



COMMERCE COMMISSION

Please refer to:

11128
885887_2

26 August 2009

David Kreider
General Counsel
Vodafone New Zealand Limited
20 Viaduct Harbour Avenue
Private Bag 92 161
Auckland 1142

by email: david.kreider@vodafone.com
cc: marie.fitzsimons@vodafone.co.nz, richard.york@vodafone.com,
Vanessa.Oakley@telecom.co.nz, Airihi.Mahuika@telecom.co.nz,
Bill.McCabe@2degreesmobil.co.nz and other interested parties to the MTAS Investigation

Dear David

RE: Investigation into Mobile Termination Access Services (MTAS)

1. I refer to your letter of 20 August 2009 in which you raise concerns on behalf of Vodafone New Zealand Limited (**Vodafone**) with the process adopted by the Commission in respect of its investigation under Schedule 3 of the Telecommunications Act 2001 (the **Act**) into Mobile Termination Access Services (**MTAS Investigation**), and the letter from Richard York to Tom Forster dated 25 August 2009 on the administrative arrangements for the MTAS Investigation.

Vodafone's concerns with the MTAS process

2. I refer first to the concerns raised in your letter of 20 August 2009. Vodafone's primary concerns are stated¹ as being:
- “the Commission’s failure to undertake cost-benefit modelling for each service it proposes to regulate ... means that the Commission cannot discharge its obligations under section 18(2) of the Telecommunications Act 2001 (Act) and also means that affected parties are deprived of the opportunity to be fully informed and be heard; and
 - access providers do not know what the Commission’s final views are on contentious issues ... [and] must before they are given a last opportunity to provide revised undertakings. If this does not occur, there is an unacceptable risk to dynamic efficiency and a risk that the aims of Schedule 3A will not be met.”

¹ Page 1-2 of your letter of 20 August 2009.

Cost-benefit modelling

3. In relation to Vodafone's first concern, the Commission does not accept it has failed to adequately assess the costs and benefits of regulation in respect of each service. The Commission has set out its assessment in the draft Report and has invited submissions on the draft Report. The Commission acknowledges that Vodafone has submitted on this concern. The Commission will be asking questions at the MTAS Conference in relation to Vodafone's and other parties' submissions on this point. The Commission's view is that the proposed steps a) and b) at pages 6-7 of your letter are not required, and that there is sufficient information available in the draft Report and parties submissions to test the Commission's assessment at the Conference. The Commission therefore does not agree to adopt those steps in your proposed revised process.
4. The Commission notes Vodafone's assertion on page 3 of your letter that "other regulators have undertaken cost-benefit modelling for MTM". The Commission requests that Vodafone identify the regulators it is referring to who have undertaken cost-benefit modelling for MTM, in particular modelling which identifies the impact of regulation on efficient entry and expansion, and direct the Commission to the cost-benefit modelling undertaken by those regulators.

Undertakings

5. In relation to Vodafone's second concern, the Commission notes that it provided an opportunity for parties to make amendments to their undertakings at the time they make submissions on the draft report, in response to concerns raised in your letter of 3 April 2009. Telecom provided an amended undertaking as part of that process.
6. The Commission considers that the legal position in respect of undertakings is clear – there is no legal obligation on the Commission to provide further opportunities for revised undertakings to be submitted. Clause 16(3) of Schedule 3A to the Telecommunications Act does provide for access providers to have a reasonable opportunity to amend undertakings in light of submissions received, and this opportunity has already been provided to access providers.² It is also clear from the legislation that the Commission is required to make a final decision in light of any undertakings received; it is not the case that access providers must be afforded an opportunity to submit undertakings in light of the Commission's final decision.
7. The legislation does provide the Commission with some discretion to manage the undertakings process. In exercising this discretion, the Commission has an important obligation to set out a process and manage the MTAS Investigation in an orderly way, to ensure that the process is fair to all interested parties, and to give them an equal opportunity to engage effectively with the investigation. The Commission may decide to invite revised undertakings if it considers that the potential benefits of doing so outweigh the detriment of further delays to the Commission's process. Indeed, the Commission has done this in conjunction with submissions on the draft Report. Any decision by the Commission to seek revised undertakings from access providers in a particular instance should not be construed as setting a precedent.

² See Commission letter to Vodafone, 2degrees and Telecom *Comments on Undertakings Received in relation to MTAS Investigation* (25 March 2009).

8. The Commission considers that Vodafone's proposal for an additional opportunity to submit revised undertakings is a matter that should be discussed at the MTAS Conference. The Commission has therefore scheduled this as a matter for discussion at the Conference, and has released your letter and this reply to all interested parties on the Commission's website³ so that they can be informed for that discussion.

Vodafone's comments on the administrative arrangements

9. Richard York's letter of 25 August 2009:
- outlines a number of specific issues that Vodafone would like to comment on at the MTAS Conference; and
 - raises concerns regarding the timeframe between the cross-submissions and the MTAS Conference, and the time available for the MTAS Conference itself.
10. The purpose of the Conference is for the Commission to question parties on areas where the Commission considers that it needs further clarification of parties' views. The purpose of the conference is not for parties to restate the views they have already expressed to the Commission in reports, submissions and cross submissions. Interested parties have had reasonable opportunities to make their views plain to the Commission in the course of written submissions and the extensive engagement between interested parties and the Commission up to this point. The MTAS Conference is not intended to be another opportunity for interested parties to present those views to the Commission.
11. In line with the purpose of the MTAS Conference, it is for the Commission to determine the issues that it wishes to test further in that forum. The Commission appreciates Vodafone communicating its views on the issues that it considers important to the MTAS Investigation. However, the Commission will be determining the agenda for the MTAS Conference based on the submissions received and issues raised to date. Consistent with the Commission's previously stated intention, an agenda for the MTAS Conference identifying the key issues for discussion will be circulated separately to interested parties today. The Commission is confident that the two days currently set aside for the MTAS Conference is sufficient to address the issues of interest to the Commission.
12. Any residual concerns Vodafone may have about the opportunity it has had to state its case need to be considered in light of the extensive engagement and consultation with interested parties over the last 15 months. This engagement includes:
- release of an Issues Paper of 8 August 2008 prior to the commencement of the MTAS Investigation;
 - submissions on the Issues Paper;
 - release of a "reasons document" outlining the Commission's decision to commence the MTAS Investigation;
 - an opportunity for access providers to submit initial undertakings, in line with statutory requirements;
 - submissions on initial undertakings received from Vodafone, Telecom and 2degrees;

³ See

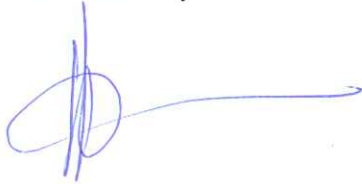
<http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/Investigations/MobiletoMobileTermination/mobiletomobiletermination.aspx>.

- comments from the Commission to Vodafone, Telecom and 2degrees on their initial undertakings in light of submissions;
- an invitation to submit revised undertakings prior to the release of the draft Report;
- correspondence with Vodafone and Telecom on process issues related to undertakings;
- release of the Commission's draft Report into MTAS;
- correspondence with Vodafone regarding timelines and benchmarking;
- submissions and cross-submissions on the Commission's draft Report; and
- an opportunity for access providers to submit revised undertakings with submissions on the Commission's draft Report.

13. Further, the Commission has continuously communicated its intended process to interested parties, including updating that process where necessary. This has provided all interested parties, including Vodafone, adequate time to make any reasonable arrangements for the MTAS Conference. While the views of interested parties are relevant, the final process is a matter for the Commission to determine in line with its statutory and natural justice obligations.

14. Should you have any queries in relation to this letter or the MTAS investigation generally, please contact me by email at ross.patterson@comcom.govt.nz or by phone on 0212 254 455.

Yours sincerely

A handwritten signature in blue ink, consisting of a stylized 'R' followed by a horizontal line extending to the right.

Dr Ross Patterson
Telecommunications Commissioner