

TelstraClear Limited

**Telecommunications Act 2001: Schedule 3
Mobile Sector Review**

Combined submission in response to:

**Commission Issues Paper “A Review of Cellular Mobile
Market Entry Issues” dated 15 December 2006; and**

**Vodafone’s Undertaking submitted on 19 January 2007
under Schedule 3A in respect of national roaming
and co-location services**

PUBLIC VERSION

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1. Executive summary

1. The New Zealand cellular market is characterised by two mobile networks utilising different, incompatible technologies to deliver mobile services to New Zealanders, with calling charges among the highest in the OECD.
2. TelstraClear welcomes the Commission's review of the reasons for lack of further entry into the cellular market. TelstraClear is investing \$50m over four years to develop an HSDPA network 'Unplugged' in Tauranga. TelstraClear isn't here to free ride on the investment of others - we have invested over \$1.4b in New Zealand to date, and would like to invest more, but the environment for further investment must be right.
3. Our experience negotiating access to facilitate our own investment has been an uphill battle. For incumbents commercial incentives are to preserve existing market power. Accordingly TelstraClear faces with commercial options designed to raise entry barriers to hinder further investment.
4. In contrast, in jurisdictions such as Australia, where multiple competing cellular networks co-exist, the commercial incentives of competing operators are to efficiently utilise their networks. These incentives make reasonable commercial agreements possible, and thereby minimise the need for regulation.
5. Efficient infrastructure investment, rather than the further development of a wholesale market, will best bring about improved services to end-users. However, given the present structural impediments to the development of the New Zealand cellular market, TelstraClear considers that interim price regulation for roaming is required to ensure that an efficient entrant can invest in a competing network without facing costs that are not incurred by the incumbents themselves.
6. TelstraClear supports the development of a regulated roaming service with:
 - an initial build requirement of 10 percent of the population to gain access to roaming;
 - a network build-out requirement to 70 percent of the population within a reasonable specified period;
 - roaming access for voice and SMS services only, at cost-oriented prices; and
 - access to the roaming service ceasing once the network build reaches 70 percent of the population, or after the expiration of the specified network build period, whichever is earlier.
7. The emergence of mobile competition will dissipate the need for regulation as competing cellular networks will have improved incentives to provide commercial roaming on reasonable terms. TelstraClear supports the regular review of roaming to ensure that, once competition emerges, unnecessary regulation is removed. The Act's requirement for the Commission to investigate the continued regulation of services not less than every five years would achieve this.
8. Roaming regulation should be limited to voice and SMS services only, to ensure that incentives for further 3G investment are preserved. Once an entrant achieves reach to 70 percent of the population (for example, key metropolitan regions), regulated roaming should no longer be available to that entrant. This will ensure that geographical reach remains a competitive advantage. An entrant can then build out its own network, or alternatively reach a commercial agreement with the incumbent for further roaming access.

9. Development of a national cellular network from ground zero, without any reliance on roaming in New Zealand, is neither an economic nor a practical option. Network development will require roaming on an interim basis. Suitable co-location arrangements can reduce the time and cost to roll out a national network. However, given potential co-location impediments caused by the dominant market position of the providers of co-location services, TelstraClear also supports a change to the existing co-location regulation to allow for the regulation of price.
10. In its current form, TelstraClear considers that Vodafone's roaming undertaking is deficient, and would be unlikely to deliver the necessary pro-competitive benefits to New Zealand consumers. However, TelstraClear does support, in principle and with appropriate safeguards, an undertaking in lieu of regulation. The undertaking would have to be altered considerably before the Commission could consider it a reasonable proxy for appropriate regulation.
11. TelstraClear considers that Vodafone's co-location price undertaking is reasonable. The amendments to the non-price terms identified in this submission would still be required before TelstraClear would recommend the Commission recommend accepting Vodafone's co-location undertaking.

2. Introduction

12. On 10 May 2006, the Commerce Commission (the 'Commission') announced that it would examine the reasons for the lack of effective competition in the cellular mobile services market.
13. On 10 October, the Commission concluded that there were reasonable grounds to investigate:
 - a. amending the terms of the national roaming service;
 - b. moving the national roaming service from a specified to a designated service; and
 - c. moving the co-location service from a specified to a designated service.
14. As the first stage of its investigation into amending roaming and co-location services, the Commission published a paper "A Review of Cellular Mobile Market Entry Issues" on 15 December 2006 ("Issues Paper"), in which it sought to gather preliminary information prior to the release of its draft report.
15. On 19 January 2007, Vodafone, as an access provider of national roaming and co-location services, provided an undertaking to the Commission under Schedule 3A of the Telecommunications Amendment (No 2) Act ("the Act") in respect of roaming and co-location services (the "Undertaking"). The purpose of a Schedule 3A undertaking is to provide an alternative to a proposed regulatory change in which the access provider supplies the service to all access seekers on a voluntary basis that avoids the need for regulation.
16. On 2 February 2007, the Commission announced that it would extend the date for submissions on the Issues Paper to align with the due date for submissions on the Undertaking of 9 March 2007. This will ensure that different factual scenarios, between an amendment to Schedule, or alternatively acceptance of an undertaking, in lieu of further regulation, can be considered concurrently.
17. Accordingly, this submission provides TelstraClear's response to both documents and is set out as follows:
 - a. Section 4 addresses the analytical framework for the investigation. This includes discussion of:
 - i.) the use of quantitative analysis,
 - ii.) the relevant facts and counterfactuals,
 - iii.) market definition; and
 - iv.) costs and benefits of regulation;
 - b. Section 5 discusses TelstraClear's proposed amendments to the roaming service description, including in relation to:
 - i.) the initial rollout requirement;
 - ii.) the price that should apply to roaming;
 - iii.) the importance of a technologically agnostic service description;
 - iv.) the use of a sunset or review clause;
 - v.) the definition of a national network;
 - c. Section 6 discusses the co-location service description;
 - d. Section 7 provides TelstraClear's comments on Vodafone's Undertaking;
 - e. Section 8 makes recommendations;

- f. Appendix One provides TelstraClear's response to specific questions raised in the Issues Paper;
 - g. Appendix Two provides TelstraClear's comments on terms specified in the Undertaking; and
 - h. Appendix Three provides TelstraClear's proposed amendments to regulated co-location and roaming services.
18. This Public Version of TelstraClear's submission has had removed from it TelstraClear-designated Restricted Information (**TCLRI**) protected by the Commission's Confidentiality Order issued 15 December 2006.¹

¹ Commerce Commission, *Schedule 3 Investigations into Amendments to the Roaming and co-location services, Order made by the Commerce Commission under section 100 of the Commerce Act 1986, as applied by section 15(i) of the Telecommunications Act 2001*, 15 December 2006

3. Analytical Framework

19. In making a recommendation to the Minister for amendments to Schedule 1, section 18 of the Act requires that the Commission consider whether any proposed amendment would be likely to best give effect to the promotion of competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand by regulating, and providing for the regulation of, the supply of certain telecommunications services between service providers.
20. This necessitates careful consideration by the Commission as to whether any proposed regulatory amendment (the 'factual') would be likely to better give effect to the purpose of the Act than the status quo (the 'counterfactual').
21. In the context of this review, this question is further complicated by the Commission's concurrent consideration of the counterfactual against several factual scenarios: (i) amendments to current roaming and co-location regulation, and (ii) acceptance of an undertaking by Vodafone.

3.1 Quantifying the benefits of amending regulation

22. TelstraClear supports the use of a cost-benefit analysis ('CBA') framework to evaluate the factual and counterfactuals. However, the weight placed upon a quantified net benefit of alterations to regulation must be balanced against a risk that a CBA is unable to replicate real-world outcomes, and provides a static analysis that can't take into account dynamic efficiency effects.
23. In the Commission's Mobile Termination reconsideration report to the Minister, the Commission noted that:²

"The Court of Appeal has previously referred to "the desirability of quantifying benefits and detriments where and to the extent it is feasible to do so".³ Such analysis is desirable rather than indispensable and extensive analysis may not be feasible in every case. In considering whether to regulate mobile termination, the Commission considers both quantitative and qualitative factors".
24. In the Commission's consideration of the extension of key regulated services, the Commission did not seek to quantify the net benefits of continued regulation, however the Commission took into account a counterfactual of no regulation and a factual of continued regulation.⁴
25. The direction provided in *Telecom v Commerce Commission* requires that quantitative analysis should be undertaken only where feasible. Given the complexity of the proposed changes, and the dynamic interplay between roaming and co-location, there is a significant risk that reliance on static modeling would not adequately reflect that dynamic, and would risk underestimating dynamic efficiencies over time.
26. For this reason, TelstraClear submits that the Commission should also give careful consideration to qualitative factors in assessing whether a scenario would be likely to best give effect to the promotion of competition. The consideration of both qualitative

² Commerce Commission, *Telecommunications Act 2001: Schedule 3 Investigation into Regulation of Mobile Termination – Reconsideration Report*, 21 April 2006, paragraph 55.

³ *Telecom v Commerce Commission* (1992) 3 NZLR 429 (CA), at 447, per Richardson J.

⁴ Commerce Commission, *Telecommunications Act 2001: Schedule 3 Investigation into the extension of regulation of designated and specified services, Final Report*, 28 August 2006, p.12.

and quantitative factors will be most likely to provide robust conclusions. However, in the event that reliable quantitative information is not available, the Commission may need to take a pragmatic approach and rely on qualitative analysis only.

3.2 Assessing appropriate factual and counterfactuals

27. This section sets out TelstraClear’s views on the appropriate factual and counter-factuals for the Commission’s review. These options can be summarized as:

Figure 1: Factual / Counterfactual Scenarios

	ROAMING	CO-LOCATION
Counterfactual 1	Existing specified service in Schedule 1	Existing co-location service in Schedule 1
Factual 1 Changes to existing regulation	Amended roaming service that has: <ul style="list-style-type: none"> Initial build requirement to 10% of population Roll-out plans to 70% of population Initial pricing principle: Benchmarked mobile termination and, to the extent available, domestic roaming rates Final pricing principle: TSLRIC 	Amended co-location service that has: <ul style="list-style-type: none"> Designated not specified service Initial pricing principle: benchmarked forward-looking cost-based co-location rates Final pricing principle: TSLRIC
Factual 2 Acceptance of Vodafone undertaking (or variation of undertaking)	Acceptance of undertaking (or variation of undertaking). Removal of existing roaming regulation under Schedule 1	Acceptance of undertaking (or variation of undertaking) from Vodafone. Amended co-location service that has: <ul style="list-style-type: none"> Designated not specified service Initial pricing principle of benchmarked forward-looking cost-based rates for similar services Final pricing principle of TSLRIC Exclusion of Vodafone as access provider

28. Identification of the appropriate factuals is, however, complicated by the interdependency between roaming and co-location. Co-location assists an access seeker by providing access to other cellular providers’ cellsites, thereby reducing the costs of network roll-out for the access seeker, and in turn reducing the costs of cellsites for the existing cellular providers’ sites. The speed in which an access seeker is able to deploy network, rather than rely on roaming, will be a function of the ease with which an access seeker can co-locate, and the relative price between roaming and co-location. Therefore, consideration of a counterfactual for roaming cannot be considered in complete isolation from co-location.

29. The following section sets out TelstraClear's view of the scenarios identified above.

3.3 Counterfactual scenarios

30. TelstraClear submits that the national roaming and co-location services currently specified in Schedule 1 of the Act are the most appropriate counterfactual scenarios for the Commission's Schedule 3 investigation.

31. In 2006, the Commission concluded that, in its investigation into the extension of existing regulated services under Schedule 1 of the Act, for both roaming and co-location, the market was characterised by limited competition, and that there would be ongoing benefit to the extension of the existing regulation of these services.⁵

3.4 Factual scenarios

32. TelstraClear considers it appropriate to have two factual scenarios for the assessment of proposed regulatory amendments. This is to allow the Commission to separately assess the costs and benefits of:

- a. Amending the current national roaming and co-location services regulations; and/or
- b. Accepting the Vodafone Undertaking and thus avoiding the need to regulate the services.

3.5 National roaming factual scenarios

3.5.1 *Factual scenario 1: Commission recommends improved regulation for roaming to encourage efficient entry*

33. TelstraClear proposes that factual scenario 1 be to retain national roaming as a specified service, but alter the description of the service and the conditions under which it is provided.

34. TelstraClear proposes the following:

- a. roaming for voice and SMS only;
- b. an initial build requirement of coverage of 10 percent of the New Zealand population;
- c. roll-out plans to cover 70 percent of the New Zealand population;
- d. Initial pricing principle: Benchmarked mobile termination and, to the extent available, domestic roaming rates; and
- e. Final pricing principle: TSLRIC.

35. TelstraClear's proposed amendments to the Roaming Service are detailed in Appendix 3.

36. TelstraClear considers that the proposed regulated service would best give effect to the promotion of competition for the long-term benefit of end-users by increasing certainty for access seekers, while maintaining incentives for a national rollout by new entrants, and preserving incumbents' incentives to extend network coverage and value-added services. TelstraClear's rationale for the proposed amendments is detailed in section 5 of this submission.

⁵ Commerce Commission, *Telecommunications Act 2001: Schedule 3 Investigation into the Extension of Regulation of Designated and Specified Services, Final Report*, 28 August 2006.

3.5.2 Factual scenario 2: Commission accepts Vodafone undertaking (or variant of) and removes national roaming as specified service

37. TelstraClear proposes that the Commission consider a second factual scenario, that being the terms and conditions set out in the Vodafone Undertaking.
38. In its introduction of the Telecommunications Amendment Bill, the explanatory note advised that “the Bill amends the Act to ensure that access terms and conditions are set in an effective and timely manner by – providing for a formal undertaking process that will allow the Commission to accept and enforce voluntary supply commitments from access providers in lieu of regulation”.
39. If the Commission was to recommend, and the Minister was to accept, Vodafone’s undertaking in lieu of regulation, the appropriate factual would be a recommendation that Vodafone be removed as an access provider for the specified roaming and co-location services in Schedule 1. The ability of the Commission to enforce an undertaking for those services is likely to have a similar practical effect as improved regulation under the Act.
40. However, the removal of such a position at counterfactual only considers regulation in respect of roaming on a GSM network, and would have consequences if an access seeker sought access to roaming for Telecom’s CDMA network. Furthermore, the existing regulation covers any access provider who provides a cellular network service – not Vodafone alone.
41. The definition of Access Provider for the roaming service is “a cellular mobile telephone network operator who operates a cellular mobile telephone network”.⁶ Further the existing legislation covers all access providers of cellular services, including Telecom’s existing CDMA network, and would currently extend to include future entrants.
42. TelstraClear’s view is that, given that the two entrants that have publicly committed to entering the cellular network market, TelstraClear and Econet, have both identified a preference for GSM and the Commission has identified that there is limited competition in the GSM roaming market, roaming regulation should apply to GSM.
43. TelstraClear does not consider that roaming regulation should also apply to other technologies, such as Wi-Max. Wi-Max deployment is in its early stages and no problem has emerged regarding access to Wi-Max or other wireless networks. The Commission could re-examine this should a problem emerge.
44. The emergence of a second GSM provider is likely to significantly reduce the competitive bottleneck, by creating incentives for GSM providers to provide roaming on a commercial basis to utilise capacity within their networks. In addition, incentives should remain for providers to compete on the basis of extent of coverage. TelstraClear therefore considers that roaming regulation should only be available for a defined period during the build-out commitment and for a defined extent of coverage. Once an entrant’s build-out commitment is achieved, access by the entrant to regulated roaming would cease.
45. The ongoing benefit of roaming regulation would need to be assessed as competition emerges. Section 1(3) of Schedule 3 of the Act requires that “the Commission must consider, at intervals of not more than 5 years after the date on which a designated service or specified service comes into force, whether there are reasonable grounds for commencing an investigation into whether the service should be omitted from Schedule

⁶ Telecommunications Act 2006, Part 3, Schedule 1, National Roaming service

1 under section 66(b)".

46. The emergence of an entrant into the GSM market is likely to reduce the current bottleneck associated with securing roaming on a commercial basis. Section 1(3) of Schedule 3 provides the Commission with flexibility to undertake a review of the roaming legislation earlier than its fifth anniversary if appropriate, to assess whether competition problems persist before deciding whether roaming regulation should continue. This provides strong incentives on new entrants to ensure that the coverage of their networks is extensive given a risk that the Commission may recommend removal of regulation.
47. An access seeker would require investment certainty that roaming regulation remains in place until the network build-out is complete. Absent such certainty, investment would be increasingly unlikely to occur as the regulation reached its anniversary date.

3.5.3 Removal of CDMA Roaming Regulation

48. TelstraClear's favoured technology is GSM. Telstra is in the process of decommissioning its CDMA network in Australia, and TelstraClear is launching a GSM HSPDA "Unplugged" network in Tauranga. Internationally, GSM is the favoured technology. According to the GSM Association, GSM accounts for 82 percent of the global mobile market.⁷ For that reason, if the Commission were to recommend acceptance of Vodafone's undertaking in lieu of regulation, TelstraClear submits that the effective removal of regulation for CDMA is unlikely to hinder further entry, given that TelstraClear as an entrant, and Econet as a potential entrant, are focussing on the development of a GSM network. However, in general TelstraClear supports technology-neutral service descriptions.
49. TelstraClear notes that dual mode CDMA/GSM handsets are now becoming available. However, TelstraClear does not consider that this development should alter the Commission's view of the definition of the market for roaming services. Availability of such handsets is limited and is likely to remain so for the foreseeable future. Consequently, services limited to use of these handsets is not likely to be attractive to customers, particularly when compared with the range of GSM handsets. Moreover, Vodafone's coverage is sufficiently extensive that there would be no need for an entrant to also rely on Telecom's coverage to provide a "national" service.

3.6 Co-location factual scenarios

50. TelstraClear proposes that the Commission consider two factual scenarios for the co-location services. The scenarios are:

Factual scenario 1: A designated co-location service where price is cost based using TSLRIC as the final pricing principle; and

Factual scenario 2: A co-location service as provided by the Vodafone Undertaking.

3.6.1 Co-location Factual Scenario 1: Designation

51. In contrast to roaming (discussed in section 4.5), where Vodafone is the sole supplier of GSM roaming services, regulated co-location could currently be provided by Telecom or Vodafone. This is reflected in the service description for the specified service of co-location, which includes "[e]very person who operates a cellular mobile telephone network".⁸

⁷ <http://www.gsmworld.com/news/statistics/index.shtml>

⁸ Telecommunications Act 2006, Part 3, Schedule 1, Co-location on cellular mobile transmission sites

52. GSM and UMTS technology can co-locate on the same structure. The same applies to CDMA (including EVDO) and UMTS technology. Accordingly, a GSM infrastructure builder may seek to co-locate on either Vodafone or Telecom structures (as access providers of the regulated service).
53. The Commission has limited its review under Schedule 3 to the question of whether the regulation of co-location should move from a specified service (non-price terms) to a designated service (price terms).
54. The Commission has indicated that, should its investigation conclude that there are benefits from the designation of co-location, it is of the preliminary view that the pricing principle for co-location should be cost based.⁹ TelstraClear agrees with this position. Cost-based pricing would ensure that both entrants and incumbents face the same costs for location of equipment. Consequently, any entry that occurs would be efficient.
55. As the Commission notes, co-location costs may vary widely depending on the nature of co-location and local conditions.¹⁰ This is likely to make it difficult for the Commission to undertake an accurate quantitative examination of whether there will be net benefits from designation of co-location. The Commission may therefore need to rely more heavily on a qualitative assessment of the net benefits of designation.
56. While actual costs may vary significantly from site to site, TelstraClear is of the view that there is scope to classify co-location into a number of generic site types/forms as the forms of co-location are relatively standardised. For example, Vodafone has eight standard site types.¹¹

3.6.2 Co-location Factual Scenario 2: Acceptance of Vodafone co-location undertaking

57. While both Telecom and Vodafone are potential access providers of co-location services, only Vodafone has chosen to submit an undertaking in relation to co-location. The possibility therefore exists of an access seeker obtaining access to Vodafone's sites on the terms specified in its undertaking and obtaining access to Telecom's sites on terms provided for under designation of the service. However, TelstraClear's view is that the Commission should only accept Vodafone's undertaking if the pricing of co-location services is consistent with that determined under designation. TelstraClear's assessment is that Vodafone's proposed pricing is sufficiently close to this that the acceptance of Vodafone's co-location undertaking with respect to price would be an efficient outcome for the industry. Consequently, it is appropriate to assess Vodafone's undertaking separately from designation of the service.
58. Vodafone's undertaking provides two options for pricing of co-location services, one involving contribution of half of the replacement capital costs of a site and the other an operating fee calculated on the yield of half of the capital costs. Both options should broadly equate, with the difference between the two being that the operating fee provides an allowance for the cost of capital. TelstraClear considers that the Commission will need to examine both options.

3.7 Market Definition and Competition Assessment for Roaming

⁹ Commerce Commission, *Telecommunications Act 2001: Schedule 3 Investigations into Amendments to the Roaming & Co-location Services*, 15 December 2006, paragraph 68, page 17.

¹⁰ *ibid*, paragraph 71, page 17.

¹¹ Vodafone, *Telecommunications Act 2001: Undertaking to the Commerce Commission under Schedule 3A in respect of national roaming and co-location services*, 19 January 2007, Schedule 5, paragraph 2, page 17.

59. In August 2006, the Commission defined and assessed competition in the markets for roaming and co-location during its investigation into the extension of ten of thirteen regulated services in the Telecommunications Act 2001 (Act). The Commission concluded that the relevant markets for national roaming and co-location services are:
- a. The national wholesale markets for national roaming on GSM and CDMA mobile networks; and
 - b. The national wholesale market for co-location on cellular transmission sites.
60. In its assessment of competition for roaming, the Commission concluded that neither Vodafone nor Telecom face competition for the provision of roaming services on their respective networks.¹²
61. In its assessment of competition for co-location on cellular transmission sites, the Commission concluded that “there is limited competition in the market for co-location on cellular mobile transmission sites ... whilst the number of cell sites available for the location of cell towers are likely to be already in use and controlled by the incumbent mobile network operators.”¹³
62. TelstraClear considers that this analysis continues to accurately reflect the competitive environment in New Zealand.

3.8 Relative benefits of an undertaking and regulation under Schedule 1

63. An important consideration for the Commission is considering a scenario where an undertaking provides the same level of service as the regulation, and whether acceptance of such an undertaking should be favoured over inclusion of the service as a regulated service under Schedule 1 of the Act.
64. Section 5(2) of Schedule 3A under the Telecommunications Amendment Act (No 2) 2006 provides that “[a]n undertaking must not be amended after the Commission has made a recommendation under clause 3(2) in respect of that undertaking.” Provided that an undertaking is made within 40 working days after the Commission commences an investigation, it appears that Vodafone can amend its original undertaking.
65. TelstraClear is concerned that the ability to amend an undertaking could be used to drive delay into the Commission’s processes. Repeated “undertakings” during the mobile termination review highlights this risk. After almost three years of the issue being under consideration the Government has still yet to make a decision on whether to regulate mobile termination. In the meantime, end-users have been denied the benefits that the Commission’s analysis concluded would flow from the regulation of mobile termination.
66. As previously discussed, Vodafone’s undertaking in its present form is deficient and would not be consistent with the promotion of competition for the long-term benefit of end-users. In Appendix 2, TelstraClear sets out its key concerns with Vodafone’s undertaking. However, we note that Vodafone could amend its undertaking prior to the Commission’s recommendation, so that it is in a form that would be consistent with section 18.

¹² Commerce Commission, *Telecommunications Act 2001: Schedule 3 Investigation into the extension of Regulation of Designated and Specified Services, Final Report*, 28 August 2006, paragraph 136.

¹³ Commerce Commission, *Telecommunications Act 2001: Schedule 3 Investigation into the extension of Regulation of Designated and Specified Services, Final Report*, 28 August 2006, paragraphs 107-108+.

67. While TelstraClear does not support iterative submission of undertaking variants, TelstraClear considers that a suitable undertaking, in lieu of regulation, is most likely to remove competitive impediments in the most rapid timeframe.

4. Roaming Services

68. TelstraClear submits that the national roaming service description and conditions currently set out in Part 3 of Schedule 1 should be amended.

4.1 Initial rollout requirement – 10% of the population

69. TelstraClear proposes that the rollout requirement be amended to be 10 percent of the population, thus reducing uncertainty and ensuring the rollout requirement does not continue to prohibit entry.

70. Currently, condition (c) requires that the access seeker roll 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*. This has two possible interpretations:

a. The access seeker must have rolled out a network that covers 10 percent of the area New Zealanders normally live or work. That is, remove those areas of New Zealand where New Zealanders do not live or work, such as mountain ranges and uninhabitable islands, and take 10 percent of the area remaining; or

b. The access seeker must have rolled out network covering 10 percent of the New Zealand population¹⁴.

71. TelstraClear is of the view that the first of these interpretations is an onerous undertaking for a new entrant, as it would require a significant network rollout before roaming services could be accessed. The second interpretation is substantially less onerous, as it allows for a rollout covering a much smaller land area in a more densely populated metropolitan area.

72. TelstraClear concedes that should the first interpretation be selected, the access seeker still has the option of applying to the Commission for a determination allowing access to roaming services before achieving the initial rollout threshold. However, it is not guaranteed the Commission would allow such access, and therefore an element of uncertainty exists for the access seeker. Such uncertainty is likely to inhibit efficient entry. TelstraClear therefore recommends that the Commission amend the initial rollout requirement so that the access seeker's network covers 10 percent of the population, thereby reducing the uncertainty inherent in the current provision and avoiding the onerous nature of the condition on a new entrant should the first interpretation be selected.

4.2 Definition of national network

73. TelstraClear proposes that a definition of 'national network' be inserted, so that it reads 'cellular mobile network that covers 70 percent of the New Zealand population'.

74. Currently there is no national network definition, and condition (d) of the national roaming service requires that the Commission must approve a plan for the access seeker that includes:

“(ii) the provision for rollout of a new national cellular mobile telephone network within the period of time in which the national roaming service is specified.”¹⁵

¹⁴ It appears that the Minister of Communications at the time the Act was introduced understood the provision was to be given the second interpretation. In his Second Reading speech on the Telecommunications Act 2001, Hon. Paul Swain stated “access seekers...will have to roll-out a network to at least 10% of the population before the regulatory requirements take effect”.

75. This provides a level of uncertainty for the access seeker, as it is arguable that a national rollout would have to cover 100 percent of the New Zealand population. A new entrant who wished to deploy a network covering, say, 75 percent of New Zealand end-users could be prevented, or at least delayed while the issue was debated, from accessing the regulated roaming service because its network did not intend 100 percent coverage.
76. TelstraClear is of the view that the roaming regulations should retain some incentive for the access seeker to rollout a national cellular network. However, TelstraClear submits that such a network need not cover the entire New Zealand population. Defining 'national network' to cover 70 percent of the population ensures that the access seeker retains the incentive to build a network, but eliminates prohibitive or uncertain conditions on potential entrants.

4.3 Sunset clause on national roaming

77. The Commission has queried whether there should be a sunset clause for the provision of roaming services.
78. While incentives should be placed on access seekers to rollout their own networks, TelstraClear considers that the inclusion of a specific sunset clause for roaming is unnecessary. Section 3(1) of Schedule 3 of the Act currently includes a legislative requirement that the Commission proactively review, at intervals of not more than five years, whether there are grounds to retain the service in Schedule 1 of the Act. Furthermore, TelstraClear's roaming recommendation would require that an access seeker build out to 70 percent of the population.

4.4 Technology agnostic service description

79. TelstraClear submits that the service description be amended so that it is technology agnostic, as was recommended by the Commission for the mobile termination service. TelstraClear proposes that the service description specify that the national roaming service cover voice calls and SMS services and not make any reference to second or third generation services.
80. Currently, the national roaming service allows end users to use roaming services 'generally accepted internationally as second generation cellular mobile services'. This causes difficulties for both access seekers and access providers as end users switch between second generation and third generation network services during and between calls. Thus, there is no way of ascertaining which part of the call comes within the jurisdiction of the national roaming regulation. Further, as access providers replace second generation with third generation networks, the regulated national roaming service will diminish in its coverage and uncertainty around the extent of the available roaming service could discourage entry.
81. This uncertainty is removed by defining the scope of the roaming service but remaining agnostic as to the technology that delivers that roaming service.

4.5 Regulated price for roaming services

82. The *Issues Paper* notes that two pricing principles are available for pricing of roaming if it were designated: retail minus or cost-based pricing principles.¹⁶ TelstraClear considers

¹⁵ Schedule 1, Part 3, Telecommunications Act 2001.

¹⁶ Commerce Commission, Telecommunications Act 2001: Schedule 3 Investigations into Amendments to the Roaming & Co-location Services, 15 December 2006, paragraph 48, page 13.

that the appropriate pricing principle for voice and SMS roaming is cost-based. This would ensure that entrants face the same costs as the incumbent, which would in turn ensure that any entry is efficient.

83. The Commission states that a possible disadvantage of cost-oriented pricing is that it may reduce incentives on access seekers to build their own networks and extend coverage.¹⁷ TelstraClear agrees that if pricing were cost-based, there were no build-out requirements, and the roaming regulation were permanent this may indeed be a problem. However, the purpose of roaming regulation is to remove barriers to entry to the mobile market, not to provide a means for permanent roaming on the incumbent's network. That is why TelstraClear considers that roaming regulation should include a build requirement over a specified time period, and should cease once the entrant had achieved a level of national coverage such that they could effectively compete with the incumbent without the need for regulation, i.e. 70 percent of the population.
84. Furthermore, the use of a cost-based pricing methodology such as TSLRIC provides the flexibility for the Commission to utilise a Weighted Average Cost of Capital (WACC) that reflects the appropriate investment return based on the risk of the investment.
85. The key difficulty with retail-minus pricing, as noted by the Commission,¹⁸ is determining the appropriate retail price to use as a basis for calculating the roaming price. There is no retail price for domestic roaming so the alternatives are retail prices for voice calling and SMS. Given Vodafone's monopoly in the GSM market, these services are subject to limited competition and so pricing is likely to exceed costs.
86. The Commission has noted that:

“One possibility for setting a regulated cost-based price for the roaming service might be to have regard to cost-based mobile termination rates. Mobile termination refers to the costs of terminating calls on a mobile network, and this may form the basis of an appropriate proxy for the costs of providing a roaming service, which also relates to the carriage of traffic on a mobile network.”¹⁹

87. TelstraClear agrees that mobile termination rates may provide an appropriate proxy for the roaming price, as the infrastructure involved for providing the service, and therefore the cost basis, is similar. However, roaming may involve both origination and termination and the roaming price would need to reflect this. Both would be involved for a roaming customer of an access seeker calling another roaming customer of an access seeker, origination would be involved where a roaming access seeker's customer called an access provider's customer, while only termination would be involved where an access seeker's customer calling from within the reach of the access seeker's network called an access seeker's customer that was roaming. The roaming price in Vodafone's undertaking appears to be based on []
]TCLRI.
88. TelstraClear notes that the Commission has already undertaken some analysis of a benchmarked TSLRIC price for mobile termination. Given the absence of regulated roaming in most other jurisdictions, and regulated roaming prices in particular, a benchmarked price based on regulated prices for mobile termination from comparable jurisdictions that use forward-looking cost-based pricing would be an appropriate initial pricing principle.

¹⁷ *ibid*, paragraph 55, page 14.

¹⁸ *ibid*, paragraph 52, page 13.

¹⁹ *ibid*, paragraph 54, page 14.

89. TelstraClear considers the final pricing principle should be TSLRIC. This is consistent with the pricing principle proposed for mobile termination and used for other regulated services in New Zealand where the pricing principle is cost-based. The WACC would be set to reflect the appropriate investment return based on the risk of that investment.

5. Co-location services

90. As stated in section 3.6.1, TelstraClear considers that the appropriate pricing principle for co-location should be cost-based.
91. However, determination of the initial pricing principle for co-location is unlikely to be straightforward. Although regulators in other jurisdictions support co-location regulation, most have not had to set prices by regulation. Consequently, finding appropriate benchmarks from international jurisdictions to efficiently set an initial price may be unrealistic. For this reason, Vodafone's co-location undertaking in respect of price is likely to represent a commercially pragmatic proxy, reflecting cost-based pricing that could be quickly implemented in the market.

6. Vodafone's Undertaking

92. The Telecommunications Amendment Act (No 2) 2006 introduced the undertakings provisions of Schedule 3A to provide for an alternative to a proposed regulatory change. It allows an access provider to undertake the provision of the regulated services to all access seekers on a voluntary basis.
93. TelstraClear supports the general principles of schedule 3A, and would submit its support for an undertaking if it could be shown that the undertaking promotes competition for the long-term benefit of end users. However, TelstraClear is of the view that the Undertaking, in its current form, does not promote competition, due to the onerous nature of its terms for access seekers. TelstraClear sets out its detailed analysis of the Undertaking in Appendix Two.
94. First, TelstraClear notes that Vodafone retains the ability to terminate the Undertaking at any time by providing the Commission with written notice. TelstraClear considers that this introduces an unacceptable element of uncertainty into the regulatory environment, impacting significantly on an access seeker's business case for investing in network infrastructure. It is extremely unlikely a new entrant would consider rolling out a network without guaranteed continuous access to national roaming, subject to clearly specified conditions, and co-location services given consumers' expectation for a national service and the time delay and greater cost of obtaining suitable cell sites.
95. Second, the Undertaking excludes parties that already have agreements with Vodafone for roaming and co-location services. This is inconsistent with the recent changes to the Act that do not require an access seeker to be out of contract to seek access to a determined service (eg the repeal of s.22(1)(a) and (b) of the Act). TelstraClear notes that Vodafone is the only provider of GSM network roaming services, and so any current agreement with Vodafone for GSM roaming services is likely to reflect Vodafone's dominant market position. The pro-competitive benefits of improved access to roaming would be undermined because an access seeker would potentially be excluded from accessing an undertaking if it had a prior roaming agreement.
96. Third, TelstraClear is of the view that the national roaming prices specified in the Undertaking are excessive. As noted earlier, a more appropriate price for voice traffic would be based on the regulated mobile termination rate, given that the resources required to produce the services are similar though, as discussed in paragraph 87, roaming may involve origination and termination (and this is reflected in Vodafone's roaming price being "per leg"²⁰). Further, the proposed SMS roaming rates seem high compared to current retail rates. For example, Vodafone's TXT 1000 retail price is around 1 cent per text.²¹ Even a retail-minus pricing approach would calculate an SMS roaming rate well below that proposed.²²
97. Fourth, TelstraClear opposes the charging of an access fee for national roaming services on the basis that the Undertaking requires that the access seeker must also pay set up and development costs, and a contribution to common costs. The proposed access fee, being 25 percent of the previous calendar's usage charges, far exceeds Vodafone's actual incremental cost of providing the roaming service. Further, Vodafone proposes that the access fee be paid quarterly in advance, and be non-refundable should the access seeker's total usage charges for the quarter be less than the amount of the access fee.

²⁰ Vodafone, *Telecommunications Act 2001: Undertaking to the Commerce Commission under Schedule 3A in respect of national roaming and co-location services*, 19 January 2007, Schedule 2, paragraph 1, page 7.

²¹ This is on top of a core plan charge that varies depending on the amount of minutes selected for the plan. The basic plan that includes 20 minutes of calling costs \$19.95 per month.

²² 16% is the current discount for regulated services, where the service is subject to limited competition

These conditions are unacceptable, and are far in excess of standard industry terms for interconnection.

98. Finally, TelstraClear considers the initial rollout requirement of 150 cell sites to be a formidable barrier to entry, as this would require new entrants to have cell sites covering the entire Auckland region, or approximately 25 percent of the New Zealand population. TelstraClear submits that a more suitable requirement would be 10 percent of the population, which removes the prohibitive nature of the provision, but provides sufficient incentive to the new entrant to commence its network rollout.
99. TelstraClear notes that Vodafone's Undertaking does not expire once an access seeker has achieved a set level of coverage (though, as noted above, Vodafone propose that the Undertaking can be withdrawn at any time). TelstraClear considers that roaming is only required to address the barriers to entry to the mobile market. Once an entrant has achieved a level of coverage such that it can compete effectively with the incumbent, regulation can be removed. For the certainty of the entrant, specifying the level of coverage required and the timeframe to achieve this is much more preferable than Vodafone's approach of it reserving the right to withdraw the Undertaking at any time.
100. In relation to co-location, TelstraClear considers that the prices are acceptable on the basis that they relate to actual costs.

7. Recommendations

101. TelstraClear recommends that the Commission:

- a. recommend that the regulated roaming service be amended to a designated service with the following provisions:
 - i.) roaming for voice and SMS only;
 - ii.) an initial build requirement of coverage of 10 percent of the New Zealand population;
 - iii.) roll-out plans to cover 70 percent of the New Zealand population;
 - iv.) Initial pricing principle: Benchmarked international mobile termination and, to the extent available, domestic roaming rates; and
 - v.) Final pricing principle: TSLRIC.
- b. reject Vodafone's Undertaking in relation to roaming;
- c. accept Vodafone's Undertaking (with amendments to the non-price terms) in relation to co-location;
- d. recommend that the regulated co-location service be amended to:
 - i.) exclude Vodafone as an access provider, if Vodafone's Undertaking is appropriately amended;
 - ii.) a designated service with the following provisions:
 - Initial pricing principle: Benchmarked international forward-looking cost-based co-location rates
 - Final pricing principle: TSLRIC.

8. Attachments

Appendix One: TelstraClear responses to specific questions raised in the Issues Paper.

Appendix Two: TelstraClear responses to Vodafone's Undertaking

Appendix Three: Proposed Service Descriptions

TelstraClear

Appendix One: Commerce Commission Investigation into amendments to the roaming and co-location services – TelstraClear responses to specific questions raised in the Issues Paper

[Attached as a separate paper]

Appendix Two: TelstraClear responses to Vodafone's Undertaking in respect of roaming and co-location services

[Attached as a separate paper]

Appendix 3: Proposed Service Descriptions

[Attached as a separate paper]