

12 August 2009

Shane Kinley  
Commerce Commission  
Wellington

Dear Shane

**MTAS: Submissions on the Fixed and Integrated Operators' data - Public version (there is a restricted version)**

1. This letter is written on behalf of CallPlus, Woosh and Kordia.

The [ ] TRI; VRI

2. The Telecom and Vodafone data in particular shows [ ] TRI, VRI
3. [ ] TRI, VRI
4. [ ] TRI, VRI
5. This raises [ ] TRI; VRI high barriers to entry, whether for 2degrees, or other new entrants such as WiMAX providers. A new entrant faces the challenge of attracting customers [ ] TRI; VRI
6. Our clients have submitted that only regulating the termination rate will not solve the problem.<sup>1</sup> Regulating the rate just tinkers with the problem and retains the market failure. The Commission must look to supplementary solutions if there are to be satisfactory market conditions.
7. What has now come out [ ] TRI; VRI, and the need for solutions beyond regulating the termination rate. That is so even if the Commission can derive the true cost-based price (a highly contentious exercise, with it being recognised that true cost-based pricing can never be determined anyway). As 2degrees note in their submissions on the Commission's draft report, on/off-net pricing and similar problems will remain even if the model is BAK. If ultimately the IPP rates are similar to the rates used in the counterfactual, there is still going to be market failure, possibly fatal for any new entrant.
8. In their most recent submission (dated 28 July at Para 6), Woosh and Kordia expressed frustration that their submissions, calling for a broader approach than just setting the termination rate, have been ignored (although the Commission

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<sup>1</sup>Kordia, Woosh, CallPlus and Orcon Submissions dated 5 September 2008; Kordia, Orcon and Woosh submissions dated 13 February 2009; Kordia and Woosh submissions dated 28 July

squarely raised and recognised the strategic price discrimination problems in its Issues Paper).

9. [ ] **TRI;VRI**. Further, whatever the outcome, it is important that the Commission deals with the submissions anyway.
10. If adding solutions is a unique addition, compared to other countries, this reflects the unique problems we face here, which call for extra measures.
11. As has been observed by our clients, a key role of regulation in this context is to solve market failure when general competition law fails to do so. *Ex ante* regulation, to supplement regulating the termination rate, is available under Section 66 the Act.<sup>2</sup>
12. Last week's 0867 judgment reinforces the point already made: *ex post* remedies are not effective to solve for market failure in view of the limited interpretation of section 36 and that the remedy is available too late anyway. Therefore *ex ante* regulation is needed.
13. The Commission has also been silent on submissions as to the additional solutions demonstrated by the Commission's own Homezone decision as to non-discrimination.
14. If the Commission is not prepared to apply the approach it has already taken (regulate retail pricing as an ancillary requirement, as it did in the analogous Homezone situation), other solutions are available.
15. [ ] **TRI;VRI**. For example, in relation to on/off-net pricing, the Commission can incorporate a margin squeeze imputation test into the description of the recommended service, under Section 66. Access providers must pass the imputation test at all times. Although ideally the full test would be developed as part of the report, one option is to include a short description of the test, to be developed in detail at the determination stage.
16. This vertical test can apply the learnings from countries such as Australia and Ireland. Workable tests can be developed. The absence of such tests in a mobile context elsewhere is not an impediment: New Zealand faces unique circumstances (a general competition regime with limited ability to deal with the problems and relatively late entry of third entrants into an already saturated market where the on-net pricing problem [ ] **TRI; VRI**).
17. An imputation test should also be developed to deal with horizontal squeeze issues including as to bundling and the issues identified by the Commission in its draft report.<sup>3</sup>
18. Much less satisfactory options would be:
  - (a) margin squeeze reporting under Part 2B.<sup>4</sup> This is less satisfactory as it involves reporting only (compliance with a test would not be required);
  - (b) A Section 9A review, with a view to finding solutions to the problems.

<sup>2</sup> As an "applicable condition", an access principle, and/or as part of the requirements in the IPP and FPP.

<sup>3</sup> At Para 686 et seq

<sup>4</sup> Which can extend to Vodafone, as well as Telecom, pursuant to Section 69ZC

### Careful review of the pricing model

19. [ ] **VRI TRI** the importance of a careful review, noted in our clients' submissions on the draft report, at a level similar to Ofcom's Wholesale mobile voice call termination review. As has already been noted, the level of review in the draft report is well short of the UK review. Yet in the UK, the problems are less (for example, the on-net pricing problem is far less of a problem there, as Ofcom notes in its May 2009 report). Ofcom is carefully considering the options of the equivalent of: no regulation; TSLRIC (as applied in NZ); LRIC (as applied by the EU); BAK; CBC, and the mandated reciprocity model (which reflects the 1 cpm fixed/mobile proposal by 2degrees in its submission on the draft report).<sup>5</sup>
20. [ ] **VRI; TRI** the need to look at pricing methodologies other than TSLRIC, in the manner of the Ofcom review.

### Qualified and missing data

21. The Vodafone data in particular is heavily qualified as to reliability. Further, data, which should be obtainable, for 2006, has not been produced. This should be fixed, or sufficient reason for the position given to the Commission and to Nominated Counsel. We would be grateful if you could advise if the Commission will take steps without the need for nominated counsel to take further action.

Yours sincerely



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<sup>5</sup> We refer to the options at Para 6.16 I in the Ofcom 20 May 2009 discussion paper, the analytical framework at Para 6.17, the critical policy question at Para 6.5 and the analysis of those 5 options in Section 6 including as to on net and off net pricing