

06 October 2006

Osmond Borthwick
Manager, Network Access
Commerce Commission
P.O. Box 2351
WELLINGTON

Re: Econet Complaint

Dear Osmond,

1. Please accept our appreciation for your positive response to our request for an investigation into Vodafone's representations to the Commission during the Review of Regulated Services conference on 15 August 2006. We are in receipt of the correspondence between the Commission and Vodafone regarding our complaint, and are gratified that Vodafone has retracted its previous statements and admitted their error in their letter from Tom Chignell of 4 September.

2. While the Vodafone misrepresentations had no influence on the Commission's decision to recommend the extension of these services, we feel that Vodafone's letter introduces unnecessary and unhelpful confusion in a seeming effort to disguise its efforts in preventing an industry-led co-location solution. After prolonged conversations with our engineering consultant, we have come to the conclusion that we must set the record straight now in order to prevent any perceptions that might negatively impact the Mobile Market Review and other proceedings before the Commission (in particular, the Commission's review of the Draft Co-location Code prepared by the TCF).

3. Our concerns centre on Vodafone's efforts to distort the broadly accepted definition of co-location and to correct Vodafone's representations regarding the status of on-going co-location and co-siting discussions.

Co-Location Definitions

4. While there is no official industry repository for the language used in mobile networks, there is a broad, generalized understanding of what is meant when certain technical terms and terminology are used. We have noted efforts by certain parties over the past few years to try to use a ridiculously broad definition of "co-location," presumably in efforts to (1) mitigate any perception of their being a co-location problem, and (2) to provide maximum flexibility in confusing the scope of the issues faced in the co-location discussion.

5. In Vodafone's representation, co-location includes any situation in which the mobile equipment of one carrier is somewhere within the vicinity of another carrier, including where the carriers share some infrastructure, share an access right-of-way, or share a landlord. Co-location itself, however, is never defined, most likely because it is clearly at odds with how the word "co-location" is used within the mobile industry as a whole.

6. Even Vodafone's property group disagrees with the broad definition previously offered. Vodafone has two different application forms it uses in co-siting situations: "Co-Siting Application Form – Co-location" and "Co-Siting Application Form – Nearsiting only". The Co-location form is only used when an applicant is actually co-locating on Vodafone's tower structure – all other application types (e.g., sharing non-tower structure facilities, sharing rights-of-way or power) use the Nearsiting form. As far as EWNZ can determine these applications are internally circulated through various disciplines within Vodafone, which tends to indicate at least some commonality through the company.

7. EWNZ would propose that further discussion reflect the following definition, with which we believe an overwhelming majority of mobile professionals would concur:

Co-location: An access seeker locating mobile communications equipment on a dedicated telecommunications base structure (e.g., a tower or monopole) owned by an access provider.

Co-Siting: A cellular operator locating on land or a structure (most usually a green field or building rooftop) owned by a third party upon which another cellular operator is also located. A co-siting situation may, on occasion, included sharing of certain infrastructure, such as a common access road, utility supply, or equipment shelter; under such circumstances, an agreement between the two cellular operators might be necessary to resolve maintenance and liability obligations, resolve shared costs, etc.

EWNZ Co-Siting "Applications"

8. The Vodafone letter of 4 Sept. inaccurately describes the status of co-siting applications between EWNZ and Vodafone. Paragraph 21 of Vodafone's letter state's that Vodafone has received and approved two "co-site on rooftops" applications from EWNZ. Contrary to Vodafone's belief, EWNZ submitted no application or request for approval from Vodafone; in both cases EWNZ sent Vodafone a *courtesy notification* of it's intent to co-site at these locations. However, as EWNZ was not sharing any infrastructure or facilities with Vodafone, but instead merely locating nearby pursuant to a separate agreement with the Landlord, the only applications that EWNZ had to make in respect to either of these two sites was with the building owner (to secure the lease), Auckland City (to secure the required resource management and building consents), and the MED (for the necessary radio licenses).

9. That is not to say, however, that Vodafone felt it had the power in these situations to grant or deny our leases. In the case of EWNZ CBD No 9 site Vodafone "approved" the "application" without conditions (even though no Vodafone approval was required). In the case of the EWNZ CBD No 7 site Vodafone "approved" the "application" with conditions that were unacceptable to EWNZ¹. EWNZ did not respond to Vodafone's "conditional approval" as the building owner had already approved the lease and the other required consents had already been received, and Vodafone's consent was not required as a matter of law or contract.

10. For the record when engaging in site acquisition activities involving co-siting EWNZ will always:

- Secure a commercial lease/license from the landowner;
- Gain the necessary resource and building consents from the relevant local authority;

¹ The conditions were such that they essentially made the EWNZ site unusable.



- Obtain the necessary radio and spectrum licenses for the installation from the MED including the required ARE² certificate.

Consistent with international practice and the legal requirements of New Zealand, EWNZ will *not* make applications to Vodafone in a co-siting situation when the only infrastructure being “shared” is the building rooftop. EWNZ has taken the notification approach with other network operators, specifically Woosh and Telstra-Clear, without any issues.

11. However, EWNZ is aware that in some instances Vodafone incorporates exclusivity clauses in their lease agreements with building and land-owners in order to prevent other telecommunications operator being granted a lease at the same property. Such clauses can only be intended to be used in a commercially motivated manner; their sole purpose is to bar access in order to prevent competition. EWNZ will make a more complete submission on the anti-competitive threats of such clauses within the current mobile communications environment.

EWNZ Co-Location Applications

12. Vodafone’s letter also inaccurately describes the status of co-location requests between EWNZ and Vodafone. Paragraph 21 states that Vodafone has received 30 co-location requests from Econet, of which they have declined two, and they are awaiting more information from EWNZ to perform a desk study on the remainder. In actuality, 8 applications have been declined and the remaining 22 are awaiting Vodafone to provide critical site information in order to prepare the materials required by Vodafone for its “desk study”.

13. EWNZ is waiting to be provided with three pieces of information in order to prepare for the desk study:

- Copies of underlying lease agreements
- Copy of resource consents
- Copies of “as-built” plans

14. Most co-location sites are on facilities subject to an underlying lease between the access provider and an underlying landowner. As a matter of law, a sublessee’s rights are limited by the rights of the lessee/sublessor – a sublessor cannot lease greater rights than they have acquired from the landowner. EWNZ requires a copy of the underlying lease to complete its due diligence, including whether or not there are access limitations or specific construction requirements or limitations, consent obligations, a right to sublet or assign, easement or other use rights or limitations, or any other matters which might affect EWNZ’s sub-tenancy. Vodafone, however, has refused to supply this information. In their communication to EWNZ the Vodafone representative stated: “I am unable to provide any Access

² Under the Radiocommunications Act, the A.R.E. certificate certifies that the licensed facility:

- a. will not endanger the functioning of any radionavigation service; and
- b. will not endanger the functioning of any radio service essential to the protection of life or property; and
- c. will not cause harmful interference to rights conferred by registered spectrum or radio licences; and
- d. is technically compatible with services authorised to be operated under existing spectrum licences and radio licences; and
- e. will sufficiently define the nature and characteristics of the proposed transmissions to enable subsequent spectrum licences and radio licences to be co-ordinated for the purpose of avoiding harmful interference”



Seeker with a copy of the commercial agreements at this time as these are not available to the public and are held between the two parties.”³ This information is necessary before EWNZ can make a determination as to whether to assume the costs of proceeding with a desk study; EWNZ uses this information to obtain engineering and other drawings and materials, underlying title and land record information, and preliminary radio propagation analyses from the property.

15. In addition, EWNZ needs to obtain copies of the operative resource consents in order to determine what, if any, additional consents are required to support the co-location application. Vodafone has refused to supply this information on the grounds that “[t]he RMA consent Vodafone has obtained for a site is not relevant to an Access Seeker, other than that Vodafone confirms that it shall always comply in all respect for the activities on a site.”⁴ Vodafone’s position is particularly confusing as Land Use (RMA) consents are a matter of public record in New Zealand. While OIA / public record requests can obtain such information directly from the appropriate authorities, it takes substantially longer, and requires a consummate increase in costs. It is always easier to obtain copies from the holder rather than the local authority⁵.

16. Finally, EWNZ needs to obtain copies of the Vodafone “as built” plans for these sites in order to complete our own engineering assessment of the site prior to requesting Vodafone to carry out their desktop study. Vodafone will supply these plans only if EWNZ will pay “actual and reasonable” expenses for the administrative work required. Unfortunately the Vodafone labour charge is a non-negotiable NZD\$100.00 per hour, regardless of whether there is any out-of-pocket expense to Vodafone, and there is no set maximum time limit in which the plans can be produced. (Based on this and the other frustrating barriers to obtaining necessary information, we are justifiably concerned that we’ll be told the plans are stored in an off-site storage facility, and it will take 40 man-hours to locate them, return them to an office, and copy them.) EWNZ do not regard this as a reasonable expense given that the average rate for temporary administrative staff in Auckland is currently around \$35.00 per hour and this is essentially a clerical task that should require little, if any, time to complete. By comparison, Telecom New Zealand have provided copies of as-built plans at zero cost for nearly all of the 58 sites upon which EWNZ has lodged co-location applications with Telecom.

17. Thank you for your continued attention to this issue. We hope this letter helps correct any continuing misconceptions about the reasons for failure of industry participants to resolve co-location negotiations with incumbent operators. While we understand that the original matter for which these co-location issues were presented have already been resolved, we hope that this information will provide a satisfactory starting point, or a further justification for, a more thorough investigation of the barriers to competitive co-location in the mobile market and a positive outcome to the mobile market review.

Please feel free to contact me directly with any questions.

Yours sincerely

David Grant Rauscher
Sr. Counsel

³ Email from Peter Nicoll 11-July-2006.

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⁵ This is slowly changing as some council’s, like Auckland City, have an excellent on-line search system.