



COMMERCE COMMISSION

16 November 2005

Review of Designated and Specified Services under the Telecommunications Act 2001: Decision to Investigate

Background

1. On 19 December 2006, the thirteen designated and specified services originally incorporated within Schedule 1 of the Telecommunications Act 2001 ('the Act') are due to expire.¹ The Commission may investigate whether or not to recommend to the Minister of Communications ('the Minister') that the period of designation or specification of any or all of these services be extended for up to two years.² Any investigation must commence at least one year prior to the expiry of the services.³
2. In making a recommendation, the Commission must consider the purpose of the promotion of competition in telecommunications markets for the long-term benefit of end-users within New Zealand, and make the recommendation that the Commission considers best gives, or is likely to best give, effect to that purpose⁴
3. The Commission must follow the procedure set out in Part 1 of Schedule 3 to the Act when conducting an investigation into whether to extend a regulated service.⁵
4. On 8 August 2005, the Office of the Minister released a cabinet paper on the Implementation Review of the Telecommunications Act 2001 ('the Cabinet Paper').⁶ This paper contained a number of recommendations relating to the Schedule 3 investigation process for considering whether to extend an already regulated service.
5. The proposed amendments to the extension review process include:⁷

¹ Section 65(1)(a) of the Act provides that every designated or specified service expires on the expiration of 5 years from the date on which the designated service or specified service came into force unless the period is extended in accordance with this section.

² Refer to sections 65 and 68 of Act.

³ Refer to clause 1(1)(b) of Part 1 of Schedule 3 to the Act.

⁴ Section 19 of the Act.

⁵ Refer to section 68 of the Act.

⁶ Office of the Minister of Communications, *Implementation Review of the Telecommunications Act 2001* (Cabinet Paper), 8 August 2005.

⁷ *ibid* pp 5-6.

- the ability to extend a regulated service for a maximum of five years where a full Schedule 3 investigation process is used;
 - the introduction of a simpler test based on an assessment of whether competitive conditions in the market have changed significantly such that regulation is no longer justified. Where such a test is used, regulation may be extended for one period of up to three years;
 - the availability of a reserve power to extend the period of regulation of existing services by up to two years without further investigation where the Commission considers that there is a case for investigating extension of the period of regulation, but is unable to carry out a review in the time available.
6. The Commission is required to conduct any investigations into whether to extend the regulated services in accordance with the current legislation. Any investigation will be conducted by the Commission in accordance with the current process set out in Schedule 3, unless the Act is amended in relation to this process in the future.
 7. However, if the proposals set out in the Cabinet Paper are enacted prior to the Commission making its recommendation to the Minister under clause 4 of Schedule 3 to the Act, the Commission will apply the amended process to the extent that it is appropriate to do so. The Commission acknowledges both Vodafone and TelstraClear's request that it consult with interested parties on this matter should the amendments come into force.^{8 9}
 8. On 15 September 2005, the Commission issued its preliminary view on the decision to investigate ('the Preliminary View Paper') and sought comment from interested parties. Having considered all submissions received, the Commission has now finalised its decision to investigate whether to extend regulation of the services subject to review.

Services for which there are reasonable grounds to investigate

9. In compliance with the Schedule 3 process for investigating whether to extend a regulated service, the Commission may only initiate such an investigation where it is satisfied that there are reasonable grounds to do so.¹⁰ Those grounds relate to the promotion of competition in telecommunications markets.
10. In the Preliminary View Paper, the Commission drew a distinction between initiating an investigation into whether to regulate a new service and initiating an investigation into whether to extend the period of regulation of an already regulated service. The thirteen designated and specified services subject to review were included in the Act as regulated services because Parliament considered that reasonable access terms may not be available to access seekers because of market power or other competition concerns. The Commission

⁸ Vodafone, *Regulated services extension review: Comments on Commission's preliminary view on decision to investigate and procedural issues*, 30 September 2005, page 3.

⁹ TelstraClear, *Comments on Review of Designated and Specified Services under the Telecommunications Act 2001: Preliminary View on Decision to Investigate and Procedural Matters*, 30 September 2005, page 6.

¹⁰ Refer to clause 1(1)(a) of Part 1 of Schedule 3 to the Act.

assumes that Parliament considered that these are instances of enduring, rather than transitory, competition concerns. Accordingly, the Commission considers that the threshold to launch an investigation into whether to extend the period of regulation should be evidence that those competition concerns remain. An appropriate indicator at this stage of this process is to consider whether access seekers have experienced difficulties in negotiating terms of supply. Where that test is met, the Commission should initiate an investigation.

11. In order to apply for a determination in relation to a designated or specified service, the applicant must have made reasonable attempts to negotiate the terms of supply of the service, and have failed to reach an agreement. In deciding whether to investigate the application, the Commission satisfies itself that there are reasonable grounds for believing that this requirement has been met. Where the Commission has done so, the threshold test to launch an investigation into whether to extend the period of regulation is met.
12. Other evidence that access seekers have experienced difficulties in negotiating terms of supply may take the form of complaints to the Commission from access seekers. The frequency and persistence of these complaints may also be given weight.
13. In its submission on the Preliminary View Paper, Telecom argues that a distinction should not be drawn between an investigation into whether to regulate a new service and an investigation into whether to extend the period of regulation of an already regulated service. Telecom considers that the same reasonable grounds threshold must be applied to both types of investigations. At a minimum, the Commission must consider whether there have been changes to the market since the Act came into force, and whether there are competition concerns with each service.¹¹
14. Vodafone generally agrees with the Commission's proposed approach and considers that there are two legal tests, the first applying when the Commission is deciding whether to investigate and the second when the Commission is deciding whether to make a recommendation. Vodafone agrees that the fact of an application for an access determination should satisfy the test for whether there are reasonable grounds to investigate whether extension of a particular service is warranted. However, Vodafone does not consider that expressions of concern about a service from an access seeker should be used as a criterion for investigation.¹²
15. TelstraClear, Econet Wireless, and Callplus agree with the Commission's approach. TelstraClear points out that extensive market and competition analysis was conducted prior to the passage of the Act. TelstraClear also agrees that an application for a determination is an indicator that there may be competition problems with a service and these problems are a likely cause of the access seeker seeking a determination in the first place.¹³

¹¹ Telecom, *Review of Designated and Specified Services under the Telecommunications Act 2001: Request for Comment on Preliminary View on Decision to Investigate and Procedural Matters*, 30 September 2005, page 2

¹² Vodafone, *op cit*, pp 2-3

¹³ TelstraClear, *op cit*, 30 September 2005, page 2.

16. The Commission is satisfied that its approach as set out in the Preliminary View Paper is appropriate. A lesser threshold test is appropriate when deciding whether to investigate the extension of the period of regulation from that required for an investigation of whether to regulate a currently unregulated service. The Commission does not consider it necessary to conduct the type of market and competition analysis proposed by Telecom prior to initiating these investigations. This would amount to conducting a substantive investigation regarding the services prior to even deciding whether to investigate their extension. Instead, the analysis will be conducted during the investigation phase.
17. In the Preliminary View Paper, the Commission set out which services it considered met the threshold for investigation. The Commission considered that the following designated services under Schedule 1 of the Act should be investigated as it has received applications for access determinations in relation to each of them:
- Interconnection with Telecom's fixed PSTN¹⁴
 - Interconnection with fixed PSTN other than Telecom's¹⁵
 - Retail services offered by means of Telecom's fixed telecommunications network¹⁶
 - Residential local access and calling service offered by means of Telecom's fixed telecommunications network¹⁷
 - Bundle of retail services offered by means of Telecom's fixed telecommunications network ('bundle of retail services')¹⁸
 - Retail services offered by means of Telecom's fixed telecommunications network as part of a bundle of retail services ('parts of bundles')¹⁹

¹⁴ In May 2002, both Telecom and TelstraClear filed applications for determination concerning price and non-price terms in respect of interconnection with Telecom's fixed PSTN. The Commission released its final determination (Decision 477) on 5 November 2003. This determination was based on the initial pricing principle. Subsequent to the release of Decision 477, both Telecom and TelstraClear filed applications requesting the Commission review the interconnection price set in that determination. The Commission is currently investigating these pricing review applications.

¹⁵ All The applications referred to in footnote 14 also related to interconnection with TelstraClear's fixed PSTN.

¹⁶ In May 2002, TelstraClear filed an application for an access determination concerning price and non-price terms in respect of a number of retail services offered by means of Telecom's fixed PSTN (to business customers). The Commission released its final determination (Decision 497) on 12 May 2003. In November 2002, TelstraClear filed a similar application concerning retail services offered to residential customers. The Commission released its final determination (Decision 525) on 14 June 2005.

Both Telecom and TelstraClear have requested that the Commission review the wholesale discount set in both these wholesale determinations. The Commission is currently investigating these applications. In November 2004, TelstraClear filed an application for an access determination in respect of a number of business retail services (including Private Office Networking) not already covered by Decision 497. The Commission is yet to make a determination on this application.

¹⁷ The Commission's Residential Wholesale Determination also concerned the residential local access and calling service offered by means of Telecom's fixed telecommunications network. Similarly, the wholesale discount for this service is also the subject of the pricing review applications.

¹⁸ The Commission's Residential Wholesale Determination also concerned a number of bundles of retail services offered by means of Telecom's fixed telecommunications network. Similarly, the wholesale discount for this service is also the subject of the pricing review applications.

- Local telephone number portability service²⁰
 - Cellular telephone number portability service²¹
18. Telecom argues that the fact that an application has been made for a determination for a service does not provide reasonable grounds to initiate an investigation.²² The Commission does not agree, for the reasons set out above, and is satisfied that for each of the services listed in paragraph 17, except for parts of bundles, a valid application for a determination has been made, and that therefore there are reasonable grounds to investigate the extension of the period of regulation.
 19. With regard to parts of bundles, the Commission notes that it declined to investigate this aspect of TelstraClear's application as TelstraClear did not show that it had first made reasonable attempts to commercially negotiate with Telecom the terms of access to any parts of bundles. However, the Commission considers that the parts of bundles service is a complementary service to that of bundle of retail services, for which the Commission has received a valid application. The Commission considers that as a result of this complementarity, there are reasonable grounds to investigate the extension of the period of regulation of parts of bundles.
 20. The Preliminary View Paper proposed that there are reasonable grounds to investigate whether to extend the period of regulation of the following specified services, on the basis that there is other evidence of difficulties in negotiating supply terms:
 - National roaming; and
 - Co-location on cellular mobile transmission sites.
 21. For each of these services, the Commission has been provided with information by potential cellular network operators of difficulties in negotiating supply terms that would support the business case for new entry.
 22. Vodafone argues that the facts do not justify an investigation into national roaming or cell site co-location. It says that the Commission should assess the reasonableness of the positions underlying the claims of negotiation difficulties, and argues that the public complaints of Econet do not meet a standard of reasonableness.

¹⁹ TelstraClear's May 2002 application for an access determination also requested access to a number of retail services offered by means of Telecom's fixed telecommunications network as part of a bundle of retail services. The Commission declined to investigate this aspect of the application as TelstraClear did not show that it had first made reasonable attempts to commercially negotiate with Telecom the terms of access to any parts of bundles.

²⁰ In March 2003, the Commission received a multiparty application for determination of the allocation of costs for provision of local and cellular number portability amongst the industry. In December 2004, the Commission received a multiparty application for determination of the functions and standards necessary to provide number portability. On 31 August 2005, the Commission released its final Determination on both of these applications.

²¹ Refer to footnote 20.

²² Telecom, *op cit*, page 3

23. Telecom argues that complaints of negotiation difficulties, or even the making of an application, are insufficient to establish reasonable grounds for an investigation. It says that the Commission should undertake a “robust analysis” and consider whether there have been changes to the market since the Act came into force, whether there is evidence of market failure, and whether ongoing regulation is necessary.
24. The Commission agrees that in order to give weight to complaints of negotiation difficulties the Commission should be satisfied that there is potentially merit to the complaints. However, the Commission does not consider that this is a demanding standard. Without a substantive examination of the merits of the competing negotiating positions, the Commission would not be able to decide on the reasonableness of those positions. Such an examination is not warranted at the present stage. Instead, the Commission considers it is sufficient that the complainant’s position is potentially justifiable, but without any finding that it would be sufficient to succeed on an application for a determination.
25. The Commission does not agree with Telecom’s view of the threshold, which appears to conflate the threshold decision with the very issues the Commission will consider during the resulting investigation.
26. The Commission is satisfied that there is potentially merit to complaints it has received of difficulties in negotiating reasonable supply terms for national roaming and co-location on cellular mobile transmission sites. Accordingly, there are reasonable grounds to investigate the extension of the period of regulation of those services.

Services for which there are no reasonable grounds to investigate

27. The Preliminary View Paper proposed that there are no reasonable grounds to investigate whether to extend regulation of the following three services:
 - Co-location of equipment for fixed telecommunications services at sites used by Broadcast Communications Limited;
 - National toll-free telephone number portability service; and
 - Telecom’s fixed PSTN to mobile carrier pre-selection service.
28. The Commission has received no applications or complaints in relation to any of these services. Market indications are that access to these services is not a source of concern to actual or prospective access seekers or access providers. With respect to national toll free number portability, in April 2003 a telecommunications industry joint venture developed a common industry database system (TNAS) in order to introduce toll-free number portability in New Zealand. With respect to co-location at BCL’s sites and the carrier pre-selection service, the Commission understands that satisfactory commercial solutions are in place between industry participants.
29. Telecom agrees with the Commission’s view on the latter two services, but argues that the absence of complaints as to BCL co-location does not justify a conclusion that there are no competition concerns.²³ Telecom says that there are

²³ Telecom, *op cit*, page 4.

still no co-location agreements in this market. However, Telecom does not point to any specific competition concerns, and BCL has confirmed that it does in fact have co-location or co-siting agreements with a number of parties.

30. Absent any indication from potential access seekers of co-location at BCL's sites that there are concerns regarding access to the service, the Commission does not consider that there are reasonable grounds to investigate its extension.

Procedural Matters

31. In the Preliminary View Paper, the Commission also set out its proposed approach to combining investigations, investigation of amendments to services, and other procedural issues. The Commission has received limited submission from some interested parties on these matters.

Combining Investigations

32. The Commission will conduct four investigation processes by grouping the 10 designated and specified services under review as follows:

Interconnection Services:

- Interconnection with Telecom's fixed PSTN;
- Interconnection with fixed PSTN other than Telecom's.

Retail Services:

- Retail services offered by means of Telecom's FTN;
- Residential local access and calling service offered by means of Telecom's FTN;
- Bundle of retail services offered by means of Telecom's FTN;
- Retail services offered by means of Telecom's FTN as part of a bundle of retail services.

Number Portability Services:

- Local telephone number portability service;
- Cellular telephone number portability service;

Cellular Roaming and Co-location:

- National cellular roaming;
- Co-location on cellular mobile transmission sites.

33. None of the submissions on the Preliminary View Paper were opposed to this approach.

Amendments to Services

34. In the Preliminary View Paper it was noted that the Commission may at any time initiate an investigation into whether to recommend that various aspects of a service listed in Schedule 1 of the Act be amended.²⁴ Such amendments may include changes to the scope of the service, the applicable conditions, the

²⁴ Refer to section 66(c) of the Act.

description of access seekers and access providers, and the access and pricing principles. The Commission is also able to consider whether to designate a service that is currently specified by omitting it from Part 3 of Schedule 1 and adding it to Part 2 of that Schedule.

35. The Commission explained that where it initiates an investigation into whether to amend a service, it must decide that there are reasonable grounds to do so, and that the threshold for deciding whether to amend a service may be different from that for deciding whether to extend a service. The Commission did not express a view as to whether it should investigate whether to amend any of the services but explained that it will consider this matter once the substantive investigations into extending the services are underway.
36. The Commission considered that there would likely be efficiencies in considering any suggested amendments to a service in parallel with the extension investigation, as related competition issues will arise. The Commission stated that it will consider the advantages of whether to run parallel or sequential processes once it has examined any proposals for amendment.
37. Telecom submits that it is concerned by the Commission's indication that it may decide to investigate an amendment to a service part way through its investigation whether to extend its expiry date. Telecom considers that such a process must be run separately, and the parties must be provided the opportunity to comment on whether there are in fact reasonable grounds to amend the service.²⁵
38. Prior to initiating an investigation into amending a service, the Commission must establish that there are reasonable grounds to do so. Such a decision is separate from the current decision to investigate. However, as stated above it may be appropriate, for practical reasons, to combine any such investigation with the extension review already underway. Should the Commission initiate any investigations into amending a service, interested parties will be provided with an opportunity to make submissions on that proposal for amendment.
39. In its submission on the Preliminary View Paper, Econet Wireless requests that the Commission initiate investigations into whether the specified services of national roaming and co-location on cellular mobile transmission sites should be amended to become designated services under the Act. The Commission acknowledges this submission but intends to first initiate investigations into whether to extend regulation of the services subject to review and then to consider any requests for amendments.
40. The Commission invites interested parties to submit proposals to the Commission on whether amendments should be made to any of the ten services it has decided to investigate. The Commission would expect such proposals to contain analysis and supporting arguments as to why the amendment should be made.

²⁵ Telecom, *op cit*, page 5.

Process Going Forward

41. The Commission is not at this stage seeking further submissions from interested parties on its decision to investigate. Nor does the Commission intend to release an issues paper in relation to these investigations.
42. Instead, the Commission will begin conducting market and competition analysis in relation to the ten services under investigation. As part of this analysis the Commission may request specific relevant information from various interested parties. The Commission will move directly to issuing a draft report for each of the four groups of services listed above. As set out in the Preliminary View Paper, the Commission will stagger these investigations to a certain extent, to avoid administrative burden and inconvenience to parties as a result of all submissions on the draft reports being due at the same time or conferences falling too closely together.
43. A number of submitters have requested that the Commission set out its timeframe for these investigations. It is not possible at this stage to provide a detailed timetable. The Commission must make reasonable efforts to provide its final report on the extension of the regulated services not later than 120 working days after the giving of public notice of the commencement of the investigation. The Commission hopes to issue its first draft report reasonably early in 2006.
44. In any event, the Commission expects to complete all of the investigations as early as possible in 2006 in order to provide the Minister with sufficient time to consider and act on the recommendations before the services expire.

Address for Proposals on Amendments to Services

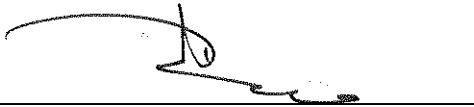
45. As set out in paragraph 40, the Commission invites interested parties to submit proposals to the Commission on whether amendments should be made to any of the ten services it has decided to investigate. Please provide these proposals in writing by no later than 21 December 2005 to:

kate.saunders@comcom.govt.nz

Commerce Commission
PO Box 2351
Wellington

Enquiries: (04) 924 3669
Fax: (04) 924 3700

DATED this 16th day of November 2005



Douglas Webb
Telecommunications Commissioner