



COMMERCE COMMISSION

**Decision Whether to Investigate the Vodafone Application for
Determination of Designated Access Services**

Decision whether to investigate under section 25 of the Telecommunications Act 2001 ('the Act') in the matter of an application for determination for the designated access service of "Interconnection with Telecom's fixed PSTN" under section 20 of the Act by:

VODAFONE NEW ZEALAND LIMITED

The Commission:	Douglas Webb
Summary of Application:	Vodafone New Zealand Limited applied for a determination under section 20 in regard to Interconnection with Telecom's fixed PSTN.
Decision:	The Commission has decided to investigate Vodafone's application for determination.
Date of Decision:	14 March 2006

INTRODUCTION

1. The Act regulates the supply of telecommunications services in New Zealand.
2. The Commission has a range of responsibilities under the Act, including making determinations in respect of designated access services. Subject to sections 22 and 23, applicants may make an application to the Commission under section 20 for a determination of all or some of the terms on which a designated access service must be supplied during the period of time specified in the application.
3. This decision to investigate is made with respect to Vodafone New Zealand Limited's application for determination of a designated access service under section 20 of the Act, namely "Interconnection with Telecom's fixed PSTN".

THE APPLICATION

4. On 13 January 2006 Vodafone New Zealand Limited ('Vodafone') filed an application with the Commission for determination of a designated access service under section 20 of the Act (the 'Application').¹ Vodafone is seeking a determination by the Commission in regard to the origination and termination of voice calls on Telecom's fixed PSTN. The service sought only applies to voice calls to and from local numbers assigned to Vodafone and does not apply to calls to and from Vodafone's mobile numbers.
5. On 24 January the Commission issued a confidentiality order for the Application, which will govern the access of persons to confidential information.²
6. On 25 January the Commission requested comment from Vodafone and Telecom New Zealand Limited ('Telecom') on matters relevant to the Application.³ On 8 February, the Commission received comments from Vodafone and Telecom.
7. Telecom argued that the Commission should decline to investigate the Application on the grounds that the Application does not satisfy section 22(c) of the Act⁴, which states that no person may apply for a determination if:

That person has not made reasonable attempts to negotiate the terms of supply of the service with the person who would otherwise be a party to the determination
8. Telecom argued that Vodafone had not made reasonable attempts to negotiate an interconnection agreement with Telecom.⁵
9. Following a preliminary review of the Application, along with comments submitted by Vodafone and Telecom ('the Parties') on the Application, the Commission considered that further information was required in order to determine whether Vodafone had made

¹ Section 20: Application for Determination for Designated Access Service, Vodafone New Zealand, 13 January 2006

² Available on the Commerce Commission website at: www.comcom.govt.nz.

³ Letter from the Commerce Commission notifying parties of Application for Determination for Designated Access Services, 25 January 2006.

⁴ Telecom submission (Bruce Parkes) to the Commerce Commission (Douglas Webb), 8 February 2006, page 3, paragraph 10.

⁵ Ibid.

reasonable attempts to negotiate with Telecom. On 21 February the Commission issued a notice under section 98 of the Commerce Act and section 15(f) of the Act requiring that Vodafone supply information relating to the negotiations that had taken place between the Parties.

10. On 27 February Vodafone supplied the requested documents to the Commission.
11. The Commission subsequently received further comments from both Vodafone and Telecom relating to the Application. Those submissions were received outside of the timeframe allowed by the Commission for comment and the Commission has therefore placed only limited weight on them in reaching this decision.

THE LEGISLATIVE FRAMEWORK

12. Under section 20(1), an access seeker or access provider may apply to the Commission for a determination of all or some terms of supply in respect of a designated access service.
13. The Commission cannot investigate an application under section 25 unless the applicant satisfies the criteria under sections 22 and 23. The Commission may also consider any other relevant matters in making such a decision to investigate, although none arise in relation to this Application.
14. Section 22 states that no person may apply for a determination if –
 - (a) the persons who would otherwise be parties to the determination have an agreement for the supply of the service for part or all of the specified period of time; or
 - (b) those persons have agreed not to have any term for the supply of the service determined by the Commission; or
 - (c) that person has not made reasonable attempts to negotiate the terms of supply of the service with the person who would otherwise be a party to the determination; or
 - (d) the applicable conditions in relation to the service (if any) have not been met.
15. Section 23 requires that an application made under section 20 must –
 - (a) be in writing; and
 - (b) be given in the prescribed manner, if any; and
 - (c) contain the prescribed information, if any; and
 - (d) be accompanied by the prescribed fee, if any.

Assessment of the Application

16. The Commission has reviewed the Application against the criteria specified in sections 22 and 23 of the Act. The Commission has examined the documents, materials and other evidence provided in support of the Application, and has considered the comments made by the Parties on the Application.
17. The service for which a determination is sought by Vodafone appears to fall within the scope of the regulated service of “Interconnection with Telecom’s fixed PSTN”, a designated access service under Schedule 1 of the Act. Telecom argues that the proposed service is no different to a mobile telephone service and says that the Act does not include regulation of interconnection with mobile services. The Commission does not believe that it is required at this stage of the proceeding to reach a conclusion on Telecom’s assertion that the Vodafone service is essentially a mobile service. The regulated service is one of interconnection with Telecom’s fixed PSTN, without limitation as to the character of the interconnecting network.

Section 22(a)

18. Section 22(a) states that, despite section 20, no person may apply for a determination if –
- (a) the persons who would otherwise be parties to the determination have an agreement for the supply of the service for part or all of the specified period of time.
19. Vodafone submits that ‘there is no current agreement between the Parties to the determination for the supply of the requested service’⁶. The current interconnection agreement between Telecom and Vodafone specifies that:⁷

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20. Vodafone requests interconnection with Telecom’s fixed PSTN in relation to voice calls to and from Vodafone’s local numbers.
21. Telecom does not raise section 22(a) as a jurisdictional issue in its submission.
22. The Commission is satisfied that the Application complies with section 22(a).

Section 22(b)

23. Section 22(b) states that despite section 20, no person may apply for a determination if –
- (b) the persons who would otherwise be parties to the determination have agreed not to have any terms for the supply of the service determined by the Commission.

⁶ Section 20: Application for Determination for Designated Access Service, Vodafone New Zealand, 13 January 2006, Page 18.

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24. Vodafone notes that the Parties have never agreed not to have any term for the supply of the requested service determined by the Commission.⁸
25. Telecom does not raise section 22(b) as a jurisdictional issue in its comments on the Application.
26. The Commission is satisfied that the Application complies with section 22(b).

Section 22(c)

27. Section 22(c) provides that, despite section 20, no person may apply for a determination if –

- (c) that person has not made reasonable attempts to negotiate the terms of supply of the service with the person who would otherwise be a party to the determination.

28. On 28 May 2002, the Commission issued a Guide as to its role in making access determinations under the Act ('the Guide').⁹ The Guide sets out factors the Commission would rely upon in making its decision on whether the applicant for a determination has made reasonable attempts to negotiate the matter with the other party. The Guide states that in deciding whether reasonable attempts have been made to negotiate, the Commission will require evidence to the effect that:

- The applicant has made a reasonable attempt to engage the other party in order to achieve and agreement. Factors to be taken into account may include the following:
 - Whether or not a reasonable commercial proposal was put to the other party, supported by data, and supporting arguments.
 - Whether or not the other party was given sufficient time and opportunity to respond to the proposal. This could be determined by reference to any similar agreements between parties; or
- The other party has refused the request or rejected the proposal. The refusal may be an explicit refusal or a constructive refusal.

29. In subsequent decisions to investigate applications for determinations, the Commission has regarded the following factors as relevant to the reasonableness of the attempts made by the applicant to negotiate:

- Whether the Parties had previously entered into interconnection agreements which may represent a substantial basis of common understanding as to appropriate interconnection terms going forward.;
- Whether the Parties had exchanged marked-up contracts, which included specific proposals as to price and non-price terms, demonstrating an awareness of each other's opening negotiating positions;
- Whether the Parties had met to discuss commercial proposals;

⁸ Application for Determination for Designated Access Service, Vodafone New Zealand Limited, 13 January 2006, Page 18.

⁹ Commerce Commission "A Guide to the role of the Commerce Commission in making Access Determinations under the Telecommunications Act" 28 May 2002.

- Whether efforts were made to clear away high level issues before substantive negotiations could occur;
 - Whether senior management were involved in the negotiations;
 - Whether both parties made concessions during the negotiation process;
 - Whether the applicant provided rationale for the price and non-price terms of its proposals;
 - Industry practice and the dynamics of a negotiation between a new entrant and an incumbent.
30. The “reasonable attempts” test is fact specific and objective. In deciding on whether “reasonable attempts” have been made, the various factors mentioned above are indicative only and the weight to be given to particular factors is dependent on the specifics of the case under investigation.
31. In making this assessment, the Commission is concerned only with the reasonableness of the attempts made by Vodafone to negotiate the terms of supply. In the context of the application, Telecom’s efforts to negotiate are relevant only to the extent that they shed light on the negotiation attempts made by Vodafone.
32. Vodafone submits that it has made reasonable attempts to negotiate the terms of supply with Telecom.¹⁰ Vodafone states that it has been in intermittent negotiations with Telecom since late 2003, when it presented its first local interconnection proposal to Telecom. Vodafone submits that:¹¹
- It has provided detailed proposals for the terms of supply for local interconnection on 8 occasions
 - Telecom and Vodafone have met on 10 occasions to discuss an agreement covering the service
 - Telecom and Vodafone have exchanged substantive correspondence on at least 30 occasions.
33. [
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34. Telecom considers that there have not been reasonable attempts made to negotiate the terms of the agreement, and that it remains open and willing to negotiate with Vodafone.¹³ [

¹⁰ Section 20: Application for Determination for Designated Access Service, Vodafone New Zealand, 13 January 2006, page 19.

¹¹ Ibid.

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¹³ Letter of submission from Telecom (Bruce Parkes) to Commerce Commission (Douglas Webb), Vodafone Application for Determination of Designated Access Service, 8 February 2006, page 3.

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35. Telecom states that while a form of local mobile service was discussed two years ago, further discussions have been of a stop start nature due to the general lack of information Vodafone was prepared to share to enable a constructive discussion.¹⁵
36. Telecom says that there have not yet been negotiations on the home zone proposal [] TCNZRI, and argues that Vodafone has not yet provided Telecom with sufficient detail about the service.¹⁶
37. Vodafone argues that all proposals made by Vodafone to Telecom should be considered by the Commission to be part of the same negotiation, as each is a response to Telecom's objections from the previous round of negotiations.¹⁷
38. The Commission has reviewed the documentation provided by the Parties related to the dealings between them on Vodafone's local service proposal. The documentation is moderately extensive and detailed. As is commonly the case, the intensity of the negotiations has been uneven, with periods of activity characterized by meetings between negotiating teams and exchanges of proposals and requests for information, interspersed with periods during which the negotiations have been in abeyance. The negotiations have involved senior management of both companies and some narrowing of positions over time.
39. Nonetheless, it is apparent that the negotiations have faltered repeatedly on several key issues, in particular concerning the nature of Vodafone's network, the relevance of the management of calls to Vodafone local numbers following call handover, and Telecom's obligations under the TSO Deed for local residential service. The diametrically opposed views on these issues have meant that there has been little scope for compromise solutions that would have allowed negotiations to proceed to resolve other aspects of the relationship.
40. The Commission accepts that in such circumstances, the criteria under section 22(c) should be regarded as met once the respective positions of the parties have become clear and a reasonable period of engagement has failed to offer any prospect of a commercial resolution.
41. The Commission is satisfied that reasonable attempts have been made by the Applicant to negotiate the terms of supply of the requested service with Telecom. Accordingly, the Commission is satisfied that the Application complies with section 22(c) of the Act.

Section 22(d)

¹⁴ [] TCNZRI

¹⁵ Ibid, page 4.

¹⁶ Ibid, page 4

¹⁷ Section 20: Application for Determination for Designated Access Service, Vodafone New Zealand, 13 January 2006, page 20.

42. Section 22(d) of the Act states that despite section 20, no person may apply for a determination if -

(d) the applicable conditions in relation to the service (if any) have not been met.

43. The designated service to which the applicant seeks access has no applicable conditions in relation to the service. Accordingly, the Commission is satisfied that the Application complies with section 22(d) of the Act.

44. The Commission is satisfied that the Application meets the criteria set out in section 23 of the Act.

45. The Commission is satisfied that the Application complies with the requirements of section 22 and 23 of the Act, and will proceed with an investigation of the Application.

DATED this 14th day of March 2006

Douglas Webb
Telecommunications Commissioner
Commerce Commission