ECONET WIRELESS NEW ZEALAND LTD

SUBMISSION TO COMMERCE COMMISSION REGARDING ADJUSTMENT OF REGULATED SERVICES

21 DECEMBER 2005

Econet Wireless New Zealand Limited ("Econet") thanks the Commission for the opportunity to make this submission.

Our submission is concerned with two regulated services: national roaming and cellsite co-location. Both services contain areas of concern for us as a new entrant into the mobile market. However, since there is a necessary link between the service descriptions, and the broader Act which establishes and determines the effect of those service descriptions, we also make some general comments about the Act. Schedule 1 sets out a summary of our recommendations for amendments to the service descriptions.

It is our submission that the Telecommunications Act 2001 ("the Act") was, from the start, a political compromise. It broke new ground in enabling the New Zealand telecommunications to finally accept international principles, after a decade of disastrous telecommunications policy that turned its face against the rest of the world, and during which time New Zealand became the laughing stock of international telecommunications regulatory policy. However, so entrenched were the political attitudes against regulation when the Act was passed, that it was seen as politically unacceptable to introduce the kinds of measures – most notably, price regulation – that are commonplace in other countries. Therefore, while the Act gave competition with one hand, it took it away with the other through detailed provisions and conditions that made the introduction of competition a tortured, if not impossible, process.

The results are obvious – 4 years after the introduction of the Act, the Telecom-Vodafone duopoly is stronger than ever, with mobile prices the highest in the OECD. Fixed line telecommunications and broadband are not much better, with New Zealand's main fixed line infrastructure competitor, TelstraClear, deciding to downscale due to an unsupportive regulatory environment. Both of the two most likely new entrants – Econet on the mobile side, and TelstraClear on both fixed line and mobile – have failed to enter the market. Instead, the monopolies of Telecom for fixed line competition, and Vodafone for GSM competition, have become even stronger. If the Act was actually effective in providing a platform for competition, we would now have a multi-player market, like our OECD peers. We don't, and the Act needs to change.

Econet submits that the basic reason for these failures over the last 4 years is that the Act does not provide a true OECD-style system. Econet's mantra has been "An OECD-style regulatory system will provide OECD-style competition, which will bring OECD-style prices." It should not be difficult to bring the experience of the rest of the world to New Zealand, and have international processes play out in our domestic market. We do it in business every day; we do it in education; we do it with our sports teams; we do it with our politics and constitution; and we do it with our film-making, television and creative arts. Why should this basic principle – that the normal international *modus operandi* will produce similar results in New Zealand as to the rest of the world – not apply to telecommunications? Telecommunications markets operate according to natural economic incentives; and the economic laws applying to OECD countries also apply to

New Zealand. Therefore we should adopt the approach of other successful nations if we expect to succeed. This means following not only the framework, but the details of other regulatory systems, since the devil is very much in the detail when it comes to regulatory legislation. Investors must consider not only if the regulatory system is in the right ballpark, but whether the details of the regulatory system will negate its intent, and lay to waste their investment dollars.

**The specified services regime**

The combination of the specified services regime and the Schedule 3 procedure is fundamentally flawed. We are not aware of any jurisdiction in the world which has made a distinction between telecommunications services in which price can be regulated, and those where price cannot be regulated. The basic reason for this is that telecommunications service regulation without the ability to regulate price is practically meaningless. This reflects the fact that the 'specified services' regime was clearly the result of a political compromise, and as such has proven to be incredibly unwieldy and ineffective in practice.

It hardly needs to be said that an access provider whose services are regulated, but whose price isn't regulated, will raise its price in order to compensate for the regulation. It is basic commercial logic. It is even more pronounced in a networked industry, where incumbents, whose services are regulated, have a natural incentive to lock out new entrants. Therefore, there is no logical reason for a regulatory system which does not regulate price to have any practical effect. Its only practical purpose is to open up negotiations when no such opportunity previously existed. But even this is damaging in real terms, because it creates the illusion of progress when in fact none exists.

Econet therefore submits that the distinction in the Act between specified and designated services should be abolished altogether. Its only real effect seems to be to delay a new entrant's use of the service until price regulation can be introduced. None of the specified services have been tested since in the 4 years since the Act was passed, and one of them is due to be abolished altogether under the Commission's current review. This is basically due to the fact that because the specified system does not have a hope of working effectively. Accordingly, it should be discarded completely.

However, if the Commission considers that a distinction needs to remain, to avoid the problems of wholesale change to the structure of the Act, then the Commission should simply have the power to impose price regulation on specified services where it believes that it is justified. Allowing price to be determined should not necessitate a lengthy, expensive process, as envisaged by Schedule 3. It should simply be up to the policy of the Commission. Even so, it would be unbelievable for the Commission to decide that any service should not be regulated without including price, because it is so obviously meaningless to have service regulation without price regulation, particularly where monopoly service provision exists.

Therefore, Econet's first, and main, submission, is that the Act should either a) contain no specified / designated distinction whatsoever, and make all specified services subject to price review; or b) if this is unpalatable, allow the Commissioner the power to make price determinations on specified services if he deems it appropriate – but on his own determination and without the need for a Schedule 3 process.

**Giving and taking**

Econet submits that the entire Act needs to be reviewed to identify situations where processes have been set in place *not* for the purpose of encouraging new entry, but for the purposes of balancing the interests of incumbents and new entrants. Such provisions give hope for new entry on one hand, and take it away with the other.

This situation arises all through the Act. The right to make applications comes with conditions that must first be met. Access principles come with limits to access principles. Rights to access come with conditions on those rights. The effect is to nullify most advantages that providers of competition might otherwise gain – thereby negating the purpose of the Act, which is to promote competition in telecommunications markets.

The clearest example of these trade-offs is in the case of price regulation for specified services. On one hand, a structure is set in place for the negotiation and regulation of services. But if price is not included in the Act, any incumbent worth its salt will raise the price to an unacceptable level. The result is the incumbent's desired result – no new market entry.

The same applies to the conditions that are imposed on specified services both before and after an application can be made. These conditions, and the administrative processes they must work within, are so much in favour of existing incumbents that the legislation becomes practically useless in enabling new entrants to compete against those incumbents.

This is nothing more or less than the result of the Act's drafting, and the political cautiousness that prevailed at the time. It is *so* crucial to understand that players simply respond to economic incentives. Therefore those who draft the Act, as the platform for competition, must be clear about its objectives in introducing competition.

Econet is quite clear on this point: the Act should not exist to protect the interests of incumbents. Fundamentally, competition in the New Zealand marketplace is about market entry. The current incumbents have a very simple mission to perform: to delay, postpone and deny new market entry. Why would they ever allow a new entrant? There is nothing in it for them. It is a complete misconception to argue that, for instance, price regulation should not be included because the interests of the incumbents need to be protected. It is because the incumbents have followed their interests that New Zealand telecommunications is in its current state. Nothing will be achieved by creating a compromise that is designed to achieve a stalemate. This is what the current Act does, and the result is, of course, a stalemate – which means a continuation of the status quo.

**Delays and the fallacy of self-regulation**

The other fundamental point is that delay works in the incumbents' interests, and against the interests of a competitive marketplace. Delays in process run as a common theme through the entire Act. They are incredibly destructive for a new entrant business case, and like Christmas for incumbents.

Telecommunications is a fast-changing field, and each technology (eg, GSM, W-CDMA) has a cycle. If incumbents can delay for long enough, their would-be competitors can go through an entire change of business case because the technology life cycle changes. In Econet's case, we started off with a GSM business case; now we have a 3G business case – even though we initially invested in GSM spectrum.

In a duopolistic market, delay means profit. It allows incumbents to lock in customers and lock in monopoly rents. Strategic decisions about market behaviour (including delaying or denying potential new entry) are made by boards who are represented by shareholders. Local managers, who implement these decisions, have a responsibility to those boards and shareholders. It would be irresponsible for incumbent managers *not* to delay and frustrate new entrants in order to maximize their profits. Therefore, the delays take place not because incumbent managers are evil people who don't want people to have competition; they are made because the Act allows them to follow their natural incentives – and their natural incentive is to delay, postpone and deny. When Econet approached one incumbent operator to provide co-location, they said they could deliver co-location at the rate of one site per month. If we were to rely on co-location, at that rate it would take us 100 years to build a full country network! Therefore, if these incentives are ever to be reversed, the processes in the Act must be very focused on shortening timeframes. Talking nicely – or tough – to incumbents will not do the trick. The Act, and the Act alone, must provide the compulsion to act. Otherwise we can expect no change to the status quo.

Two examples here are illustrative of our point: number portability, and a Code for cellsite co-location. We hardly need to mention number portability, as it is such a luminous, mammoth example of how delay can be used by an incumbent. If it had not actually happened, it would be unthinkable that number portability could take over a decade to introduce into an OECD market. But it happened in New Zealand – because of a mistaken belief in self-regulation, which led to mechanisms which did not allow any progress to be made. For instance, the Number Administration Deed, which was re-jigged to become the forum for number portability, required unanimous approval for anything to be passed. Why? Because the model was "self-regulation", and incumbents were part of the NAD group and would only accept a unanimous voting system. The result is that New Zealand still does not have number portability, after nearly ten years of "self-regulation".

Worse still, this misguided confidence in self-regulation was continued into the 2001 Act. The Act established the TCF, but left it up to the industry to decide what the TCF should look like. So of course, the TCF was structured in a way that favoured the existing players' interests. And yet the TCF is intended to be a facilitator of competition.

Econet believes that the Commission must accept the logical point that competition policy necessarily acts *against* the interests of existing players. Therefore, a competition framework cannot succeed if existing players are responsible for designing and implementing it. It's like putting a panel beater in charge of designing a roundabout. Or lunatics in charge of an asylum. How could this possibly yield progress?

This exact situation has been played out in the Radiocommunications Co-location Code Working Party. In the very first co-location working party meeting in 2002, Econet made the point above – that a competition framework must necessarily be designed to favour a new entrant position and work against the interests of incumbents. Not surprisingly, this view was not accepted by the working party! We believe the battle for a pro-competitive Code was lost then and there. There is simply no way that incumbents will work against their own interests – but this is what self-regulation asks of them. Therefore, while the co-location working party was established in 2002, to this day it has produced nothing in the way of any real change in the competitive dynamics of co-location. This is because it is comprised of incumbent players, and sits within a body (TCF) which is governed at the board level by incumbent players. It would be amazing if it *did* deliver any progress.

The Co-location Working Party result is fantastic for incumbents. It costs them very little to employ regulatory managers to represent them at these forums, relative to the profits they continue to make as a result of a lack of new entry. There is nothing better for the incumbents than to go through a lengthy, multi-party working party process where every point is debated, and have the Commission then reject the Code and have to go back to the drawing board. A whole technology lifecycle can pass during these kinds of processes. Whole new entrant business cases can come and go while these processes are worked through. The Commission needs a circuit-breaker – and the first step is to recognize that self-regulation simply does not work. It is a contradiction in terms. Like it or not, a policy of competitive entry must work against incumbent interests if it is to succeed.

Econet asks the government and the Commission to consider this point seriously. It is a crucial part of the regulatory equation. The government and the Commission themselves need to make the policy and processes applying to regulated services. Delivering a hospital pass to the industry will not solve the problem, because the industry is the very thing you want to reform. Everybody will *appear* to be very co-operative, but nobody will actually play ball unless they are compelled to. This is the case with any reform programmes the world over – reform always brings resistance from those whose interests are adversely affected. You simply cannot put those same people in charge of the reform process and expect success.

The final general point about delays and timeframes is in relation to the Schedule 3 processes surrounding expiry dates and changes to services descriptions. The entire principle that the Commission needs to receive submissions, cross-submissions and industry conferences to determine policy should be revised. The Commission should have the expertise and international experience, whether in-house, or through alliances and contacts with other regulators, to know what to do without the need for such long timeframes, and voluminous submissions, from the industry. It should not have to rely on a year's worth of deliberation in order to make changes to the regime. Again, such an approach merely benefits the incumbents who should be in the Commission's firing line. It is at cross purposes with the Commission's, and the Act's, imperative to introduce competition into the market.

In our view, the timeframes of making an application need to be drastically reduced in order to be effective. Wherever possible, procedures should be run in parallel and streamlined. While we recognize the complexity of many of the issues the Commission needs to deal with, we question the need for voluminous submissions, cross-submissions and industry conferences on every topic. We believe the Commission needs to be flexible enough to make speedy decisions when they are required for competition to prosper.

All of the points made above flow through to the decisions the Commission needs to make about the service descriptions for specified services in the Act. The purpose of the service descriptions is to give effect to the purposes of the Act. Therefore, the effectiveness of the Act in general must be part and parcel of the Commission's consideration of any adjustments to the service descriptions.

**NATIONAL ROAMING**

Econet submits that some specific changes are needed for national roaming regulation to be effective:

1. **Price**

   We have submitted above about the problem of not having price in the Act for specified services. We urge the Commission to seriously consider our suggestion to either remove the specified / designated distinction, or provide that the Commission should have the power to make an ad hoc decision to decide on price for a specified service where it believes it is justified.

   It is no surprise that price is the central problem in national roaming. Econet has already formally requested the Commission to adjust the service description to make national roaming a designated service. National roaming regulation is almost meaningless if the Commission cannot take a view on the price of the service, because price has an impact on all non-price terms.

However, we believe that if the Commission rejects our suggestion above regarding price determinations for specified services, it is possible within the limits of the Act for the Commission to issue *guidelines* as to pricing, and for these guidelines to be included in the service description. For instance, to specify TSLRIC pricing as the guideline for national roaming pricing would not offend section 20, which provides that a specified service application may not include the price payable for the service. There is nothing in the Act to stop the Commission issuing guidelines in advance as to the applicable pricing principles – or even a range of prices – that it would accept should an application be made. These legislated signals as to price would be likely to speed up the time frames of negotiations and Commission investigations and offer investor certainty. It could possibly avoid the need for an application to be made (though this is unlikely, given the incentives on incumbents to delay a new entrant's entry into the market).

Without price or guidelines as to price, the only course available to a new entrant seeking national roaming at a commercial, internationally-benchmarked price is to go through the Commission's processes – along with a minimum of one year of submissions, cross-submissions and conferences, and at considerable expense – firstly via Schedule 3 to enable the Commission to decide on price, and secondly via Schedule 1 to actually decide that price along with the other terms of service that may be in dispute.

However, we stress that guidelines should be a last resort, behind the abolition of the specified services regime, and power of the Commission to set a price for a specified service where it believes it is justified. Guidelines would be useful in providing certainty to all parties about the Commission's approach. If the guidelines were used *alongside* the Schedule 3 and Schedule 1 processes, it could streamline the arguments and bring about a much quicker resolution to the price question.

**2. Roll-out matrix**

As stated above, we believe that the conditions on the service are a classic example of the political compromises in the Act. In the case of national roaming, there is a collection of regulatory conditions in the service description which is focused around the new entrant's roll-out plan. They are highly problematic, and work together to strangle the effectiveness of the regulation. These are:

- Silence on price
- The roll-out plan
- Penalty for *any* failure to meet milestones
- The meaning of 'national'
- Expiry dates

We have dealt with price above. It is included in the matrix because it is central to all terms of service, including the speed and location of roll-out. The other conditions are discussed below:

**<u>The roll-out plan</u>**

The need for the Commission to approve a roll-out plan before an application for a determination can be made (see ss 20 and 22) is problematic, and the legislation creates practical difficulties which we believe act against the purposes of the Act.

The major issues are:

1. The roll-out plan is one of the most fundamental aspects of the business plan, and needs to be decided to a high degree of certainty before other aspects are finalized. However, the roll-out provision does not allow a business case to be finalized until a roll-out plan has been decided by the Commission. This means that until the roll-out plan is complete, significant aspects of the business cannot be finalized or even developed. This creates extreme sequencing problems in developing and finalizing business cases and strategies; and

2. It commits the operator to a roll-out schedule within a particular timeframe (ie, the expiry of the service) that may or may not make commercial sense.

**<u>Penalty for any failure to meet milestones</u>**

The Act provides that the access provider can stop providing the roaming service to the access seeker upon *any* failure by the access seeker to meet the roll-out milestones set by the Commission.

The specific, and very real, danger of this provision is that an access provider will be aware of the roll-out milestones that the access seeker must meet, and then use its market power to ensure the access seeker fails to meet a milestone. It could do this through limiting access to co-location, ensuring the access seeker cannot roll out according to its schedule; by creating technical difficulties around the roaming service, so that the roll-out cannot proceed as quickly as planned; or even by charging a high roaming charge to ensure that the new entrant experiences financial pressure. Once the access seeker has failed, it can either simply switch off the roaming service, or hold the new entrant to ransom in order to continue the roaming service.

The failure to meet a roll-out plan should simply be dealt with in the same way as any failure to comply with the Commission's determination – ie, through application to the High Court. It is overkill to penalize a new entrant for this by switching off the roaming service.

We believe this provision should be deleted. It adds nothing positive in terms of enabling competition to the normal regulatory requirements that already exist as part of the Commission's power to determine the terms of service. It grossly over-penalises the access seeker in a situation when roll-out milestones will almost certainly need to be revised in response to market needs.

**The meaning of 'national'**

> *Conditions:*
>
> *... the provision for roll-out of a new national cellular mobile telephone network within the period of time in which the national roaming service is specified ...*

The meaning of the word "national" in the service description is ambiguous – however, it is one of the most crucial inputs into a business case for a new entrant. There is a huge difference in business model between a full nationwide roll-out to a roll-out that covers the main cities of New Zealand. Both can be called "national".

Econet submits below that the entire notion of a 'national' build should be discarded. However, if the concept of 'national' is to remain, then clarification should be given as to what 'national' entails.

**Expiry dates**

Econet has submitted in the past on the need for long term expiry dates. However, expiry dates are particularly crucial in the context of national roaming, because a national roll-out must be concluded within the lifespan set out for the regulated service.

At present, a national roll-out must be achieved within 5 years, if the regulations are not extended. Any operator will confirm that this is practically impossible, and it is certainly commercially impossible in New Zealand in 2006. When planning the business, an operator cannot simply assume that regulations will be extended. It must plan for a situation where the roll-out must be completed within the timeframe given. Given that this is an impossible task, the service description clearly needs revision if the regulation is to be effective.

Accordingly, we submit that any national roaming agreement must have an expiry date of 15 years.

The Commission may already have the power to determine a 15 year roaming agreement. It is arguable that even though the service itself may expire within a 5 year timeframe, the Commission may nevertheless have the power, within those 5 years, to determine an agreement which lasts for 15 years. The enforceability of that agreement would not be jeopardized simply because the regulation it was created under no longer existed.

However, it would be better if the expiry dates themselves were extended for a realistic timeframe. We would see 15 years as the benchmark for the regulation to be effective. The termination of services should also be specifically tied to the Commission taking into account the commercial effect on interested parties, as well as to competition in telecommunications markets.

**The matrix**

The roll-out plan issues above all interconnect and reinforce one another. For instance, a 5 year expiry date increases the pressure on the Commission and the new entrant in setting and meeting milestones. The lack of definition of 'national' exacerbates the problem of a 5 year expiry date, and so on.

Some of these issues can be resolved through the Commission taking a realistic and sensible approach to the issue. However, at present this comes at the cost of an ambiguous and lengthy process, since the roll-out plan is part of a lengthy application process.

It must also be noted that this matrix is also connected to the price question. The ambiguities surrounding the roll-out plan would not be so acute if it were not for the lengthy Schedule 3 processes that are now underway – both in relation to expiry dates and in relation to moving a service from specified to designated. Therefore, we encourage the Commission to take a holistic view of the problem and recognize that these conditions work together to nullify the efficacy of the regulation.

**Solutions to the roll-out matrix**

We believe the easiest, and possibly the most sensible, solution is simply to lose some of the most problematic requirements – namely, the requirement to build a national network, and the requirement for the Commission to sign off on a roll-out plan before an application may be made.

The policy reason for having a national network is firstly to ensure that roaming is sought by realistic competitors, and not 'infrastructure bludgers' who are not prepared to roll out a proper network. Secondly, it is to ensure that the benefits of the regulation are not simply enjoyed by new entrants to 'cherry-pick' the key population areas, and fail to pass on the benefits of the regulation to the rest of New Zealand.

However, there are some fundamental points which this analysis misses. Firstly, both Telecom and Vodafone took over a decade to roll out a full national mobile network. Their networks were rolled out in the days of booming mobile usage and exponential increases in mobile penetration, when demand was insatiable throughout the entire country. At today's rate of around 90% mobile penetration, how can a new entrant network be expected to roll out a competitive national network twice as fast as the two incumbent networks? It simply does not make sense.

Secondly, the definition of 'national' itself is problematic. Not only does it create an unrealistic expectation of full country coverage, but because there are no guidelines offered as to what 'national' means, it exposes the process to challenge, because it will be very difficult for the Commission to arrive at a definition that is satisfactory to both parties.

Overall, it would be better for the Commission's own judgement to guide the process and arrive at sensible roll-out requirements. This is the normal state of affairs in European markets, where the regulatory agency sets the parameters for the new entrant's roll-out requirements. There should not be a need for legislation to determine a requirement that will certainly change according to commercial circumstances – especially where that legislative standard does not make sense. Therefore, the requirement for a national network should be abolished, and the power given to the Commission to decide on realistic roll-out requirements without reference to a 'national' requirement.

On the issue of the roll-out plan, the problems in the Commission signing off a roll-out plan before an application can be made are fundamental when one considers the sequencing of finalizing a business plan, committing capital and rolling out. At the very least, there should be no requirement for the Commission to be satisfied that an applicant has the ability to meet the roll-out plan *before* an application may be made. Such an approach makes it harder for the new entrant to enter, which is contrary to the purpose of the Act.

This approach would be consistent with the fact that the roll-out plan depends on many other terms that the Commission will also determine, including price and term. These two terms, in particular, have a material bearing on the business plan, which in turn determines the roll-out schedule. The issues are all related, and should not be dealt with at separate points in the process. Accordingly, the issue should be dealt with as part of the determination, and without reference to a 'national' build.

We believe the best approach is to discard the roll-out plan condition altogether. If the Commission is determining a regulated national roaming agreement, it can easily include certain roll-out milestones that the Commission arrives at as part of its determination. This can be arrived at in consultation with the access seeker. There is no need for a separate legislated process which must occur before an application can even be made.

### 3. Geographic vs population coverage

*"the access seeker must have rolled-out a new cellular mobile network that covers no less than 10% of the area in which the New Zealand population normally lives or works"*

The Commission is aware of the ambiguity that exists in the Act regarding the required network build-out that an access seeker must achieve before it can apply for a national roaming determination. Econet has previously submitted to the Commission on this point and the Commission is aware of Econet's views. In summary, the provision should be amended to make it clear that the minimum roll-out requirement is 10% of New Zealand's population, not any other measure – for instance, such as 10% of the geographical area of New Zealand.

**4. Capacity**

Capacity needs to be dealt with by being as specific as possible about the area that has capacity constraints. Econet's experience is that access providers will try to exclude whole districts on the basis of constrained capacity. These districts may comprise the most lucrative and essential markets in the roaming region. This has the effect of shutting out the new entrant to the most commercially sensitive areas, and forcing the new entrant to build those areas before roaming becomes available.

It is Econet's experience, as an international GSM operator, that capacity is a moving feast, as traffic patterns change according to market dynamics. Capacity problems can be created or relieved with a simple tariff adjustment. Also, capacity problems are generally limited to particular geographic areas that may be delineated by socio-economic groups or cultural activity. It is unheard of in Econet's experience for capacity problems to exist across large geographic areas. Therefore, capacity issues should be identified as specifically as possible and any limitations on service should be dealt with according to those specific areas. It must not be an excuse for shutting a new entrant out of a market.

Finally, in a virtually fully penetrated market such as New Zealand, capacity constraints are not as credible as they would be in a market with increasing penetration. This is because, for instance, if Econet gains market share, it will be at the expense of Vodafone, the other GSM / W-CDMA player. If Econet is roaming on Vodafone's network, then there is minimal change to the capacity requirements on Vodafone's network, because it is the same customers talking under a different brand. Therefore we are skeptical about the net effect on an access provider's network capacity through roaming arrangements in the current New Zealand market.

We would support a change to the service descriptions which limits the capacity condition to specific base stations, with a requirement for the parties to come to a commercial solution. This could only work, however, if price was also determined by the Commission so that it did not become an opportunity for financial leverage by the access provider.

## 5. Requirement not to have an existing agreement

The Act requires that an access seeker must not have made an existing agreement with the access provider, or anybody else, for national roaming if it is to make an application to the Commission.

This provision puts the access seeker in a difficult situation: it means it must either enter the market accepting an uncommercial agreement which cannot be changed, or wait and go through a process of 12 – 18 months in order to have the question resolved for the longer term. From the point of view of the total business case (ie, the business case over the long term) the new entrant's logical position is to go through the regulatory process, and take the risk on a later market entry. However, this is counter to the objectives of the Act, which is to promote competition. Therefore, the new entrant should be encouraged to enter the market quickly, not to fight outside the ring, waiting until a lengthy regulatory process delivers a result.

The other policy reason for allowing regulatory review is to enable competitive terms to emerge. For instance, if Telecom decided to switch technologies to W-CDMA, a GSM new entrant would have a competitive choice of roaming provider. This would fundamentally change the dynamics of roaming service provision: since it would be accepted that the new entrant would enter the market (because no monopoly provider could shut it out), each provider would have an incentive to compete for the roaming revenue. However, if the regulations only allowed a deal to be struck with one provider, it would put the new entrant back into the situation of having to accept non-commercial terms from a monopoly provider.

The effectiveness of this approach was proven by Hutchison "3" in Australia, when it changed its roaming provider from Vodafone to Telstra during 2005. Competitive pressure led to better terms, a more stable competitive platform and more sustainable competition.

Therefore, there is no reason in principle why a determination should only be made if there is no agreement between the parties. The Commission's decisions relating to fixed line interconnection and mobile termination clearly illustrate that a service that is agreed between two parties may nevertheless be contrary to competitive goals, and in need of revision. To allow regulatory review of existing services would encourage an access provider to agree to fair terms, so as to avoid the need for regulatory review in the future, and the risk that would entail.

There is a policy need to guard against regulatory gaming, where the parties will strike an agreement, only to have one of those parties seek to improve the deal through a regulatory process. However, that risk exists at present, as it always does, and simply needs to be managed. Conditions can apply to limit this risk, without putting an access seeker into quarantine while a regulatory process is worked through.

Therefore, we believe that the condition that the parties must not have come to an agreement should be deleted. It stifles the possibility of parties coming to an agreement and enabling a new entrant to get up and running, and limits the possibility of better terms through competition for providing regulated services.

**CELLSITE CO-LOCATION**

There are three main issues in the co-location service description which need to be addressed:

1. Price;

2. The need for rapid, multi-site access to towers and other facilities; and

3. The need to deal with the Resource Management Act as a blockage to efficient and environmentally friendly roll-out.

**Price**

Price is such a fundamental issue that there is little to say about co-location pricing specifically that has not been said before in our general discussion about the importance of price regulation generally.

However, it should be said that cellsite co-location is a clear example of the differences between the new entrant and the incumbent, as the new entrant's roll out occurs some 10 - 15 years after the incumbents'. This means that the prevailing mobile penetration rates are fundamentally different for the new entrant than for the incumbent.

The effect of this is that, in the New Zealand context, the incumbent's infrastructure is fully paid off through high retail prices by the time the new entrant rolls out. Without a growing market, the new entrant must obtain a higher market share than the incumbents to achieve the same revenue. This leads to a blockage in lowering prices. Only if the new entrant's costs are lower can it afford to lower prices. Therefore, a sensible co-location price is not only essential to the new entrant's business, but it is also essential to the competitive framework so competition can be introduced.

**Rapid, multi-site access**

There are a number of reasons why the Act does not presently allow for rapid, multi-site access to towers and other telecommunications facilities. These are:

- The conditions in the Act that must be met before co-location can be accessed, almost all of which provide a barrier to gaining access;

- The Act's lack of definition around the structure of a TIF (now the TCF), which has allowed a TCF and Co-location Working Party to develop which are dysfunctional;

- The Act's misguided faith in the efficacy of self-regulation;

- The Commissioner's absence of any power to enforce an industry Code; and

- The failure of the Act to deal with the Resource Management Act.

The Resource Management Act issue is dealt with below.

On the conditions contained in the service description, we accept the need for some conditions. For instance, it is reasonable for physical capacity on a tower, as well as interference issues, to be a legitimate issue to be resolved. However, it is not reasonable for these issues to become absolute blockages to co-location, which is what they effectively have become.

For example, the service description refers to "additional limits" to the limits set out in section 6 of Schedule 1. These additional limits act as guidelines to the Commissioner regarding a determination on an application for co-location. In making a decision, the Commissioner must limit access to the access seeker with reference to future incumbent requirements, interference, any Resource Management Act requirements, all health and safety issues, all existing contractual obligations, and the interests of third parties who use facilities in question.

The condition relating to existing contractual obligations, in particular, is difficult, because the incumbent will make site leases subject to convenants relating to limiting new entrant infrastructure. This by itself creates real problems for new entrants because it means that not just practical but legal roadblocks are put up to co-location.

The structure of the Act is such that an application may not be made until negotiations have taken place. Econet's experience in negotiating access to sites has been that access providers will request specific details about when, where and how the site is to be used. But there are two problems here: firstly, there is a Code of practice being developed which sets out timeframes and procedures for negotiating access to sites. This works as a block to access, because the incumbent will take the position that the process should work according to the Code. Secondly, sites are required at the very beginning of a roll-out. These issues need to be resolved potentially even before a business case is finalized. So the access seeker first must spend time negotiating access, either according to a Code process (which in any case are not binding) or according to the timeframes that the incumbent will accept. Then when the incumbent stalls, defers, or denies access – or allows access at an uncommercial price – what choices does the access seeker have? It must then decide either to not co-locate at all, or accept the uncommercial terms, or go through the procedures in the Act for a determination.

But the problem with the Act's procedures is firstly, that price is not included; and secondly, that the process itself is subject to time delays and conditions. These all work together to make the process ineffective: as we have seen with roaming, incumbents will always raise the price in order to compensate for non-price terms that it would not choose of its own accord. So the access seeker must make a Schedule 3 request to have co-location designated. This can take anywhere from 3 months to a year. Then, even if this request is successful, it then must make another Schedule 1 application to have the terms of service decided – which could take another 3 to 6 months. And in making its decision, the Commission must take all of the conditions stated above into account, which will severely limit the efficacy of the decision in terms of enabling new entry.

To cap it all off, all of this must happen during a roll-out – ie, all of this time is wasted during the most crucial, expensive period in the new entrant's business. By the time a decision is obtained, the roll-out could be over. It is ridiculous that all of this effort could be expended over a single site, given that there is no requirement in the Act for multi-site access.

All of this means that a co-location application is almost certainly not worth the effort. It is no wonder that the Commission has received not one application for a co-location determination, despite a number of roll-outs that have occurred since the Act was passed.

As far as the self-regulatory process is concerned, we have mentioned in our introduction that we believe self-regulation is a contradiction in terms. It is not effective in theory or in practice. The attendance record of new entrants in both the NAD and the Co-location Working Party speaks volumes about the effectiveness of these forums: in short, new entrants are not well resourced, and therefore do not participate. In Econet's case, we do not have a vote, and even if we did it would not be effective. We believe that the reason for the lack of progress made by the Co-location Working Party is the lack of power in the Act given to the Commission.

Therefore we believe that for the service description of co-location to be effective, the Working Party must be either abolished, or the TCF fundamentally restructured by restructuring the provisions dealing with the TIF within the Act.

**Resource Management Act**

Currently, requirements under the Resource Management Act 1991 ("RMA") are a limit to gaining access to co-location. This should be reversed: the Act should override the requirements of the RMA when it comes to co-location.

There are plenty of precedents for industry-specific legislation to override general law in order to meet specific objectives. The Act itself gives relief to network operators in using land to maintain telecommunications infrastructure. Other examples have been seen in the Australian Telecommunications Act 1991, which overrode local council requirements for operators building out fixed line telecommunications infrastructure (nb: this provision was specifically designed to facilitate the Optus fixed line network roll-out in order to allow competition into the Australian market, and fell away once the Optus network was up and running); the Australian Telecommunications Act 1997, which gives relief from local council requirements to operators installing low-impact facilities; and in the relationship between the Australian Trade Practices Act 1974 and the Telecommunications Act 1997. Following these models, the Act should specify that the RMA does *not* apply to new operators installing mobile telecommunications infrastructure, and particularly where such infrastructure is co-located.

Obviously, there would be details to work through to ensure some of the policy objectives of the RMA were maintained. However, we ask the Commission to accept the principle that in relation to some key areas, the Telecommunications Act should follow international precedent, and specifically override the RMA.

What are these key areas?

Firstly, the time and expense involved in making resource applications. It is a barrier to competition that a slimline mast or pole needs resource consent, while a streetlight – a much larger and more invasive structure erected by local councils – does not. Econet submits that if a new entrant's structure is consistent with the landscape, then that infrastructure should be able to proceed without the need for specific RMA consent. Therefore, new entrants should be exempt from RMA and local council requirements slimline towers when installing and other similar structures. This approach is entirely consistent with the approach taken by the ACCC in facilitating the Optus roll-out in the early 1990s.

Secondly, new entrants should be able to add to existing towers without the need for RMA or local council approval. Currently, the RMA and local/district plans limit heights of telecommunication masts.

The higher a mast is, the wider will be the coverage that the operator can transmit to. Higher masts mean a more efficient roll-out, which ultimately means lower costs to pass onto consumers. Each operator requires a certain amount – no more than 5 metres – of clear space between itself and its co-located neighbour to ensure that no interference issues arise. However, in the New Zealand environment, to build a 5 metre addition to a tower is not only denied by incumbents, and made subject to the lengthy and expensive processes outlined above, but is also subject to RMA and local council restrictions.

We submit that new entrants should have the right, without RMA or local council consent, to add five metres onto any existing tower for the purposes of co-location. The only conditions on this should be that the new entrant must ensure the safety of the structure (in appropriate circumstances, by constructing a new facility), and ensuring that no interference occurs.

In the USA and UK, it is commonplace to see 35 metre towers which hold a number of different co-located operators. In New Zealand, 25 metres is the practical limit imposed by local councils, even in rural environments. But the higher a signal is transmitted from, the more coverage it has and therefore the fewer cellsites are required. Therefore, it is in the public interest, both in terms of competition and the environment, to allow new entrants the right to add five metres onto existing towers. This would not prejudice existing owner's use rights or interfere with existing signals, and would ensure certain public benefit in a way that ensured visual pollution remained at a minimum, while competition was materially advanced.

The Commission may believe it is beyond their brief to make environmental provisions in the Act; however, a large part of the Act is already dedicated to specific environmental concerns (ss 117 – 156). There is strong Australian precedent for such a move; and further, such provisions are necessary to make co-location work. Without the Act limiting the anti-competitive effect of the RMA, it will be very difficult to make co-location work in practice.

**Solutions**
We believe the Act needs to include a few key concepts in relation to co-location:

- An access seeker can gain access to multiple sites from an access provider. By multiple sites, we mean 25 or more in one application.

- Issues such as interference, forecast capacity etc, must be worked through on a commercial basis, and it should be specifically stated that they must not provide a barrier to access being granted;

- The Commission must be able to determine price; and

- Timeframes for a determination must be reduced drastically. Ideally, the Commission - or another judicial or administrative body – would have the power to make ad hoc determinations regarding co-location applications.

- Abolition of the TIF. Failing that, it must be fundamentally restructured so that it actually achieves a pro-competitive outcome. This will only be achieved through a weighting towards new entrant positions – either through increased representation, or through the Commission having an active role and the ability to set the agenda during the discussion process (ie, not only at the end of a year's process). The Commission *must* be involved on the ground if self-regulation is to have any chance.

- Primacy of the Act over RMA and local council requirements for new entrants providing new telecommunications infrastructure.

SCHEDULE 1: SOLUTIONS MATRIX - RECOMMENDATIONS

| | |
|---|---|
| **GENERAL** | |
| Specified services regime | Abolish, make all services designated. If not, allow the Commission to determine price where it believes it is justified. As a last resort, set out guidelines as to pricing methodology. |
| Schedule 3 process (specified to designated) | Delete. |
| Timeframes generally | Streamline and run in parallel wherever possible |
| | |
| **NATIONAL ROAMING** | |
| Price | Commission must be able to determine price |
| Condition that service may cease on any failure to comply with roll-out plan | Delete. Transfer this decision to the Commission in making its determination. |
| Requirement for 'national' network | Delete. |
| Expiry dates | Should be 10 years. Termination of a regulated service should be linked to the effect of the termination on existing players, and competition in telecommunications markets. |
| Approve roll-out plan before making an application | Delete. The Commission can decide on realistic rollout requirements as part of the determination. |
| Capacity | Limit to specific base stations; provide that the issue must be resolved without limiting access to geographical areas. |
| 10% minimum build requirement | Clarify that the 10% refers to population, not geography |
| Requirement to not have made an agreement before making an application | Delete. |
| | |
| **CELLSITE CO-LOCATION** | |
| Price | Commission must be able to determine price |
| Access | Provide specifically for rapid, multi-site access to at least 25 sites at a time |
| Timeframes | Conditions must not limit access, but may be legitimate issues that need to be resolved. |
| Resource Management Act | Telecommunications Act must override RMA and local councils in new entrant infrastructure and co-location matters, a la Australian system |
| | New entrants should be able to add 5m to existing towers without RMA or local council approval |
| TCF | Abolish, or fundamentally restructure within the Act so that the Commission has a real and active role. |