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Kate Saunders
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Dear Kate

**REVIEW OF DESIGNATED AND SPECIFIED SERVICES UNDER THE TELECOMMUNICATIONS
ACT 2001: REQUEST FOR COMMENT ON PROCEDURAL MATTERS**

1. I refer to the Commission's letter of 4 August 2005 regarding the review of designated and specified services that are due to expire on 19 December 2006 ("**services**") under the Telecommunications Act 2001 ("**Act**"). The Commission has sought comment on:
 - (a) Procedural matters relating to the review of the services; and
 - (b) Whether the commission should consider amendments to the services during its investigations into whether to extend the expiry date of the services.
2. In the short time available Telecom offers its preliminary views on these matters.

Review of designated and specified services under the Act

3. Section 65 of the Act governs the expiry of designated and specified services. In order to extend the expiry date specified in section 65(1)(a), the Governor General must make an Order in Council, on recommendation from the Minister.
4. A recommendation from the Minister to extend the expiry date of designated and specified services must follow the process set out in section 68:
 - (a) The Commission's recommendation must be made in accordance with the procedure set out in Part 1 of Schedule 3 of the Act.
 - (b) The Minister must only make a recommendation if the Minister accepts the Commission's recommendation that the proposed alterations be made;

5. 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 (discussed in more detail below).
6. If the Commission considers that there may be reasonable grounds to investigate whether to extend the expiry date of some or all of the services, the Commission should detail those grounds and allow parties the opportunity to comment. This was the approach followed by the Commission with respect to [**TCNZRI.**

7. Telecom notes that, as a starting point, the overall policy objective for including an expiry date for designated and specified services under the Act is to ensure de-regulation where regulation is no longer necessary. Minister Swain summed up the over-riding purpose of the regulatory framework as¹:

we need as much market as possible, as much government as necessary

8. The Commission should consider, amongst other things, whether there have been changes to the market since the Act was enacted and whether ongoing regulation is necessary.

Combination of Investigations

9. The Commission has sought comment on whether it is appropriate to group the designated and specified services together for the purpose of the investigations under Part 1 of Schedule 3 of the Act.
10. For those services for which there are reasonable grounds to investigate an extension of the expiry date, Telecom agrees that it would be sensible to group the services for the purposes of requesting submissions, and holding a conference or public hearing, and issuing the draft and final reports. However, the Commission must separately assess whether to extend the expiry date of each service. The Commission cannot decide whether or not to extend the expiry date based on an assessment of the group of services.
11. Subject to the preceding paragraph, Telecom agrees that the grouping of services proposed by the Commission at paragraph 6 of its 4 August 2005 letter is sensible. However, Telecom suggests that "Telecom's fixed PSTN to mobile carrier pre-selection service" would more logically sit with the "Interconnection Services", as it is an access method for interconnect origination.

Prioritisation of investigations

12. The Commission has sought comment on whether it is necessary to prioritise the investigation of particular services, and if so, how.
13. Telecom agrees that the Commission should prioritise the investigations.
14. If the Commission is minded to investigate the extension of all of the services, Telecom suggests, that the Commission should look at those services for which there have been no regulatory applications, and those services for which there are commercial agreements between carriers, last.

¹ Minister of Communications answer to Rodney Hide question 13497

Amendments to Services

15. The Commission has also sought comment on whether it should investigate amendments to any of the services at the same time as investigating whether to extend their expiry date.
16. Telecom does not agree that the Commission should investigate amendments to any of the services at the same time as investigating whether to extend their expiry date. The reasons for Telecom's view are detailed below.

Resource constraints

17. As the Commission will be aware, investigations under Schedule 3 of the Act require a significant amount of resources – both time and cost.
18. In Telecom's experience hundreds of thousands of dollars in direct costs are incurred during a Schedule 3 investigation. In addition, a Schedule 3 investigation absorbs a large amount of senior management time and casts uncertainty over all related decisions for the duration of the investigation. It is also clear that Schedule 3 investigations occupy significant Commission resource.
19. If the Commission decides to investigate the expiry of all 13 services, this in itself will create a significant amount of work, and stretch both the Commission's and the parties' resources. A single Schedule 3 investigation plus a number of regulatory applications over the last year has clearly absorbed all of the Commission's resources. For this reason, Telecom does not believe that it is feasible for the Commission to investigate the extension of the expiry date of all 13 services, as well as concurrently investigate whether to amend service descriptions. This is particularly so given that there are likely to also be other regulatory applications on foot.
20. There would be some real and significant risks involved with overstretching the Commission's resources in this way:
 - (a) There is a real risk of poor decision making and regulatory error where the Commission does not have sufficient resource.
 - (b) There is a risk that other key regulatory decisions will be delayed to ensure that the deadline for reviewing the expiry dates of the services is met.
21. Such outcomes are clearly not in the long term interests of end-users of telecommunications services.
22. Telecom considers that the risks arising from both the Commission and the parties having an unsustainable regulatory workload provides a strong reason for only reviewing the expiry dates at this stage.

Purpose of review of expiry dates

23. The purpose of the review of the expiry dates of designated and specified services under section 65 of the Act was to build in an automatic sunset clause into regulation, thus ensuring that the renewal of regulation would only occur if there was a positive decision to do so. The thrust of this part of the Act is to consider whether services should be removed from the Act, and is not about increasing regulation.

24. An investigation into whether to amend a designated or specified services has a different focus, and does not sit logically with a review of whether the expiry date of a service should be extended.
25. In each case, the counterfactual that the Commission will need to consider is very different:
- (a) For an extension of the expiry date, the Commission will need to compare the existence of designated/specified service to no regulation, and ask whether the benefits of continued regulation outweigh the costs, and whether the section 18 purpose is advanced;
 - (b) For an amendment, the Commission will need to compare the amended designated/specified service to the existing service, and ask whether the change will result in benefits that outweigh costs, and whether the amendment advances the section 18 purpose.
26. These different questions require different analyse.
27. If the Commission were to carry out the two types of investigation concurrently, there is a serious risk of mixing together or blurring the claimed benefits. The Commission runs the risk of attributing the benefits of extension (i.e. having regulation at all) to any proposed amendment.
28. It is logical that the Commission should first determine whether there is ongoing benefit of continued regulation of a designated or specified service. If there is ongoing benefit, and the expiry date of a service is extended, it may be appropriate for the Commission to then consider whether there are reasonable grounds to amend the service.
29. If both investigations occurred concurrently, parties could expend considerable resources inputting into an investigation on whether to amend a service, only to find that the expiry date of that service is not extended.

Regulatory uncertainty

30. Numerous investigations into possible amendments to designated and specified services would create significant regulatory uncertainty.
31. As the Commission will appreciate, regulatory uncertainty acts as a disincentive to investment and a signal that policy can be substantially altered at any time means commercial returns on investment become more unpredictable. On the other hand, policy consistency aids certainty and promotes investment.

No reasonable grounds

32. As the Commission notes, sections 66 and 68 specify the process that must be followed in order to amend a designated or specified service. If the Commission decides to investigate whether to make a specified service a designated service, the procedure in Part 2 of Schedule 3 of the Act must be followed. Investigations into all other types of amendments detailed in section 68 must follow the procedure set out in Part 1 of Schedule 3 of the Act.

33. If the Commission is minded to consider investigating amendments to designated or specified services, it must bear in mind that Parliament has placed a positive duty on the Commission under Part 1 of Schedule 3 of the Act to commence an investigation only if it is satisfied that reasonable grounds exist. This places a high onus on the Commission (consistent with the ultimate decision in a Schedule 3 investigation). This position may be contrasted with other provisions in the Act (for example section 25 which only requires that the Commission exercise its discretion in accordance with the principles of administrative law).
34. The burden on the Commission is at its highest, when the decision being considered is a new or altered regulatory intervention beyond that which Parliament has already set out.
35. The uncertainties and risks of any regulatory intervention mean that the section 18 standard, requiring confidence that an intervention will be to the long term benefit of end-users, is a demanding one. The Commission should be very cautious when considering whether to commence investigations.
36. Telecom has previously submitted that the Act places an onus on the Commission to demonstrate that any proposed regulatory intervention in telecommunications markets is warranted, and meets the standard required by sections 18 and 19. Section 19(c) provides that:
- the Commission ... must make the recommendation ... that the Commissioner considers best gives, or is likely to best give, effect to the purpose set out in section 18.
37. That the onus stays on the Commission is consistent with the primacy given by the Telecommunications Act to commercial negotiation and the operation of workably competitive markets.
38. The principles of good regulation 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.
39. If the Commission does consider that there may be reasonable grounds to investigate an amendment to a designated or specified service, the Commission should detail those grounds and allow parties the opportunity to comment on those grounds. This was the approach followed by the Commission with respect to [] **TCNZRI**. Given the potential impact of such an investigation, Telecom proposes that parties should have the opportunity to make submissions and cross-submissions before the Commission decides to investigate.

Conclusion

40. If the Commission considers it has reasonable grounds to investigate whether to extend the expiry date for the designated and specified services due to expiry on 19 December 2006, or amend any of those designated and specified services, Telecom seeks the opportunity to comment prior to any decision being made to investigate.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Anna Moodie', with a long horizontal stroke extending to the right.

Anna Moodie
Regulatory and Competition Counsel