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## MOBILE TERMINATION CONFERENCE

- 1 Telecom has instructed us to respond to the Commission's letter dated 8 February 2005. Put bluntly, that letter is an inadequate response to the concerns raised by Telecom by letter of the same date.
- 2 To recap on the most recent aspects of the Commission's process:
  - 11 November 2004: detailed statement from the Commission as to the conduct of the mobile termination conference, to be conducted the same way as other (including Schedule 3) conferences
  - 30 November 2004: submissions from parties
  - 23 December 2004: cross-submissions from parties (note the Commission insisted on receiving cross-submissions 8 weeks out from the conference, despite requests by the parties for an extension which would not have affected the conference dates)
  - 4 February 2005: Commission writes to all parties proposing radical changes to the conference procedure, including removal of the

opportunity to make presentations and identifying areas it now does not want to hear oral submissions on. The details of how the conference sessions will be conducted still have not been communicated to the parties<sup>1</sup>.

- 8 February 2005: Commission writes to all parties stating it is proposing to exclude mobile to mobile termination from the scope of any proposed regulation.

- 3 Clearly, the Commission's two recent proposals would change significantly both the procedure and scope of the conference. Those changes would have the following adverse consequences:

*Removal of ability to make presentations*

- 4 All parties will be significantly disadvantaged by the Commission's decision to not allow an opportunity to present their argument. The Commission states in its 8 February 2005 letter that "[t]he purpose of the conference is to assist the Commission in understanding the issues and to assist it to come to a conclusion on whether or not to recommend regulation". The decision to not allow parties an opportunity to positively present their case will reduce the likelihood of the Commission understanding the issues, and coming to an informed decision. A procedure that is purely inquisitorial will provide a poor platform for discussing the complicated issues involved in this Inquiry.
- 5 Further, the proposed process strongly indicates that the Commission has predetermined its view on the key issues, and now wishes to focus the conference on a "crossing the t's, dotting the i's" exercise, and away from arguments that the Commission's analytical framework is incorrect. Such an approach would be as bad at law as it is procedurally.

*The economics of wealth transfers*

- 6 The Commission has expressly stated it is not making time available for economic submissions on the wealth transfer issue. Again, this can only be because the Commission has already formed a settled view on this issue. If that is so, the Commission must inform the parties prior to the conference of its view on the economics of the wealth transfer issue. If the Commission has not formed a settled view, the conference is the proper forum for addressing this crucial issue.

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<sup>1</sup> For example: whether the Commission proposes to hear parties sequentially or together; whether time will be made available for statements of position; whether the Commission will release its list of questions prior to the conference and if so, when.

## *Lateness of changes*

- 7 The lateness of these changes proposed by the Commission will substantially disadvantage Telecom. The Commission has had, at its own insistence, all submissions since 23 December 2004. Telecom has expended considerable resources in meeting that, and the Commission's other deadlines, and in preparing for the conference on the basis of the Commission's 11 November 2004 notice. If the Commission proceeds with its proposed format a large amount of that work will have been wasted. And, further pressure will be placed on internal staff and experts to prepare for the substantially changed format. This will disadvantage Telecom's preparation for the conference.

## *Additional Cost*

- 8 Telecom has already incurred considerable costs in securing international experts to assist the Commission at the conference. Telecom now would incur more costs in ensuring the continued relevance of their assistance in light of the Commission's proposed changes.

## *Senior management time*

- 9 In its 4 February 2005 letter the Commission emphasised the importance of the Commission having access to senior management, and Telecom agrees this is important. Telecom has informed the Commission that a key senior manager (Kevin Kenrick, the head of Telecom's Mobile Division) cannot attend on 23 February 2005, and requested that the timing of this session be changed. The Commission's response on 8 February 2005 that it expected senior management to have blocked out all three days of the conference is simply naive, and completely out of touch with the demands on senior management time.
- 10 In particular, the Telecom manager in question is scheduled to be in Sydney on 23 February 2005 to brief analysts from the Asia Pacific region, a very significant engagement that occurs once a year. Telecom's Mobile performance is a key area of focus for investors. Mr Kenrick has made arrangements to return at the earliest opportunity for the purpose of being available for this conference.
- 11 The only other reason given by the Commission for not accommodating Telecom's request is that the Commission would prefer to preserve the sequence in which issues are dealt with at conference. That notional inconvenience is insufficient reason for refusing to hear from the senior managers the Commission acknowledges are vital to this process.

## *Scope of the Inquiry*

- 12 Telecom's greatest concern however is the Commission's statement yesterday that the regulation proposed in the Draft Report relates only to fixed to mobile termination, and excludes mobile to mobile termination. This constitutes a fundamental change in the scope of the Inquiry, to the potential detriment of our client.
- 13 No reason is given for that change.
- 14 It is incorrect for the Commission to claim, as it does in its letter dated 8 February 2005, that such a change was clearly signalled in the Draft Report. Nowhere in the Draft Report does the Commission state that it proposes to regulate only fixed to mobile termination, and give reasons for not regulating mobile to mobile termination. Terms such as "mobile termination" and "regulation of mobile termination" are used throughout the Draft Report.
- 15 The Commission now claims the narrowing in scope of the Inquiry was implicit from the proposed service description, yet Telecom and Vodafone submissions on 30 November 2004 and 23 December 2004 have highlighted the difficulties of interpreting the proposed service description. The level of confusion created by the Commission itself is evidenced by the requests from the parties have made for clarification, and the questions raised by parties in submissions. The Commission should not attempt to address that confusion by effectively making a key decision ahead of the conference.
- 16 This last minute decision by the Commission has potentially adverse consequences for Telecom's submissions which our client and its expert advisers are endeavouring to address. But, in the time now available, it is impossible to do justice to such important and complex issues.
- 17 In any event, Telecom has been advised by its economic expert, Professor Jerry Hausman, that there is a fundamental flaw in the Commission's apparent reasoning. He believes that the Commission has failed to take into account how the supply of mobile to mobile calls affects the competitive provision of fixed to mobile calls and thus has made its decision to confine the ambit of the conference based on incomplete and inaccurate market analysis. Telecom proposes to have Professor Hausman present on this vital issue at the conference, but, again, reacting to the last minute change in scope and working through these issues will take time.

**Proposed way forward**

- 18 Clearly, the mobile termination conference should now be delayed – for the sake of all parties and the Commission’s own reputation for procedural fairness. The implications of the last minute narrowing in scope of the Inquiry will take time to assess, and all participants will be materially disadvantaged if the conference were to proceed on the current dates. Given the potential impact of the Commission’s determination on its business, and its commitment to the process to date, Telecom especially so.
- 19 When the conference is held, we submit that the Commission must allow the parties a proper opportunity to present their arguments. A purely inquisitorial approach would provide a poor platform to discuss the complicated issues in this Inquiry, and will disadvantage those parties who wish to do more than assist the Commission in filling in the gaps in its Draft Report.
- 20 We propose that the Commission and Telecom together with their respective legal representatives meet urgently to attempt to unravel this imbroglio. We are available to do so at short notice.

Yours faithfully



Grant David  
Partner