

27 July 2009

Shane Kinley
Commerce Commission

Dear Shane

MTAS: Review of classification of information. Disclosure of ICAs and related agreements with commercial customers: Public Version

This letter deals with the Commission's 22 July request (we will write separately as to the 21 July request).

We are sending this letter on behalf of CallPlus, Woosh and Kordia.

It follows receipt of [] **TNZRI** and the
COI version of Vodafone submissions.

All ICAs, for both domestically and internationally originated traffic, and the commercial agreements with parties such as AA and ASB, as noted by 2degrees, should be disclosed and accorded RI status.

There are four main reasons:

1. Use of only one ICA is artificial and risky

- 1.1 In the draft determination, the Commission has elected to use the Vodafone/2degrees ICA, which is a private agreement, not a publicly available document, as part of the counterfactual analysis. It is artificial and risky to selectively limit use of private agreements to just one, when there are other ICAs that dealing with interconnection which are relevant.
- 1.2 This risk is greater given the well known information asymmetry and power imbalance in negotiations between incumbents (Telecom and Vodafone) and other carriers interconnecting with them. It cannot be assumed that the 2degrees/Vodafone ICA is, in isolation, a valid yardstick for the counterfactual.
- 1.3 As private ICAs assume a central role on this important issue, the key relevant information should be available which extends beyond just one ICA. 'After all, the counterfactual analysis feeds in directly to a decision on whether to recommend MTAS.
- 1.4 Termination of calls originated from overseas is part of the subject matter of the investigation. Moreover, those ICAs are relevant to the counterfactual in relation to termination of domestic calls (as the components involved in terminating

international and domestic calls are similar). Our clients cannot understand why they would be excluded. There is no logical reason to treat them separately.

1.1. [JTNZRI

2. Commission reliance on ICAs and commercial agreements to cross-check the approach to cost-based benchmarking

2.1 In its draft determination, the Commission has used commercial information to validate and/or cross-check its conclusions on the information fed into the counterfactual analysis and the draft report generally. This is a valuable step to take, given particularly that the aim is not just to get benchmarks as such. Rather the aim is to get figures for the counterfactual analysis which reflect what the regulated rate would be if there is regulation. The rate being estimated must be the FPP not the IPP. Any significant information which helps that assessment should be used. That includes the ICAs for both internationally and domestically originating traffic.

2.2 It also includes the commercial agreements entered by Vodafone and Telecom with large corporates.

2.3 Both provide valuable data to enable the Commission to achieve more accuracy in estimating what the regulated prices would be on an FPP basis. The commercial agreements, when the inter-carrier ICA negotiating position and information asymmetry between incumbents and challengers are so different, are a particularly valuable source of information to enable the Commission to make a more robust assessment.

3. Practicalities

3.1 It is not accepted that it will take four weeks, as Vodafone suggest, to collate ICAs. Vodafone, and Telecom, must surely have contracts registers, like most major corporates, which collates side letters, etc. It should be assumed they do unless they state otherwise. Whether or not they do, it should only take Vodafone and Telecom a week to collate this information.

3.2 As to commercial agreements, there should be a pragmatic way to deal with this, which can have the information produced relatively quickly and easily. Again, it should be assumed, unless Vodafone and Telecom claim otherwise, that there is a contracts register and/or details loaded for billing purposes.

3.3 The timing implications of this as to the investigation, as it will cause delay, and the time involved for Telecom and Vodafone, is greatly outweighed by the benefit to the investigation.

4. Treatment as RI

4.1 Use of private agreements, as the Commission is doing as to the Vodafone/2degrees ICA, is hard enough when the information is treated as RI. It is impossible when the information, on such a critical issue that feeds into the counterfactual analysis, is treated as COI. At stake is whether or not the Commission will recommend regulation of MTAS. The counterfactual analysis is a critical part of that decision. The Commission could decide not to recommend

regulation based on information never seen by parties other than Vodafone and Telecom.

- 4.2 Kordia, CallPlus and Woosh are examples of the impossible and unsatisfactory position in that environment.
- 4.3 Ultimately this is about the interests of end-users, and their interests are even less protected when they have no ability, via parties that sign a confidentiality undertaking (such as someone instructed by TUANZ) to see critical information. The fact that no one in relation to TUANZ, etc, has sought confidential access does not erode the importance of this point, given the principles involved.
- 4.4 Vodafone relies heavily on the prospect that the lawyers, who sign confidentiality obligations, may also negotiate ICAs later, and it is hard to separate the two. This is an understandable point. However balancing interests, RI access considerably outweighs this difficulty. In any event:
 - (a) This is a problem that Vodafone and Telecom have brought on themselves by electing to use in-house regulatory counsel . While it is an understandable decision to use in-house counsel in this way, it is not right they should now argue that the potential overlapping roles require information to be treated as COI.
 - (b) The choice is not simply between RI or COI treatment. Disclosure can be RI on terms that parties receiving confidential information undertake not to engage in ICA negotiations. This can be done by in-house counsel undertaking not to be engaged in such negotiations for a period of time, or by instructing external counsel to deal with the information disclosed in the ICAs.
- 4.5 This involves time and cost for them, but, in balancing respective interests, RI disclosure (on terms if necessary) considerably outweighs COI treatment.

Yours sincerely



Michael Wigley
Solicitor

Wigley & Company
Solicitors

EMAIL michael.wigley@wigleylaw.com
DDI + 64 (4) 499 1841
MOB + 64 (27) 445 3452