction to extend the scope of the TSO by re-defining what a "local call" is in this context.
- 65 While Telecom disagrees that the Commission can determine retail prices (discussed below), the combined effect of an extension of the free local calling obligation under the TSO and Vodafone's request for non-discrimination of retail prices, would have the effect of regulation at the retail level and prevention of Telecom from recovering its costs – i.e. Telecom would not be able to charge residential customers for the calls and it also would not be compensated for these calls under the TSO.
- 66 The Act specifically mandates and recognises the TSO as a relevant consideration for the Commission when determining interconnection with Telecom's fixed PSTN and, as such, the TSO cannot be ignored by the

Commission. The TSO recognises that Telecom is free to set retail charges to Vodafone's proposed service. The TSO is discussed in further detail in the following section.

Retail charges

67 Vodafone's key focus is to limit Telecom's ability to charge at retail for calls to Vodafone's proposed mobile local service. In particular, Vodafone has sought to impose an obligation on Telecom of "non-discrimination" of its retail charging. For example, Telecom must charge its customers the same amount for calling a TelstraClear fixed PSTN customer as it charges for calling a Vodafone mobile "local service" customer. In New Zealand, this amount is zero for a residential customer, as mandated by the TSO.

68 A number of Vodafone's commercial offers have been [

] **TCNZRI/VNZRI**. It is clear from Vodafone's application that this also a key driver for their regulatory application.

69 Telecom's concern has always been the fact that Vodafone's request is a request from another operator to discuss Telecom's retail pricing.

70 Setting aside the lawfulness of Vodafone's approach in negotiations, Vodafone's request that the Commission determine, as a term of supply, that Telecom cannot charge its customers any more to call a Vodafone local number than to call any other local number on a third party fixed network is outside the Commission's jurisdiction, and outside the policy of the Act to regulate wholesale services.

71 Vodafone is asking the Commission to regulate Telecom's retail price. The words and the intention of the Act are clear in this respect – the Commission has no power to regulate retail prices. Section 18 is plain in this regard: the Commission can only regulate services and prices between service providers i.e. at the wholesale level. In this instance, the Commission can determine the termination price (the price paid by Vodafone to Telecom), but has no power to determine the retail price charged by Telecom for calls to Vodafone's network.

72 Further, as noted above, the Commission must take account of the TSO when determining interconnection with Telecom's fixed PSTN. The TSO recognises that Telecom is free to charge for calls to cellular networks, including Vodafone's cellular network.

- 73 As discussed above, section 30 does not give the Commission an unfettered discretion to impose whatever terms it might be asked, or choose, to determine. To take such an approach would be *ultra vires* the Act.

Appropriate use of geographic numbers

- 74 The administration of telephone numbers in New Zealand is governed by the NAD. It is the role of the Independent Chair of the NAD Management Committee to determine whether Vodafone's use of local numbers on its proposed service is appropriate.
- 75 While the Commission can determine whether Telecom must terminate and handover calls to and from Vodafone's proposed service, it can not determine whether Vodafone's use of geographic/local numbers is permitted under the NAD.
- 76 Accordingly, when determining what service Telecom must handover and terminate calls to and from, the Commission must not define the service by reference to its use of local numbers, but by its functional dimensions and the appropriate number range (as determined by the NAD). For this reason, it is important to clearly understand Vodafone's service. Telecom is currently considering whether it would be helpful to seek clarity around Vodafone's proposed use of local numbers from the NAD Management Committee's Independent Chair now. Consideration of this issue by the NAD now would provide certainty about the legality of Vodafone's use of local numbers and, subject to timing, could aid the Commission's determination of any terms of interconnection.
- 77 For the avoidance of doubt, as Telecom understands Vodafone's service, the proposed use of local numbers would breach the NAD. In order to clearly understand whether Vodafone can use local numbers on its proposed service, further information is required, including the following:
- Whether there is a fixed network connection to the end-user's premises;
 - The area within which the customer can use the proposed service by reference to the end-user's premises. For example, is it limited in the same way as a DECT phone, or is it wider (potentially 10's of kilometres in radius) if defined by a cell site;
 - What happens to calls when the end-user moves outside the "home zone" during a call (e.g.: does it drop in the same way as a fixed call would?); and

- What happens to calls to the local number when the end-user is outside the “home zone”.

78 These questions go to the fundamental issue of whether the service has a geographic structure, which is required for the use of geographic numbers, or whether the service is more akin to a mobile service meaning that non-geographic numbers should be attached.

79 Finally, we note that we do not understand Vodafone’s claim that it would not be feasible to use a non-geographic number range. Vodafone claims that its service is a new service. It is different from a traditional fixed service and Vodafone will presumably charge differently for its service. We therefore do not understand why the service is not viable with a new non-geographic number range in which Vodafone could invest in marketing and branding as its own cost.

D POLICY REASONS WHY VODAFONE'S REQUESTED TERMS SHOULD BE REJECTED

80 As noted in the previous sections, the Commission only has jurisdiction to determine origination or termination on Telecom's fixed PSTN. The other terms requested by Vodafone are outside the Commission's jurisdiction under the Act.

81 Without prejudice to this view, Telecom notes that, irrespective of whether the Commission has jurisdiction to determine the additional terms, there are a number of policy reasons why Vodafone's requested terms should be rejected:

- It is Parliament's role to make policy decisions and changes to the telecommunications regulation in New Zealand with the exception of the Schedule 3 process in the Act (the latter requiring the Minister's approval);
- In order to offer its proposed service, the only thing that Vodafone requires from Telecom is interconnection with Telecom's fixed PSTN with an appropriate wholesale price and terms for the provision of that wholesale service;
- Calling in New Zealand is competitive, and it would be inappropriate for the Commission to interfere with retail charging in this respect;
- Vodafone's requested terms would unlawfully extend Telecom's obligations under the TSO, and the collective effect of Vodafone's requested terms is that Telecom would not be able to recover its costs; and
- Vodafone's request for non-discriminatory retail charging is inconsistent with its own approach and nonsensical given that its service is different from the service that it wishes to not be discriminated with.
- The Commission should not regulate new and emerging markets.

Legislative process

82 If the Commission were to determine the terms sought by Vodafone, not only would it be outside the scope of the regulation legislated for by Parliament, it would also significantly change the scope of telecommunications regulation in New Zealand.

- 83 A feature of the regulatory model to date has been access seekers inviting the Commission to test the boundaries of its jurisdiction. In Telecom's view this application is in a different class, inviting the Commission to go well beyond the boundaries set by even the most liberal reading of the Telecommunications Act. No court will read into the Act the ability to regulate termination on a mobile network, nor to regulate retail prices, and the Commission must decline Vodafone's invitation to do so.
- 84 It is Parliament's role to make policy decisions and changes to the telecommunications regulation in New Zealand with the exception of the Schedule 3 process in the Act (the latter requiring the Minister's approval).

Vodafone only requires interconnection with Telecom's fixed PSTN

- 85 In order to offer its proposed service, the only thing that Vodafone requires from Telecom is interconnection with Telecom's fixed PSTN. Similarly, if Telecom were to offer its own form of converged service, all it would require from Vodafone would be agreement to interconnect with Vodafone's cellular network.
- 86 Accordingly, within the scope of the Act (and in particular the designated service of "interconnection with Telecom's fixed PSTN"), the Commission can determine the price and non-price terms for the supply of the necessary wholesale inputs.
- 87 Other matters must be left for the industry participants to establish in relevant markets.

Calling is competitive

- 88 The market for calling in New Zealand is competitive. Telecom understands that Vodafone has interconnection agreements with other carriers for interconnection with its proposed service. Accordingly, there can be no argument that calling to Vodafone's network is anything other than competitive. If Vodafone and other telecommunications service providers have agreed on retail pricing, however, there may be a competition law issue.
- 89 Despite this, Vodafone is asking the Commission to interfere with a market that is competitive, by determining the retail price at which Telecom can offer calls to Vodafone's proposed service. There is no rationale for interference in a competitive market in this way.

- 90 The Commission must not confuse the service that Vodafone wants to offer its end-users, and services Telecom offers its end-users. In order for Vodafone to offer its proposed service it requires termination on Telecom's fixed PSTN – which Telecom does not deny Vodafone. Vodafone will also require interconnection agreements with other fixed network operators.
- 91 Parties should be free to determine the charge they levy on their own customer for providing a service. It is a clear and deliberate omission from the Act that other parties cannot interfere with the relationship between a service provider and its customers. There is no justification for regulating any aspect of Telecom's retail service.

TSO

- 92 The TSO is an agreement between the Crown and Telecom, and places a requirement on Telecom to offer free local calling to its residential customers. While calls to fixed networks within the free local calling area must be free for residential customers, Telecom is entitled to charge for other call types, including calls to cellular phones.
- 93 The Act provides a mechanism for compensating Telecom for the services it must provide under the TSO, including local free calling. It does not provide a mechanism for recovering the cost it incurs for calls to cellular phones.
- 94 In short, what Vodafone is asking the Commission to do is require Telecom to interconnect on a bill and keep basis, and offer free calls to the Vodafone network for Telecom's residential customers (by virtue of the non-discrimination term). If this was accepted, Telecom would not recover the cost of offering free calls to Vodafone's service under the TSO regime.
- 95 Effectively, Vodafone is asking the Commission to regulate Telecom in a way that would mean Telecom does not recover its cost of offering the service (either from its customers or under the TSO). Ultimately this will be to the detriment of end-users, as Telecom would need to recover its cost in some other way: either by limiting future investment, or imposing the charge to end-users in some other way.
- 96 As noted above, Vodafone is effectively asking the Commission to extend the scope of the TSO (which the Commission does not have the jurisdiction to do), without extending the scope of the compensation received by Telecom.

97 In relation to the TSO, we note that it will be essential for Telecom to have information from Vodafone detailing which of its local numbers are allocated to cellular phones. Telecom must be allowed to recover its costs for calls (either via the TSO or by way of a retail charge). Where Telecom recovers its costs by way of a retail charge, it cannot do so in breach of its TSO obligation (to offer a local free calling option to its residential customers). Accordingly, it will be critical to have detailed information from Vodafone regarding which of its local numbers are allocated to cellular phones.

Non-discrimination would be inappropriate

98 Vodafone has asked the Commission to impose an obligation on Telecom that it would not discriminate its retail charging between calls to Vodafone's proposed service, and other fixed PSTN services operated by other carriers. In addition to the TSO issues raised above, such an obligation would be inappropriate for three reasons.

99 Firstly, Vodafone readily differentiates its retail charging for calls between its Vodafone mobile customers and calls from a Vodafone customer to a Telecom's mobile customer. To try and limit Telecom's ability to do the same would be inconsistent, and inappropriate.

100 Secondly, as Telecom understands it, Vodafone's proposed service is not the same as services offered by other fixed PSTN service providers. For example, unlike Vodafone's proposed service, a fixed PSTN customer:

- Is limited in their ability to make, receive, and continue calls to within a very small area – either at the point at which their telephone device is attached to their building or premises, or within the range of their DECT phone. By comparison, a Vodafone customer could potentially make and receive calls within 10's of kilometres of their premises; and
- Cannot take their fixed telephone with them and potentially receive calls anywhere in the country, or even overseas.

101 Thirdly, Vodafone is effectively asking the Commission to facilitate price fixing which is contrary to the Commerce Act.

102 For these reasons, it would be inappropriate, and inconsistent for the Commission to limit Telecom's ability to differentiate its retail charging.

The Commission should not regulate new and emerging markets

- 103 While Telecom does not claim to fully understand Vodafone's proposed retail service, it appears that, on its face, it is a new form of mobile (or potentially converged) service.
- 104 The converged services retail market is a new and emerging market both in New Zealand and overseas.
- 105 The dangers of regulating emerging markets have been well traversed, in New Zealand and overseas. Telecom would caution the Commission against regulation of this new retail market. Market participants must be given the opportunity to develop and establish new services without unnecessary regulatory intervention.
- 106 At present, the Commission can determine all of the necessary 'bottleneck' wholesale inputs to enable service providers to offer these new services and compete in this new and emerging market. It would be unwise to limit unnecessarily how these services develop by, for example, regulating Telecom's retail pricing.

E COMMISSION QUESTIONS

107 In its letter of 14 March 2006, the Commission asked Telecom to comment on a number of specific matters. Telecom responds to each matter below.

In making its determination, should the Commission be concerned with how a local call that is presented from Telecom's fixed PSTN to Vodafone's network is handled beyond the point of interconnection?

108 Telecom is concerned by the Commission's reference to "a local call". It appears that the Commission has pre-determined that a call from a Telecom fixed PSTN customer to Vodafone's proposed local mobile service is a "local call", but it is very unclear what significance the Commission attaches to this concept when administering the designated interconnection service, particularly given that the concept is not defined in the Act and does not appear relevant to the regulated service specification at hand.

109 This issue aside, Telecom submits that how a call from its fixed PSTN is handled beyond the point of interconnection is relevant for the following limited (but important) purposes:

- Defining the service for which Telecom must terminate and handover calls;
- Determining the appropriate termination cost-based pricing methodology; and
- In order for Telecom to identify the call type for retail charging purposes (including ensuring that Telecom meets its TSO obligations).

110 The Commission must clearly define the call types that Telecom must handover and terminate on its fixed PSTN. While Vodafone's application is limited to interconnection with its proposed local mobile service, Vodafone has provided insufficient details to clearly define the service that Telecom must handover to, and terminate calls from.

111 It is important that, for these purposes, the call types are defined by reference to the functional definition of the service and by reference to the appropriate number range (which may or may not be local numbers).

112 In order to be able to identify and define the relevant call types, and as previously requested, Telecom seeks further clarification of the service

that Vodafone is requesting interconnection with. The following questions are pertinent:

- How is the area within which the service operates defined? If Vodafone is purporting to create a service that is analogous to Telecom's fixed PSTN service, we presume that Vodafone's service only operates within the range of, at most, a DECT phone from the customer's fixed location;
- What happens to a call when a customer moves outside the defined "home zone" area? Again, we presume the service would operate in a manner similar to a DECT phone, and the call would drop;
- If a call made to the proposed Vodafone service while the customer is outside the "home zone", and the call is diverted, then we presume that this diversion would be to another device and not the same device.

Whether it is necessary for the Commission to consider the geographic structure of Vodafone's local service? If so, how should the geographic boundaries of Vodafone's service be defined?

- 113 Again, Telecom is concerned by the Commission's language, and specifically reference to Vodafone's service as a "local service" and a potential presumption that it even has a geographic structure. This again suggests that the Commission risks predetermining that a call to Vodafone's service must be treated as a fixed local call (i.e. within a local calling area) for retail charging purposes.
- 114 Vodafone has provided no evidence that its service is anything other than a mobile service. Again, the use of local numbers on a mobile network is not determinative.
- 115 That aside, for the reasons set out above, the relevance of the geographic structure of Vodafone's local mobile service is to define the service from which Telecom must handover to and terminate calls from, determining the appropriate termination price, and for providing clarity for Telecom's retail charging/TSO purposes. Accordingly, the Commission does need to consider the geographic structure of Vodafone's service.
- 116 The issue of whether Vodafone's service has a geographic structure for the purpose of use of local numbers is a matter for the Independent Chair of the NAD Management Committee, not the Commission.

117 Regarding the Commission's question of how the geographic boundaries should be defined, Telecom does not have sufficient information from Vodafone in order to comment further. Currently, Vodafone has been very vague as to how it will define the geographic boundaries of the home zone are defined – and there is insufficient information on which to define the boundaries. Once Telecom has further detail from Vodafone, it reserves its right to provide further comment on the appropriateness of the boundary definition.

If geographic boundaries are required, how should the Commission allow for circumstances where:

- *A call to a local access number that is forwarded to an end-user who is outside his or her home zone?*
- *A call where the Vodafone local access customer moves out of (or into) his or her home zone?*

118 Again, the issue of how a call is treated when the end-user is outside the home zone, or moves outside the home zone during a call, is only relevant to the issue of the appropriate pricing methodology for interconnection. As noted above, one reason against bill and keep would be if the Vodafone customer could receive calls from their local number when they are outside the home zone on the same device, or if a call did not drop when they moved outside the home zone.

119 The treatment of such calls is also relevant to the question of whether the use of local numbers is appropriate. However, this is a matter for the NAD Management Committee's Independent Chair, not the Commission.

120 Again, Telecom seeks further information from Vodafone about what it proposes to do in each of these call scenarios before it can meaningfully comment on their appropriateness. It would be inappropriate for Telecom to try and second guess Vodafone's intentions. Accordingly, Telecom seeks confirmation from Vodafone as to how it intends to deal with each of these call scenarios.

Can the Commission apply the bill and keep pricing principle to termination of voice calls to and from both Vodafone's and Telecom's networks by virtue of a term that requires reciprocal pricing.

121 Telecom addresses this question at paragraphs 30 to 41 above, and refers the Commission to those paragraphs.

F NISC

- 122 Vodafone has included in its application a draft Network Interconnection Service Contract 7 (the **NISC**) and proposes that the interconnection with Telecom's fixed PSTN required for its new local mobile service be provided under the terms of the NISC.
- 123 The NISC has not been prepared in consultation with Telecom.
- 124 The Commission is able to determine non price terms to sit with, and which are necessary for the wholesale service. However, the terms submitted by Vodafone are seriously flawed.
- 125 The Commission has two options. It can either seek to draft a contract between Telecom and Vodafone term by term or it can be consistent with its previous practice and establish the relevant core principles and require Vodafone and Telecom to draft the terms necessary to reflect these principles.
- 126 If the Commission seeks to take the former approach it will require very detailed submissions from both parties and will need to advise that this is what it requires in order to form a draft determination. A detailed workshop with contractual persons from both parties may well be required. As the Commission will appreciate, the terms of interconnection, the different forms of interconnection, and arbitrage issues require very careful consideration in the formulation of an interconnection contract. Such a task for the Commission is made more difficult because the Commission is only dealing with one form of interconnection between the parties.
- 127 Telecom has not provided detailed comments on the terms in the NISC at this time because Vodafone has not yet provided sufficient information regarding its proposed service to enable a comprehensive consideration of appropriate terms. The terms of any agreement will be largely dependent on the form of interconnection determined (including the pricing methodology) and how Vodafone's service works.
- 128 Telecom also expects that the parties will be able to agree the vast majority of the necessary terms once Telecom has a better understanding of the nature of the proposed service and the Commission has addressed the relevant issues arising from Vodafone's application.

High level comments on the Proposed Agreement

- 129 Telecom has the following high level comments on the NISC.

- 130 *Link to expired Supply Agreement:* The Proposed Agreement is linked to and does not form a workable “contract” without the general interconnection terms contained in the 13 May 2004 Network Interconnection Service Supply Agreement between Vodafone and Telecom (the **Supply Agreement**). The Supply Agreement has now expired and is currently under review by both parties. In agreeing new terms, the parties will need to ensure that all linkages to the local mobile service terms are appropriate. It is therefore not appropriate for the Commission to resolve these issues by making the out-of-date Supply Agreement terms continue.
- 131 *Right to use local numbers:* The Proposed Agreement assumes that Vodafone is entitled to use “local numbers” for the proposed service. Any interconnection terms imposed for Vodafone’s proposed local mobile service will need to reflect the fact that Vodafone’s use of local numbers for its local mobile service will always be subject to those numbers being properly allocated under the NAD.
- 132 *Definitions of Home Zone and Local Call:* The definitions of Home Zone, Local Call and a number of associated terms are clearly inadequate in a number of respects. For example:
- For calls that go from Telecom to Vodafone, the home zone appears to be irrelevant and there are no geographic restrictions of any kind that distinguish the service from a standard mobile call service.
 - The home zone is not at all restrictive and is only constrained by cell site coverage. We understand that this could be more than 10s of kilometres in distance in some places.
 - The definitions of Home Zone and Local Call do not pin down the key linkages that are required to reflect the basic principles of Vodafone’s proposed service that are described in the application. For example, on the current drafting, it seems possible that a Vodafone customer with premises in five different cities could have five home zones with just one local number. The definitions need to provide:
 - i. a nexus between where the local number (of the originator of the call) is allocated and the physical premises of the originator;
 - ii. a nexus between the location of those physical premises (of the originator of the call) and the place where the call is made from;

- iii. a nexus between where the local number of the recipient is allocated and the physical premises of the recipient;
- iv. a nexus between the location of those physical premises of the recipient of the call and the destination of the call.

133 *Moving out of the home zone*: The issue of what happens to calls when a Vodafone customer moves outside the home zone during a call will need to be addressed in the terms.

134 *Bill and Keep not appropriate* (see clause 4): For the reasons set out earlier in these submissions, there is currently no evidence that bill and keep is appropriate. A ruling on the appropriate pricing principle is necessary before considering drafting of such terms.

135 *Handover* (see clause 5): While Telecom accepts, in general terms, the principle of handover as proposed by Vodafone, care will need to be taken that the relevant handover principles for intra-LICA "local calls" work with and do not cut across the different handover principles that will be required for toll and other calls to Vodafone proposed service.

136 *Number use information*: The terms do not include the necessary requirement for Vodafone to provide Telecom with details of the specific numbers that are being used for its local mobile service. This information will be needed to ensure that Telecom can comply with its TSO obligation not to charge for "fixed PSTN to fixed PSTN" local calls but that it is free to charge for fixed PSTN to mobile calls.

137 *Interrelationship with general terms and terms for other services* (see clause 13): All of the proposed changes to the Supply Agreement and the NISCs are irrelevant as these agreements have expired. Care will need to be taken to ensure that any terms for Vodafone's proposed local mobile service work in the context of all of the other interconnection arrangements between the parties and do not impact on (or, by accident, "regulate") these other arrangements.

138 *Other clauses*: Telecom also does not agree with some or all of the principles encapsulated in clauses 2.3, 2.4, and 3 of the Proposed Agreement.

Terms of the Proposed Agreement are inconsistent with the Application

139 Finally, at this time, we would like to bring to the Commission's attention the fact that a number of the terms in the Proposed Agreement are

inconsistent with statements made by Vodafone in its application. A brief summary of some of the inconsistencies is set out in the table below.

What the Application says	What the Proposed Agreement says
<p>Paragraphs 42 and 43 – The best analogy with local service is a DECT phone ... range of up to 300m outdoors ... We <i>expect to be</i> quite restrictive about the size of the zones.</p>	<p>As noted earlier, the definition of Home Zone is not at all restrictive and the zone is only constrained by the coverage area of the relevant cell sites. We understand that this could be more than 10's of kilometres in range in some areas.</p>
<p>Paragraph 38 and 39 – Vodafone will assign local numbers that it has been allocated under Number Administration Deed (NAD) processes to the mobile handset of its local customers on the basis of where their home or business premises are located. We will define a home zone for each customer around the customer's home or business premises.</p>	<p>The Proposed Agreement does not require Vodafone to assign Auckland local numbers only to persons whose home or business premises are in Auckland.</p> <p>The definition of Local Call does not make it clear that the premises of the Vodafone customer that have to be in the same LICA as the Telecom local customer are the premises to which the Vodafone customer's local number has been allocated.</p> <p>As noted earlier, the drafting in the Proposed Agreement suggests that a Vodafone customer with premises in five different cities could have five home zones with just one local number (see the definitions of Home Zone and Local Call).</p>

<p>Paragraph 39 – Vodafone local customers will be able to make and receive local calls on their mobile handset when in this pre-defined home zone.</p>	<p>For calls from Telecom to Vodafone, there is nothing that ties the called party to being in the home zone – see limb (g) of “Local Call” definition and compare this to limb (h). Paragraph 39 of the application sets out proposals for Telecom to Vodafone calls where the Vodafone Local Customer is out of zone. However, these are not reflected in the Proposed Agreement.</p> <p>Also there is nothing in the Proposed Agreement that covers the situation where a Vodafone calling party moves out of zone during the call. Both the application and the Proposed Agreement are silent on this issue.</p>
<p>Paragraphs 20 and 21 – Vodafone will allow end-users of Vodafone’s local service to elect to have their local number as the A-number ... For calls originated by a Vodafone local customer from a location other than within that defined geographic zone, the A-number will always be their mobile number.</p>	<p>This distinction is not provided for in the Proposed Agreement.</p>
<p>Paragraph 33 – Vodafone is prepared to enter into equivalent interconnection arrangements with Telecom...to enable it to launch a local service on its mobile network.</p>	<p>There is no obligation in the NISC for Vodafone to enter into such equivalent interconnection arrangements with Telecom.</p>