



Telecom Corporation of New Zealand Limited  
Level 9, North Tower, Telecom House  
68-86 Jervois Quay, PO Box 570  
Wellington, New Zealand

Telephone: +64 (04) 498 9199 Fax: +64 (04) 473 5926  
Email: [anna.moodie@telecom.co.nz](mailto:anna.moodie@telecom.co.nz)  
[www.telecom.co.nz](http://www.telecom.co.nz)

**Anna Moodie**  
Regulatory and Competition Counsel

4 October 2005

Kate Saunders  
Investigator  
Network Access Group  
Commerce Commission  
44-52 The Terrace  
**WELLINGTON**

Dear Kate

**REVIEW OF DESIGNATED AND SPECIFIED SERVICES UNDER THE TELECOMMUNICATIONS ACT 2001: REQUEST FOR COMMENT ON PRELIMINARY VIEW ON DECISION TO INVESTIGATE AND PROCEDURAL MATTERS**

1. I refer to the Commission's preliminary view on its decision to investigate, and procedural matters, relating to the review of designated and specified services that are due to expire on 19 December 2006 ("**services**") under the Telecommunications Act 2001 ("**Act**"), dated 15 September 2005.
2. The Commission has sought comment on its preliminary view on:
  - (a) Its decision to investigate; and
  - (b) Procedural matters.
3. Telecom sets out its views on these matters below.

**Reasonable Grounds to Investigate**

*Preliminary view*

4. The Commission's preliminary view is that it has reasonable grounds to investigate whether to extend the period of regulation of the following designated services under Schedule 1 of the Act:
  - a. Interconnection with Telecom's fixed PSTN;
  - b. Interconnection with fixed PSTN other than Telecom's;
  - c. Retail services offered by means of Telecom's fixed telecommunications network;

- d. Residential local access and calling services offered by means of Telecom's fixed telecommunications network;
  - e. Bundle of retail services offered by means of Telecom's fixed telecommunications network as part of a bundle of retail services;
  - f. Local telephone number portability service;
  - g. Cellular telephone number portability service;
  - h. National roaming; and
  - i. Co-location of cellular mobile transmission sites.
5. The Commission is of the preliminary view that there are no reasonable grounds to investigate whether to extend the period of regulation for:
- a. Co-location of equipment for fixed telecommunication services at sites used by Broadcast Communications Limited ("co-location on BCL sites");
  - b. National toll-free telephone number portability service; and
  - c. Telecom's fixed PSTN to mobile carrier pre-selection service.

*Requirements of the Act*

6. The Commission states that it is useful to distinguish between an investigation into whether to regulate a new service and an investigation in whether to extend the period of regulation of an already regulated service. However, the Commission has not provided any reasons for making such a distinction under the Act. Telecom disagrees that such a distinction is appropriate.
7. The process for investigating (and deciding whether to investigate) a new service and the extension of the period of regulation is the same under the Act. The Commission must follow the process set out in the Act, and cannot derogate from the requirements of the Act for convenience.
8. Under Part 1 of Schedule 3 of the Act, there is a positive duty on the Commission to commence an investigation only if it is satisfied that *reasonable grounds* exist. The same threshold (that there be reasonable grounds) applies to both a decision to investigate whether to extend the expiry date of a service, and a decision to investigate whether to initiate an investigation into regulation of new service. The Act does not permit the Commission to apply a different threshold in different circumstances.
9. The principles of good regulation and the policy of the Act dictate that the minimum level of regulatory intervention that is necessary to meet the desired policy objectives should be a guide; that it is only appropriate where the market has failed or is likely to fail to meet policy objectives in the absence of regulation; and the benefits of regulatory intervention exceed the costs resulting in a net benefit to society. This must be a starting point for the Commission's consideration of whether there are reasonable grounds to investigate. Telecom submits that, 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 any competition concerns with each service.

10. Telecom notes that the Commission's decision to investigate or not will set a benchmark for investigations going forward. Accordingly, the Commission must give careful consideration to the criteria it applies. Telecom submits that the threshold proposed by the Commission for determining that "reasonable grounds" exist, i.e. there has been an "active interest" in a service, sets a very low threshold. The threshold will create perverse incentive for parties to "show an interest" in services before they are due to expire, and to encourage the opening of a Schedule 3 investigation for a new service. This risks undermining the fundamental preference for commercial outcomes over regulated outcomes that underlies the Act.

#### *Reasonable grounds*

11. Without prejudice to this view, Telecom notes that the Commission has stated its view that, when determining whether there are reasonable grounds to investigate to extend the expiry date of the services, it is appropriate to consider whether or not there has been active interest in the services since the Act came into force. The Commission goes on to state that, where an access seeker or access provider has lodged an application for an access determination in relation to a designated or specified service, this indicates there may be competition problems in relation to that service.

12. There is no apparent logic to this proposal, or the distinctions drawn by the Commission:

(a) The Commission proposes to exclude the 3 services listed at paragraph 16 of the Commission's preliminary view on the basis that there have been no applications made under the Act for those services. While there may have been "interest" in the remaining services, this interest was not sufficient to justify an application or an investigation. Where there has been no valid or accepted application for a service, it is difficult to conclude that there are reasonable grounds to initiate an investigation.

(b) There have been no applications made under the Act for national roaming, co-location on mobile sites or co-location at BCL sites. However, the Commission has concluded that there are competition problems with the first two services because a party sought to [ ] **TCNZRI**. There is no apparent logic in the Commission's decision to investigate co-location on mobile sites, but not co-location on BCL sites (neither of which have even had any interest).

(c) The Commission appears to accept BCL's view that there are no competition issues in the market for co-location on BCL sites without testing this proposition. Yet, there are still no co-location agreements in this market. Telecom is likely to similarly consider that there is a lack of competition issues in some markets, but would expect the Commission to properly test such propositions.

13. Telecom disagrees that an application for, or "interest" in, a service alone provides reasonable grounds to initiate an investigation. The Commission must carry out a robust analysis before determining whether to investigate the extension of the expiry dates of any of the services. The Commission should consider, at a minimum, whether there have been changes to the market since the Act was enacted, whether there is evidence of an enduring market failure, and whether ongoing regulation is necessary. This is consistent with section 22(d) of the Act, and will help ensure that the Commission does not unnecessarily investigate a service, or inappropriately allow a service expire.

*Services for which there are no reasonable grounds*

14. Subject to Telecom's submissions above, Telecom agrees that there are no reasonable grounds to investigate national toll-free telephone number portability service, and Telecom's fixed PSTN to mobile carrier pre-selection service. There are commercial agreements in place in relation to these services which is a relevant factor.
15. However, Telecom considers that the Commission must consider in more detail whether there are reasonable grounds to investigate the extension of the expiry date of the co-location on BCL sites service. By contrast to the national toll-free number portability and carrier pre-selection services, there are no agreements in relation to co-location on BCL sites. If the Commission accepts BCL's reasoning for not investigating the co-location on BCL sites service, it must also accept that other services (e.g. retail service offered as part of a bundle, mobile roaming, and co-location for which there are no agreements in place either ) should be left to expire.

**Procedural Matters**

*Combination of Investigations*

16. The Commission proposes grouping the designated and specified services together for the purpose of the investigations under Part 1 of Schedule 3 of the Act. The Commission intends to group the services into:
  - (a) Interconnection Services;
  - (b) Retail Services;
  - (c) Number Portability Services;
  - (d) Cellular Roaming and Co-location.

17. As noted in its 19 August 2005 submissions, Telecom agrees with this proposed grouping. Telecom also considers that it is appropriate to investigate the co-location on BCL sites service together with cellular roaming and co-location.

18. Telecom notes the Commission's statement that it is still required to assess each service individually, and make a separate recommendation to the Minister regarding each service. The Commission must ensure that this stays in the forefront throughout the entire process. The Commission cannot decide whether or not to extend the expiry date based on an assessment of the group of services.

*Amendments to Services*

19. The Commission has confirmed that, at this stage it does not intend to consider amendments to any of the services. Telecom concurs with this approach for the reasons set out in its 19 August 2005 submissions.

20. Telecom reiterates that the Commission must have reasonable grounds before initiating an investigation into amending a service, and that the purpose of reviewing whether to amend a service is different than the purpose of reviewing whether to extend the expiry date of a service.
21. Telecom is concerned by the Commission's indication that it may decide to investigate an amendment to a service part way through its investigation into whether to extend its expiry date. The Commission must be clear of the purpose of the investigations into whether to extend the expiry date of the services. If the Commission wishes to consider whether there are reasonable grounds to investigate an amendment to a service, this 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. The process cannot be short circuited simply because the Commission has another investigation on foot.

*Process going forward*

22. The Commission has indicated that it intends to issue any decisions to investigate simultaneously. However, any substantive investigations will be staggered. Telecom agrees that this approach will assist in easing administrative burden and inconvenience to parties.
23. Telecom also agrees that it is appropriate for the Commission to consider the most complex services first. Telecom proposes that the Commission consider the groups of services in the following order:
  - (a) Interconnection Services;
  - (b) Retail Services;
  - (c) Cellular Roaming and Co-location (and co-location on BCL sites); and
  - (d) Number Portability Services.

Yours sincerely



**Anna Moodie**  
Regulatory and Competition Counsel