



Telecom Corporation of New Zealand Limited
Level 9, North Tower, 68-86 Jervois Quay
PO Box 570
WELLINGTON

Telephone: + 64 (04) 498 9240 Fax: + 64 (04) 473 5926
Email: vanessa.oakley@telecom.co.nz
www.telecom.co.nz

Vanessa Oakley
General Counsel
Group Regulation, Competition & Litigation

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Osmond Borthwick
Director, Telecommunications Branch
Commerce Commission
P O Box 2351
WELLINGTON

Dear Osmond

INVESTIGATION INTO MOBILE TERMINATION ACCESS SERVICES (MTAS): PROCESS ISSUES

Telecom has reviewed Vodafone's letters of 3 and 7 April 2009. In light of those letters we have reviewed the Commission's proposal and our initial response to that proposal.

Telecom is encouraged by the Commission's stated desire that acceptable undertakings are a desirable outcome. However, like Vodafone, Telecom has concerns that the proposed process does not provide Telecom (and other access providers) with a reasonable opportunity to make a voluntary offer to provide mobile services on a properly informed basis.

The intention of Schedule 3A is that proposals for industry solutions should be encouraged and facilitated. This intention aligns with best regulatory practice. If potential alternatives to regulation have to be submitted "blind", the ability to satisfy views the Commission has, or may evolve to have, becomes self-defeating. If this is the end outcome, the Act would be deficient as matter of good policy.

While the Act would certainly benefit from greater prescription supporting the facilitation of industry outcomes as alternatives to regulation, and the role the Commission should play, this does not prevent a modification to the process to achieve these aims.

While there are interpretation issues that can be debated¹, the Commission clearly has the discretion to enable the submission of revised undertakings as an alternative to a proposed regulatory change *after* it issues its draft investigation report. This has occurred in previous Schedule 3 investigation processes in a well managed way.

The Commission's desire for a timely process needs to be balanced with the significance of the issue for the industry and with the desires expressed by all to give undertakings a real chance of success. Process and timing focuses should not be permitted to trump these other issues of significance. As the Commission itself notes, the particular terms of any undertaking will be carefully assessed against the factual of regulatory change as part of the Commission's welfare analysis (both quantitative and qualitative) in the draft report with all price and non price terms assessed.

¹ While we have chosen not to debate the legal interpretation points, our absence of doing so should not be seen as acceptance of the Commission's current position.

The appropriate and reasonable balance, which is within the Commission's discretion, is to at least allow revised undertakings after the conference that follows the draft investigation report. This should be communicated in a timetable up front.

While the Commission would need to issue a revised view after that time, this can be managed in a timely way and the Commission is experienced with this. The Commission could either update its draft report to take into account the undertakings or, issue a further consultation document with preliminary views on whether it will, or will not, accept undertakings in preference to the views in the preceding draft report². Additional consultation in this way has been voluntarily used many times by the Commission before³ and need not add significant delay.

Given this flexibility is within the Commission's reach, Telecom is confident that the Commission's proposed process could be modified relatively easily to achieve the desired outcome in a timely way.

We would request that the Commission modify its process approach in light of the above suggestion.

Finally, in light of Vodafone's intention to consider filing legal proceedings, and given the importance of the substantive and process issues, we note that we reserve our rights in relation to the legal arguments that are being traversed between Vodafone and the Commission that relate to these issues.

Yours sincerely



Vanessa Oakley
General Counsel
Group Regulation, Competition & Litigation

² This was the approach taken in the Gas Authorisation Process – see the Update to the timetable and further opportunity for submissions on asset valuation (July 2008).

³ The sub-loop unbundling standard terms determination process is the most recent example where the Commission has exercised its discretion reasonably to allow further submission processes and a workshop (in that case) to inform a final decision.