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21 August 2009

Shane Kinley
Senior Analyst
Telecommunications Branch
Commerce Commission
P O Box 2351
WELLINGTON

Dear Shane

MTAS Investigation - Reclassification of confidential information as public in the Commission's draft report

Summary

1. We are writing to provide the Commission with our views on the Commission's advice that it was reclassifying confidential information and about to release it into the public domain without consultation with Telecom.
2. We also request that the Commission provide further time in order that Telecom is able to take advice and consider the impact of the proposed designation of the information if the Commission intends to disclose the information publicly. We do not consider there is any harm in such a decision.
3. Given the commercially sensitive nature of the information the Commission proposing disclosing, and the current stage in the investigation process, we consider our request for further time is reasonable and there is no harm to public, parties involved in the MTAS Investigation and the Commission in agreeing to our request.

Background

4. On Wednesday 19 August 2009 at 1.50pm the Commission sent Telecom and Vodafone a courtesy email that it intended to release information publicly in its Draft Recommendation in relation to the MTAS Investigation (in table 49, paragraph 753, paragraph 800, and Appendix 1) that afternoon. Telecom and Vodafone had previously submitted the relevant information as "Commission Only" information, although it was later reclassified as "Restricted Information" under the Commission's section 100 order.
5. Telecom and Vodafone have both strongly objected to the reclassification of the relevant information in the Commission's Draft Recommendation as public. Telecom continues to have significant concerns about the release of that information publicly and requests that the Commission reconsider its position for the reasons set out below.

6. If, however, the Commission remains of the view that it will still release the relevant information publicly, we request further time to adequately consider the actual prejudicial effect of release of the information in more detail to determine whether to take any further steps to protect it. Given the restrictions on the distribution of the information within Telecom, it has not been possible in the time available to adequately assess the likely impact of the proposed disclosure.

Commission's process for reclassification of the information

7. Notwithstanding the need for further time to consider the likely prejudicial impact of disclosure, in our opinion, the Commission has not followed the appropriate process for review of Restricted Information.

8. As you are aware, clause 25 of the Commission's section 100 order states:

If the Commission decides to undertake a review [of the status of information] pursuant to clause 24, the commission shall:

- (a) give notice of any such review to the Party who supplied the relevant Information and any other Party or Parties to the Proceeding;*
- (b) allow affected parties to comment, where circumstances permit, within such period as may be specified by the Commission; and*
- (c) notify the parties of the outcome of its review.*

9. Telecom considers that the Commission has not followed the mandatory consultation requirements under the section 100 order before reviewing and reclassifying Telecom's information from "Restricted Information" to public (clauses 25 and 28).
10. As there is no urgency for release of the information in these circumstances, cross submissions are now in and the conference is set for the week beginning 31 August 2009, we believe that the Commission should have consulted with Telecom and Vodafone before any decision to reclassify this information was made.
11. It may be the case that, because the Commission has used both Telecom and Vodafone Restricted Information to create the relevant information, it believes that the information to be disclosed is "Commission information" and this therefore relieves it of the obligation to consult. However, in disclosing the aggregated information, the Commission will in fact be disclosing Telecom Restricted Information, as Vodafone can derive Telecom's confidential figures by using the information Vodafone currently possess (and vice versa). Accordingly the Commission's process under clause 25 must be followed.

Release of the information publicly is commercially prejudicial to Telecom

12. As set out in our previous correspondence on this matter, Telecom considers that the relevant information would be commercially prejudicial to us if released.
13. Set out in the attached memo from NERA Economic Consulting is an explanation of how if this information is made public it can be used to derive further commercially sensitive information related to revenue and volume information.
14. Based on the initial advice we have received from Telecom Retail, albeit without the benefit of sighting the information itself, Telecom Retail believes that having access to this information would enable Telecom Retail to do the following (and therefore Vodafone would be able to carry out a similar exercise):

- a. [

]TCOI.

b. .[

]TCOI.

c. [

]TCOI.

15. We note that we consider that the information set out in the paragraph 14 above is also commercially sensitive. Therefore, we request that this information is treated as confidential and this letter is not published.
16. Accordingly, we ask the Commission to confirm that it will not publicly release the information set out in table 49, paragraph 753, paragraph 800, and Appendix 1 of the Draft Recommendation.
17. If the Commission determines that it will still release this information, then we request additional time to further consider the commercial impact of release of this information and our options. The appropriate timeframe to make such a significant decision requires more than a few days and we think more time is appropriate.
18. We would be happy to discuss this matter further with you.

Yours sincerely



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Group Regulatory & Competition