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COMMERCE COMMISSION
MTAS INVESTIGATION PUBLIC MEETING RE CLARIFICATION OF
MATTERS FOR SUBMISSION OF REVISED UNDERTAKINGS

Held 23 September 2009
at the Intercontinental,
2 Gray Street, Wellington

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[11.33 am]

CHAIR: Good morning all. I'd like to welcome you to this public meeting to discuss matters of clarification for access providers so they can if they wish submit revised mobile access service undertakings. I'm Ross Patterson, the Telecommunications Commissioner and I will be chairing this Conference. Sitting with me are Anita Mazzoleni and Gowan Pickering.

During the Mobile Termination Access Services Conference on 2nd and 3rd September the Commission indicated that it intended to allow access providers another opportunity to submit revised undertakings.

Following the Conference, the Commission has released a transcript of the

1 Conference and a letter formally setting out the Commission's determination
2 regarding the process for the submission of revised undertakings and submissions in
3 relation to those undertakings.

4 The Commission indicated it would hold a public meeting to allow a final
5 opportunity for access providers to clarify any outstanding issues of substance and
6 process with the Commission if required. Access providers were asked if they
7 issues that they wished to place on the agenda today.

8 Before commenting on the substantive discussion of these matters I'd like to
9 make a few more opening comments regarding the scope and purpose of this
10 meeting and the approach the Commission is taking to provide clarification to the
11 matters that access providers have raised.

12 Firstly, the Commission regards the undertakings process as a very
13 important part of the telecommunications regulatory regime and wishes to do all it
14 can to facilitate a process which enables parties to set the terms upon which the
15 services are provided.

16 However, the undertakings regime only applies while the Commission is
17 considering a proposed regulatory change and we therefore have to balance our
18 obligations in relation to the preparation of a report to the Minister under
19 Schedule 3, with a wish to provide as much information as possible to access
20 providers prior to finalising our report to assist the undertakings process.

21 This requires a delicate balancing act and the process that we are engaging in
22 today recognises that.

23 I'd like also to restate what we have previously said about undertakings at
24 the Telecommunications and ICT Summit on 23 June 2009. Then we said
25 "undertakings as an alternate to regulation avoid the costs of regulation and,
26 provided they are accepted on a timely basis, the significant costs of the regulatory
27 process. They allow access providers to shape some of the form and content of
28 price and much of the non-price terms. They allow faster uptake of the service,
29 subject to the undertaking. They also give certainty to access providers much
30 sooner and a regulatory outcome, something that access providers consistently stress
31 to us is vitally important to them". We take all of these factors into account when
32 weighing up the difference between a counterfactual undertaking and the factual of
33 a regulated outcome.

1 In assessing undertakings we would have regard to the potential net benefits
2 of implementation issues such as glide paths, something which may be expected to
3 be assessed quite differently to achieve regulatory outcomes. For example, a
4 Schedule 3 process takes about a year and we approve for regulation any resulting
5 standard terms, due process takes a similar time. Undertakings that remove such
6 time periods would also be expected to reflect the time benefit and the significant
7 savings in the cost of the regulatory process and regulation.

8 That sets out our general approach to undertakings.

9 Now, the purpose of this meeting is for the Commission to clarify issues
10 which have been raised by access providers before they submit revised
11 undertakings.

12 Discussions will be focussed on matters that are directly relevant to revised
13 undertakings.

14 This meeting is not an opportunity to reopen or re-litigate matters that have
15 been the subject to submissions or discussed at the Conference.

16 There will be no cross-examination or submissions on points discussed
17 today, although the Commission will allow parties to ask points of clarification.

18 Parties are also reminded that the Commission's views to date on matters are
19 as expressed in the Draft Report.

20 Where the Commission has developed its thinking further in response to
21 matters raised in submissions or discussed at the Conference and recorded in the
22 Conference transcript, we will indicate so today. But in the absence of further
23 comment, parties are referred to the Commission's view in the Draft Report.

24 Some parties have asked for the Commission to form final views on matters
25 before revised undertakings are submitted. The Commission does not consider that
26 this is appropriate. The Commission is required to give its final views in the final
27 report. The Commission can provide preliminary views on key issues, as it has
28 done in the Draft Report, but must keep an open mind on all issues until its fully
29 reasoned final review is made public in the final report and this is part of the
30 delicate balancing act that I referred to earlier.

31 The Commission considers that parties will have sufficient guidance and
32 information from its comments today and by reference to the Commission's
33 preliminary views in the Draft Report and matters addressed in the Conference

1 transcript to assist and to submit revised undertakings if they wish. Ultimately
2 however, it is incumbent on the parties to put their best offer in lieu of regulation
3 forward in their revised undertakings based on the parties' views of what factors
4 should be taken into account.

5 I wish to assure parties however, that the Commission does understand that
6 certainty about what factors should be taken into account in submitting a revised
7 undertaking is important to access providers. As I noted earlier, the Commission
8 cannot express a final view on any matters prior to the final report. We will
9 however comment on our current view on a number of issues today and we can say
10 that if there is a change in the Commission's view following the submissions revised
11 undertakings, then the Commission will consider if that materially affects our
12 assessment, and if it does, the Commission would engage in a further round of
13 consultation.

14 I'd like to remind you of some matters that the Commission has provided
15 guidance on and an expectation for revised undertakings. As indicated at the
16 Conference, the Commission has suggested that access providers could consider
17 providing separate undertakings, if any, for each of the MTAS services in line with
18 the approach taken by Vodafone to date.

19 Parties are reminded of discussion at the Conference in relation to the
20 possibility of different pricing for different services; having separate undertakings
21 for each service would allow this approach to be taken more cleanly. Ultimately
22 however, each party needs to decide how they present their undertakings.

23 As a general comment, the Commission would appreciate parties clearly
24 explaining their assumptions when submitted revised undertakings. It will greatly
25 assist the Commission in its assessment of the revised undertakings to fully
26 understand the assumptions behind any changes made by parties and their revised
27 undertakings. However, the Commission notes that all parties have had full
28 opportunity to present their wider views to the Commission in submission and
29 cross-submissions to date and at the Conference and any explanation in submitting
30 revised undertakings should address assumptions relevant to the revised
31 undertakings only.

32 I understand also some parties also unclear about the importance that the
33 Commission is placing on the assessment of the effective or implied average on net

1 retail price that actually providers are charging themselves. The Commission is
2 currently working through the calculation of this figure on a consistent with
3 Telecom and Vodafone and expects to make further comment on what that average
4 figure is later this week. At this time however, I would note that the figure remains
5 a cross-check on the Commission's benchmarking and parties should pay primary
6 attention to the Commission's benchmarking. While this figure has been used by the
7 Commission as a cross-check and the Commission noted at the Conference that it
8 would find it difficult to recommend undertakings that provided for mobile
9 determination rates that were materially different to the mobile termination cost that
10 operators currently charge themselves for 80 to 90 percent of the traffic, this
11 cross-check is not intended to detract from the fact that benchmarking is the primary
12 standard against which the Commission's assessment will be made.

13 I note that Vodafone have requested that the Commission provide guidance
14 in relation to its comments at the Conference regarding this cross-check. If there
15 were any further questions on this point then they can be addressed during the
16 relevant agenda item.

17 To conclude these introductory comments, I'd like to make two more points
18 of the procedure that we will follow for the course of this meeting and to address
19 housekeeping matters.

20 Any comment should be directed through the Chair.

21 The meeting processes will be recorded so please speak into the
22 microphones when making your presentation and identify yourself, speak clearly
23 and slowly so that we do not have problems taking the transcript.

24 Coffee and tea have been provided at the rear of the room, over to the side of
25 the room, so you can help yourself at any time.

26 And in the event of an emergency, fire evacuation please follow the
27 directions of Intercontinental and Commission's staff. The Intercontinental is
28 protected by an advanced fire protection system which will evacuate single doors or
29 the entire building. In the event of an emergency you will be warned by an
30 electronic alarm. If this alarm is sounding on your floor you must evacuate the
31 hotel, please make your way out of the meeting rooms, down the main stairs directly
32 ahead and out of the main doors.

33 Toilets are located out of the meeting room doors to the right.

1 be an appropriate limit for out of balance traffic on SMS?

2 **CHAIR:** No we haven't. We are aware that that form of bill and keep was discussed and
3 some out of balance regime was discussed, but where that percentage would lie
4 would be for access seekers to determine.

5 **MR YORK:** And I suppose then it follows then that if you perhaps haven't put further
6 thought in terms of if you go outside of the out of balance limit, what the pricing
7 principle might apply for that out of balance traffic?

8 **CHAIR:** Well again, in the report TSLRIC was the final pricing principle or bill and keep,
9 so TSLRIC would be the appropriate benchmark.

10 **MR YORK:** Often in commercial negotiations with bill and keep there will be a question
11 of whether if you do go to a rate outside of the out of balance traffic limit, whether
12 that applies only to the amount of traffic beyond the out of balance limit or whether
13 it goes back to all traffic. Would the Commission have put any thought to that issue
14 at this point?

15 **CHAIR:** No we've got no view at this point. Again, that's matter for parties providing
16 undertakings to assess.

17 **MR YORK:** Okay. I probably haven't got anything further.

18 **CHAIR:** Any other parties want any clarification on that particular issue?

19 [No further comments]

20

21 **SELECTION OF BENCHMARKS, PRICE POINT AND COST-PATH**

22

23 Agenda item 2: Selection of benchmarks, price point and cost-path. This
24 was also raised by Vodafone.

25 The issue raised was the Commission's views on and logic and support of an
26 appropriate cost benchmark for voice and SMS termination; the cost-path the
27 Commission believes is relevant for both voice and SMS termination.

28 The Commission's response in relation to benchmarks, price point and
29 cost-path: The Commission has considered all views raised in the submissions and
30 at the Conference and sees no reason at this stage to depart from the benchmarks,
31 price point and cost-path set out in the Draft Report.

32 **MR YORK:** So just to clarify, that would mean the median of cost estimates in the nine
33 jurisdictions?

1 **CHAIR:** Yes,.

2 **MR YORK:** Were put forward in the Draft Report?

3 **CHAIR:** Correct.

4 **MR YORK:** And the Commission has not - has it reached a preliminary view on the
5 questions of - raised by Analysis Mason on countries such as France and Hungary
6 and on the views in the Covec Report on Greece?

7 **CHAIR:** It has taken all of those matters into account and considered it in reaching the
8 view - current view, that there is no reason to depart from those.

9 **MR YORK:** Should we expect there will be further consideration of those submissions and
10 reports from this point to the final?

11 **CHAIR:** Yes, because it's an ongoing process. What we have said already, is if we came
12 to a view that was materially different we would consult on that.

13 **MS MAZZOLENI:** Just to clarify, that's not just in relation to the benchmarks, that would
14 also be in relation to the price point as well.

15 **CHAIR:** We are in this delicate position where we are still processing the information to
16 come to a final report and so everything is still at large. No final decisions have
17 been made. What we are doing today basically is an unusual process that would not
18 happen, other than that we're trying to work within the undertaking regime as well,
19 indicate our current thinking. But clearly, we are still working through some these
20 issues and again I say if any changes to our current thinking which are material we
21 will consult further.

22 **MR YORK:** And to be clear, you are not expecting in the submissions that come in in
23 support of any potential revised undertakings, that we should be -

24 **CHAIR:** You shouldn't be covering those issues. We are well aware of the views of all the
25 parties on all of these issues. So we do want to understand the assumptions that you
26 reach in coming to your - the undertaking that - should you choose to put one in, but
27 that's as far as it goes.

28 **MR YORK:** Okay. I guess, and hopefully I'm not labouring the point, but just to
29 understand, it's still a live issue? Or it's -

30 **CHAIR:** Every issue is still live in that we have not come to a final view on anything. We
31 are sharing, I say it again, our current thinking. If there was a material change in
32 any of this that we considered material that would impact the undertakings we will
33 consult further.

1 **MR YORK:** Okay. Thank you.

2 **CHAIR:** Do we have any further issues on agenda item 2?

3 [No further comments]

4

5 **ROLE OF CROSS-CHECKS**

6

7 Agenda item 3 relates to the role of the cross-checks. Now I dealt with that in my
8 opening. It was an issue raised by Vodafone, so is there need to discuss that issue
9 further or was it clear enough in my opening?

10 **MR YORK:** I'm still perhaps a little unclear, but maybe that's because I'm a little slow on
11 the uptake, so don't judge Vodafone by my slowness. But we should be assuming
12 then that the almost appropriate yard stick against which we judge our self is
13 benchmarking?

14 **CHAIR:** Correct.

15 **MR YORK:** What do we do in a situation where we might find that the average retail
16 price might be materially different to the benchmark? So say for instance, you
17 know, there's a difference of say one's 50 percent higher than the other, what would
18 your guidance be to us?

19 **CHAIR:** Well what we have said is the primary factor is the benchmark. We would not -
20 but that we would not expect the price to be higher than the internal charges. That is
21 just a cross check. So the benchmarks are the principle - will be the principle
22 assessment is made. Yeah, this was only ever a cross-check, it's a cross-check in the
23 Draft Report and we would take the same approach. We wouldn't change our
24 approach in the final report.

25 **MR CHIGNELL:** I was just really wanting to clarify if the internal - if the cross-check
26 ended up being much higher than your benchmarks wouldn't that be a material event
27 in your process?

28 **CHAIR:** No, because the benchmarks have been driving the assessment. It will be
29 something - I mean, you will make a decision as to the undertaking you put in and to
30 the assumptions on which it is based and we will then consider that, so certainly that
31 will be something that will be considered in looking at making that assessment.
32 When I was talking about material change it was in relation to the other issues that
33 we are working through.

1 **MS MAZZOLENI:** Sorry, just - I don't know whether this will clarify Tom, but we also
2 look at the other factors as well, as we said, it's not just the price point - it's not just
3 the benchmarks it's also the price point, so I guess we would use the applied internal
4 price as a cross-check and then iterate to go back and look at some of the other
5 factors in terms of looking at which benchmark to pick.

6 **MR YORK:** One inference I took from the conference, and it would be good if it could be
7 corrected if it was wrong, is that perhaps there was an inter- linkage between the
8 questions of the benchmark price point, a potential glide path and the average on net
9 retail price. So that, in a sense, I think the Commission's indicated it might consider
10 glide paths as an implementation issue, but it would not expect the price to be
11 greater than the average on net retail price. Do we read from that, that the
12 Commission might consider a glide path, but that it is almost capped at the average
13 on net retail price?

14 **CHAIR:** We deal with glide paths as a separate agenda item and I'm not sure you can read
15 into what we said -

16 **MR YORK:** Okay. That's good clarification. Okay, thank you.

17 **CHAIR:** Any other issues on cross-checks?

18 [No further comments]

19

20

GLIDE-PATH

21

22 Agenda item 4 is glide paths. Raised by both Telecom and Vodafone.
23 Telecom's question was whether glide paths are acceptable in principle and, if so,
24 what length. Vodafone asked whether the Commission believes a glide path is
25 appropriate for the price of mobile termination and, if so, what time scale it would
26 cover and whether it would be appropriate to any conditions such as the relationship
27 to the price implied by average on net retail prices.

28 The Commission's current view is that for a regulated outcome a glide path
29 would not be justified. However, the Commission has no, in principle, objection to
30 the inclusion of a glide path in any revised undertakings received, but would expect
31 any glide path to deliver equivalent benefits to end users when compared with
32 regulation over the equivalent time period. Whether to include a glide path and the
33 length of any glide path is a matter for access providers to consider, but the

1 Commission would expect the benefits of a glide path to be clearly demonstrated by
2 the party proposing it. And clearly one of the factors is that undertakings would
3 take effect earlier than a regulated outcome and that, as I said, in the initial
4 statement is a factor that would be taken into account.

5 **MR CHIGNELL:** So could I just clarify when you talk about benefits in those
6 circumstances are you talking about the benefits as expressed by the cost benefit
7 analysis around fixed mobile?

8 **CHAIR:** I'm talking about the benefits of an undertaking taking effect earlier than a
9 regulated outcome and that those benefits could be built into a glide path. I'm not
10 talking about the full cost benefit analysis.

11 Any further questions on glide paths?

12 [No further comments]

13

14 **SECOND + SECOND CF MINUTE + SECOND PRICING**

15

16 Agenda item 5, second + second as compared with minute + second pricing.
17 Issues raised by both Telecom and Vodafone. Telecom - does the Commission have
18 concerns with the minute + second structure at a fundamental level or is this a price
19 comparison issue such that a price adjustment would remove the concern?
20 Vodafone asked for the Commission's views on whether the price of mobile
21 termination must be set on a minute + second or second + second duration rounding
22 basis.

23 The Commission's response is that under Clause 4 Schedule 3A of the Act
24 the Commission may not recommend an undertaking for acceptance unless it
25 complies with the standard access principles in Schedule 1. Access Principle 2
26 requires any undertakings received to be consistent with international best practice.
27 The Commission notices that second + second pricing is the predominant method of
28 pricing in other jurisdictions, as was discussed at the Conference. The
29 Commission's expectation is therefore, that this approach should be adopted at the
30 wholesale level in any revised undertakings that are submitted.

31 So do Vodafone or Telecom have any further issue to raise on
32 second + second?

33 [No further comments]

1 concern was in relation for example, to links between two MSCs which may well be
2 in the same city and whether the terms and conditions for links across that boundary
3 would need to be part of an undertaking. So it wasn't about the transport issue, it
4 was about the actual physical links and who pays for which link; whether the prices
5 would need to be in there or can that be done on a commercial basis?

6 **CHAIR:** I'll have to ask the assistance of staff at this table. Yep, I think so. The same
7 answer, I think it's your call. It's not part of the regulated service, but can be in the
8 undertaking and is optional. Yeah, and the assumption on -

9 **MS MAZZOLENI:** Just as long as you're clear. I mean it's your choice what you put in
10 the undertaking and what you don't put in it. We just need to be very clear about
11 exactly what it is that is in and how it's been priced or where it's been excluded.

12 **MR HAYDEN:** Okay. Thank you.

14 **RECONCILING UNDERTAKINGS WITH DIFFERENT TERMS OR PRICES**

16 **CHAIR:** Agenda item 7: Reconciling undertakings with different terms of prices. Issue
17 raised by 2degrees. How will the Commission deal with revised undertakings, if
18 any, from access providers which contain different terms, price and/or non-price?

19 The Commission response is that in relation to the differences between
20 undertakings, the Commission will consider this matter when revised undertakings,
21 if any, are received.

22 At this stage the Commission notes that there are a range options for
23 handling different undertakings, including recommending the acceptance of one
24 undertaking and recommending regulation for other access providers. It is
25 anticipated that the proposed workshop would occur only if at least one undertaking
26 was capable of being recommended for acceptance and that workshop could then
27 address differences in price and non-price terms and how to address any reciprocity
28 requirements.

29 The Commission also notes that there appear to be majority support at the
30 Conference that a situation of different undertakings would be undesirable and that a
31 process should be provided to address this if possible. But again, until the
32 undertakings are received, exactly how that issue might be handled can't be
33 prejudged.

1 Any further comments?

2 **MS JONES:** We have one Ross. At what point in time after the 2nd of October or the
3 16th of October would the Commission advise parties whether this extra step in the
4 process would take place?

5 **CHAIR:** From recollection, there's two weeks for submissions to be received on those
6 undertakings from parties. I suspect that parties may make submissions on that
7 issue. Clearly, after receiving submissions the Commission would make a decision
8 on the next steps in the process. Fairly promptly after receiving submissions.

9 **MR WESLEY-SMITH:** Sorry, can I just make one final clarification? John over here.
10 Can I just clarify, that means the Commission will give parties an indication under
11 any scenario if it thinks there's an undertaking capable of acceptance?

12 **CHAIR:** Certainly to get to the stage of having a workshop we would expect to have an
13 undertaking capable of acceptance. So if the decision is to proceed with a
14 workshop, that's a fair assumption. Quite how that process will work, we're a bit
15 uncertain until we see - but certainly that's a reasonable expectation.

16 **MR WESLEY-SMITH:** Yeah, the reason I say it is because there are a raft of scenarios,
17 as we've discussed previously, but having one undertaking out there capable of
18 acceptance; imagine it was Telecom's, there's a whole raft of assumptions you have
19 to make and there's potential scenarios where you may not want to have your
20 undertaking accepted if it means that other parties have got another 12 or 18 months
21 before the rate for termination on their network is regulated.

22 **CHAIR:** And the Commission is live to that issue also, yes.

23 **MR WESLEY-SMITH:** Great.

24 **CHAIR:** And it will be part of the continuing balance act that we are trying to engage in
25 too.

26 **MR WIGLEY:** It's Michael Wigley.

27 **CHAIR:** In person now. Thank you Michael

28 **MR WIGLEY:** Thank you for tolerating that before. I have come from a plane. I suppose
29 the indication is fine, that John asks about, but let's say Telecom puts in an offer
30 which is low, they do run the theoretical risk that that will be accepted in isolation
31 and that's quite a risk to take without any certainty. You are giving a strong lead,
32 the Commission's giving a strong lead that there's certainty - well, not certainty, but
33 the way it's going to go, but there is no certainty, so if you are a Telecom you may

1 still be very reluctant to put your best foot forward for fear that you're going to be
2 left in isolation. Is there a solution to that problem? It seems to be a real problem. I
3 think John's going to go away and still feel ouch can I really put my best foot
4 forward? Or Vodafone or 2degrees.

5 **CHAIR:** Yeah, it's one of the difficulties that you face dealing with multi-party
6 undertakings is exactly that. This whole process of dealing with undertakings is
7 difficult and we're working through it step-by-step, but the Commission is live to
8 that issue. We do sense a wish among all parties that this whole issue can be
9 resolved by undertakings, it's certainly our wish, and I think the parties just have to
10 have faith in the process that a party will not be left exposed in that way. Quite how
11 the process will work, we still are exploring, but certainly if all parties are acting in
12 good faith I don't - think it's a theoretical risk, rather than an actual risk. But parties
13 have to make their own judgments.

14 **MS JONES:** Just one more question from us Ross, for this workshop is the Commission -
15 has it considered whether this workshop would include price as well as non-price
16 terms? Does it envisage a situation where if the prices are not too different the
17 parties can sit in a room and talk about price?

18 **CHAIR:** I think the answer to that is until we get the undertakings we really can't
19 determine, but it is not - we have not ruled out the possibility that there may be an
20 ability to discuss price; we haven't ruled it in and there are issues about that. So it's
21 open at the moment. We need to do more thinking about that, quite frankly, but it's
22 certainly an issue we're aware of and if undertakings are very close well, one would
23 like to think there is a process that can be reached that can deal with that. Quite
24 what the process is, is yet to be determined.

25 26 **INTER-CONDITIONALITY OF UNDERTAKINGS AND RECIPROCITY**

27
28 That was item 7 I think, we must now be on item 8.

29 The inter-conditionality of undertakings and reciprocity, this was raised by
30 2degrees.

31 The Commission response is inter-conditionality of undertakings is not
32 acceptable, as was discussed or indicated certainly at the Conference and in earlier
33 comments. In relation to the question of reciprocity of price and non-price terms,

23 September 2009

1 which we've are really discussed, if this remains an issue, as I have said, it's
2 anticipated that if it is able to be addressed it would be addressed at the proposed
3 workshop. The processes that we adopt will be determined after we've received the
4 undertakings and after we've received submissions on those undertakings, but the
5 workshop is designed to deal with reciprocity issues and I think the only extra
6 clarification we've given today is that for that workshop to be triggered we would
7 need at least one undertaking that was capable of acceptance. In our view, was
8 capable of being recommended to the Minister that it would be acceptable.

9 **MR MCCABE:** I'm sorry, maybe I missed something. It's Bill McCabe here from
10 2degrees. Are you saying - you were very clear on inter-conditionality, so that if we
11 put something forward, then Vodafone and Telecom would not necessary have to
12 agree to the same price, but on reciprocity I'm still not quite clear. If I put forward
13 an undertaking that provides anybody access to my network, however, to be able to
14 access my network at that price can I demand access to - let's say it's between us and
15 Vodafone, can I demand access to Vodafone's at the same price, that being the
16 reciprocity? I wasn't quite sure whether you were allowing an insistence of
17 reciprocity or not.

18 **CHAIR:** Yeah I think the - where we got to was that it could not be conditional on that,
19 but reciprocity was an issue that would be worked through. If we end up with three
20 undertakings all capable of acceptance and all different, one would imagine that we
21 need to work somehow towards a common standard if we can and that's what the
22 workshop's designed to try to achieve, given that the undertakings, at least one of
23 them is, in our view, capable of being recommended to the Minister for acceptance.
24 But how that's going to work is still to be determined.

25 **MR WESLEY-SMITH:** Can I just make a comment on that? Because I think, at least in
26 our minds, there is a distinction between a conditionality clause which was the
27 particular clause in our previously undertaking that 2degrees objected to, which
28 made the activation of the entire undertaking conditional on acceptance by named
29 parties and a reciprocation requirement. Reciprocity is just a standard clause in
30 inter-connection arrangements around the world, so I don't accept that that's a
31 conditionality. Mr Wigley's clients can still accept an undertaking from Telecom in
32 the current form whether or not 2degrees reciprocates. So I think there is a slight
33 distinction there.

1 **CHAIR:** Yeah. I think there is, and I might get some guidance. That that was fine, I
2 think, is that -

3 **MR WILLIS:** I guess from a staff perspective, certainly there is a distinction there John,
4 that's absolutely right. What - we viewed that conditionality aspect you're talking
5 about as being inappropriate when we looked at the Statute and undertakings. The
6 reciprocity issue was more of a practical issue. If two parties have terms that are
7 reciprocal then one of them has to win our and so it was dealing with that issue from
8 a practical point of view that we were concerned with.

9 **CHAIR:** Yeah, so I think the answer must be a reciprocity provision in the undertaking
10 itself would not rule it out of order, but we are then faced with a number of
11 undertakings all with reciprocity provisions and all being inconsistent and that is the
12 objective of the workshop, to try to determine whether there is a common ground.

13 **MR WESLEY-SMITH:** I understand the practical. How should one - easy isn't it!
14

15 **SUBMISSIONS ON REVISED UNDERTAKINGS**

16

17 **CHAIR:** Moving then to agenda item 9 which is submissions on the revised undertakings
18 and that was raised by 2degrees which was the process and parameters for
19 submissions on revised undertakings.

20 Really repeating I think what has already said. Submissions will be limited
21 to issues directly relevant to any revised undertakings received. We don't want
22 submissions on any other matter. And two weeks has been provided for those
23 submissions, they will be due by the 16th of October. Is that clear?
24

25

26 **PASS-THROUGH AND WATERBED EFFECT**

27

28 Agenda item 10 was modelling issues. This related to pass-through
29 waterbed effect impact on deeds of recommendations to regulate being accepted.
30 These were issued raised by Vodafone. Specifically clarification of the
31 Commission's approach to certain key assumptions and parameters, including
32 pass-through and fixed to mobile, extent of the waterbed effect and modelling of the
33 waterbed effect and whether the Commission will assume fixed and mobile
34 termination rates will continue to come down on 1 April 2010 in line with the MTR

1 deeds under the factual scenario.

2 The Commission's response is that the Commission had in its Draft Report
3 provided estimates of the likely net benefits associated with regulation on the basis
4 of assumptions about the likely level of pass-through in the fixed to mobile market
5 and the waterbed effect. These issues were discussed in submissions and at length
6 at the Conference. In relation to pass-through the Commission's current thinking,
7 taking into account submissions and discussion at the Conference, such as the
8 comment by Chris Abbott that there was a movement towards bundles, so there was
9 access calling, broadband and television, and we all fairly ferociously compete
10 around that whole parameter and that we do see pass-through and it occurs in
11 multiple ways; those comments and others by parties at the Conference. The
12 Commission's current view is that the likely pass-through to fixed line services will
13 be no less than that assumed in the Draft Report and may in fact be greater.

14 In relation to the waterbed effect, the Commission's current thinking takes
15 into account again submissions and discussion at the Conference such as the
16 statement by Dr Ralph in relation to the fixed to mobile market, that the waterbed
17 effect, whatever it is, is very likely to be swamped in terms of the harm that may be
18 incurred by some customers due to higher prices, is very likely to be swamped by
19 overall decline in prices brought about by entry. And the Commission also notes a
20 statement by Dr Small that I think mobile-to-mobile waterbed if it exists is not
21 really large.

22 So the Commission's current view is that the waterbed effect will be less
23 than the upper bound of 50% provided for in the Draft Report and if any waterbed
24 effect exists it's likely to be minimal.

25 In relation to the factual MTR for 2010, in the Draft Report the Commission
26 used the rates contained in the deeds. However, given that the deeds terminate
27 immediately if MTAS becomes a designated service, the Commission's current view
28 is that as submitted by Covec on behalf of Vodafone, it is reasonable to assume that
29 the prevailing rates at the time will continue to apply until the regulated terms take
30 effect. That means that the factual MTR for 2010 would be 15 cents per minute,
31 rather than 14.41 cents per minute as indicated in the Draft Report.

32 I don't know if Vodafone has any supplementary questions?

33 **MR CHIGNELL:** Just to follow up on that I suppose, are you then also going to take into

1 effect that was a minute + second price in your model? Because you're comparing
2 with second + second prices. And if so, what is the uplift you're going to use?

3 **MS MAZZOLENI:** I'm not sure I understand your question Tom?

4 **MR CHIGNELL:** The model is a second + second model, I think that's true to say?

5 **MR KINLEY:** Shane Kinley, from Commission staff. Yes, I believe it is a second +
6 second model at the moment, but would need to confirm that, but I believe that's the
7 case. So if I understood your question Tom if a party was to submit an undertaking
8 on a minute + second basis what would the implication of that be? No?

9 **MS MAZZOLENI:** In relation to the deeds you are saying?

10 **MR CHIGNELL:** In relation to the deeds, it's minute + second in the deed and if you're
11 comparing in your model between that and a second + second price under other
12 scenarios then you just need to - we believe you need to adjust.

13 **MS MAZZOLENI:** So it's not a question, you are just clarifying that the deeds have
14 minute + second and we need to make sure we're comparing apples with apples?

15 **MR YORK:** It brings the effective price up from 15 to about 18.

16 **CHAIR:** Yes, so the answer is that would be taken into account in the assessment and
17 there was some discussion, as I recall, at the Conference about what the differential
18 is between a minute + second and a second + second in terms of cost and price.

19 **MR YORK:** At the Conference I think it's fair to say a couple of parties - you'd be able to
20 check the transcript, I think were in the 23 percent I think was the number?

21 **CHAIR:** I certainly recall that.

22 **MR YORK:** Would the Commission be able to provide any views possibly - not in a
23 position to now, but shortly afterwards, on what it thinks might be an appropriate
24 uplift? Or whether it has any views on what that appropriate uplift might be?

25 **CHAIR:** I think the answer is that the transcript of the Conference gave some pretty clear
26 evidence of what that was and I think parties can read the transcript and make their
27 own decision.

28 **MR HADEN:** Just on that one, the information that we'll be submitting at the end of the
29 day will have actual minutes and billed minutes and so you will be able to derive the
30 difference from that data.

31 **CHAIR:** And you will make your assumptions clear in that no doubt?

32 **MR HADEN:** Yep. I did have a question following on from that. You talked earlier about
33 us setting out the assumptions that lay behind the undertaking we put up. Would

1 those assumptions include the assumptions that we were making around things such
2 as pass-through and waterbed?

3 **CHAIR:** I think you can provide as much information as you think will help us to assess
4 your undertaking and if you think it's helpful for the Commission to understand how
5 you've dealt with those issues, then the answer would be yes. I think it would be
6 helpful, but it's your call as to what information you want to provide us.

7 **MS MAZZOLENI:** I think our point is to stop there thought, the assumptions. We don't
8 need to go into all the reasons we've seen before, that all parties have made quite
9 clear.

10 **CHAIR:** And now I seem to be back to agenda item 1 and we've moved through that fairly
11 efficiently. I think it might be useful if we took a ten minute break to enable parties
12 to discuss among themselves now what we've discussed, because this is really the
13 last opportunity for clarification of any of these issues and give you an opportunity
14 then to raise any other supplementary questions that you've got arising out of what
15 we've said. We won't be coming back to do this again, but we don't want to lose the
16 opportunity if there are still issues that any party is unclear. So if we start again at
17 20 to 1 it will be. Happy with that as a process? Okay, thank you.

18

19 **[Adjournment from 12.28 pm to 12.46 pm]**

20

21 **CHAIR:** We reconvene, so this is an opportunity to raise any other issues in relation to the
22 undertaking process that they may wish to raise. We do have three quarters of an
23 hour left of time available, not sure you are going to need that long Richard but - so
24 I'll start with Vodafone, do you have any further issues of clarification you'd like to
25 explore?

26 **MR YORK:** Yeah we've got five questions we'll raise. I'll raise three and Tom the next
27 two.

28 The first one just in relation, just a clarification point on your comments on
29 the pricing principle for SMS. I guess to put it bluntly would the Commission reject
30 or be likely to reject an undertaking for SMS that did not contain some form of bill
31 and keep pricing?

32 **CHAIR:** Couldn't possibly comment on that. That's going beyond - we would obviously
33 consider undertakings on their merits and we can't prejudge what we would accept

1 or reject.

2 **MR YORK:** I guess to place context on it, you'd indicated that in your comments that
3 you'd see no reason to change from the IPP in the final pricing principle for the
4 services and as you'd know, for SMS it contains both TSLRIC --

5 **CHAIR:** It does.

6 **MR YORK:** -- and then as an option bill and keep --

7 **CHAIR:** Correct.

8 **MR YORK:** And you had indicated you'd at least considered there'd been a majority view
9 on bill and keep.

10 **CHAIR:** Yeah, we certainly noted that, yes.

11 **MR YORK:** Noted that. Okay. I guess - we obviously haven't put any final thoughts
12 towards any of this, but had been thinking up until now the Commission's likely
13 inclination was probably more to TSLRIC and I guess we want to get a bit of a steer
14 to the greatest extent possible if we did something that was a, you know, was a cost
15 based number or was a positive non-0 number are we just like wasting our time in a
16 sense?

17 **CHAIR:** Absolutely not, the undertakings - you've got to give the undertaking that you
18 wish to give and it will be considered and the comparison will be against the factual
19 and nothing is ruled in or ruled out. Our comment about the majority view at the
20 Conference, and we didn't use the word consensus because there were different
21 views, it was just to reflect what we had got from the Conference in terms of
22 majority view, but it doesn't rule in or rule out any options. So TSLRIC pricing for
23 SMS would be considered on its merits against the benchmark.

24 **MR YORK:** Okay. Second question we had was I'm not sure we got - you made some
25 comments in relation to agenda item 10 around the waterbed effect. One of the
26 issues raised in the report from Covec was that it considered it had found a - perhaps
27 an oversight or an error in its view in the way the Commission had sought to model
28 the waterbed effect. We were wondering had the commission put any thought to
29 whether it will adjust its fixed to mobile cost benefit model for the computational
30 issue raised by Covec in its submission or in its report.

31 **MS MAZZOLENI:** Just remind us of the computational issue.

32 **MR YORK:** Unfortunately I don't have Covec here to explain it. But basically there is an
33 assumed level of waterbed effect that might occur, say somewhere between 0 and

1 50%, say you assume it's 50%, you had indications from before but the way the
2 model seeks to capture that in Covec's view didn't do it properly, and so that it
3 underestimated the response.

4 **CHAIR:** Now I can say that the Commission is obviously having regard to those
5 submissions and will take them into account in its final report. It is aware of that
6 particular issue. But I think in terms of our indication of our thinking on the
7 waterbed effect you can really put that to one side in that in the totality of all of the
8 evidence that's where our current thinking is, as I outlined it - I mean, that was one
9 factor that was raised, there were a number of other also that was raised about the
10 waterbed effect, so certainly that will be addressed in the final report, not ignored.

11 **MR YORK:** Okay. The final question of clarification we had, you indicated - final of my
12 three then over to Tom's two, my final one. You had indicated that the Commission
13 had not at this point seen - or had not reached a view to change its position from the
14 Draft Report on the benchmarks. We were wondering whether we could take it
15 from that that there was nothing in the Analysis Mason Report that has influenced
16 your thoughts on relative benchmarks.

17 **CHAIR:** I don't think you can make any assumptions at all as to what has influenced our
18 thoughts. A wide range of factors have been taken into account and will be dealt
19 with in the final report. What we are sharing with you now is our preliminary views
20 on these issues, I don't think it's helpful to explain what we've take into account or
21 not taken into account to get to those views. That will be in the final report. So it's
22 not at all helpful to ask, have you considered this, have you considered that, how
23 much weight have you put on X or Y. We have taken everything into account to get
24 to our current thinking and nothing has been ignored.

25 **MR YORK:** So you are not in a position where you clarify why France would continue to
26 be included and Hungary would be excluded, the like principles behind it?

27 **CHAIR:** The final report will deal with all of this. All we're trying to do today to assist
28 the undertaking process is to let you know our current thinking. How we got there
29 will be detailed quite eloquently in the final report.

30 **MR CHIGNELL:** Okay fourth question. Relates to the - I think at the Conference it was
31 agreed that some information would be provided with respect to the interconnect
32 traffic that was being experienced in the initial weeks between 2degrees and the
33 other two networks and I think you've made a formal request for that and we're

1 providing it on Friday and I think you'll find the information very illuminating. My
2 question is, I suppose, what - two part question really, what's the process for that
3 information? Are you just going to digest it? Is there any further actions from the
4 parties on that? And secondly we did make a comment in the Conference that you
5 haven't really responded to here, which is that the cost benefit model did not take
6 into account 2degrees at all, it was a two operator model, or the effects of the
7 current interconnect agreement in the counterfactual between ourselves and
8 2degrees and so the question is what - is the Commission planning to make any
9 adjustments based on that feedback?

10 **CHAIR:** I think the answer to your first question is the information when received will be
11 analysed and inform the final decision, apart from that, that's as much as we can say.

12 And in terms of the second question, which I don't think we can comment
13 on, but it seemed to be -

14 **MR CHIGNELL:** Well there was no account taken of the interconnect agreement in the
15 model.

16 **CHAIR:** Yeah, I'm not sure the extent that that is relevant to the undertaking. We are
17 talking about undertakings relating to the industry, not a single interconnection
18 agreement between two parties.

19 **MR CHIGNELL:** I think it's relevant to the factual.

20 **CHAIR:** Yeah, the final report will deal with that. What we have said is that the factual for
21 regulation that we are comparing the undertaking to is as we've set out.

22 **MR CHIGNELL:** The final question, number 5, with respect to pass-through noted your
23 comments today that you gave considerable weight to the comments provided by
24 some of the fixed operators in particular, I think TelstraClear, at the Conference
25 around the bundle effect and some sort of pass-through that takes plays through
26 some bundles that can't be detected. And the question is, is it true that the
27 Commission's been provided information by TelstraClear to substantiate their
28 claims and if so is that - I presume that information is confidential, because we
29 haven't seen - or our RI people haven't seen it, and could it be made RI if it does
30 exist? Because it seems to be very relevant.

31 **CHAIR:** Again, I don't think that is - the reference to what TelstraClear said at the
32 Conference was just by way of observation. The views that the Commission has
33 reached on pass-through are based on a wide range of evidence and what was said at

1 the Conference, not solely on what TelstraClear said, not solely on what other
2 parties had said, but the general observation that competition is in bundles and
3 pass-through occurs in a multitude of ways was accepted by everybody at the
4 Conference, I think apart possibly from Vodafone that was not convinced and
5 maintained it was still a tort, as the transcript shows, but what the Commission took
6 into account was the totality of what was expressed at the Conference and only
7 referred to that in my comments as an example of the sort of comment that was
8 made.

9 **MR CHIGNELL:** Thank you.

10 **MR YORK:** I was going to say obviously an important factor in any analysis of this type
11 is to look at evidence and TelstraClear did refer to evidence in the Conference.

12 **CHAIR:** Yeah, I think to answer this, what we have shared with you today is our current
13 thinking. What I have said in relation to the last question is we are not going to
14 explain our reasons today, there are a wide range of reasons, they will be all set out
15 in the report. What we are trying to do is to assist you by letting you know this is
16 our current thinking on these issues, we don't expect to be cross-examined about the
17 basis upon which we've come to those views and it's not appropriate for us to share
18 that information.

19 **MR YORK:** No, I wasn't seeking to cross-examine, all I was seeking to note was I think
20 there was evidence referred to and submitted in the cross-submissions that I think
21 COI has been claimed over and so to Tom's question, can we have that made RI for
22 parties to look at?

23 **CHAIR:** Well, I don't think that's an issue for this discussion, but if it is an issue staff can
24 have a look at that.

25 **MS MAZZOLENI:** Can I just clarify one point to Vodafone. You talked about the
26 difference between network minutes compared to conversation minutes and the
27 benchmarks, can you please to assist us to assist you to put in undertakings, can you
28 make sure you clarify any assumptions that you make around that in your
29 undertakings?

30 **MR YORK:** Yeah.

31 **MS MAZZOLENI:** Thank you.

32 **CHAIR:** The staff have assisted me in relation to your issue about confidential
33 information. There is some COI in the TelstraClear submission. We would need to

1 consider a request for reclassification of that information, if relevant, and will look
2 into that and see if it's relevant.

3 **MR YORK:** Thank you.

4 **CHAIR:** 2degrees have any issues or clarification you wish to explore?

5 **MR MCCABE:** No issues.

6 **CHAIR:** Thank you. Telecom?

7 **MR WESLEY-SMITH:** Just one clarification it was mentioned I think in item 4
8 there were a couple of questions raised about term, but I don't think we discussed it?

9 **CHAIR:** Item 4 was it? Glide-path. Yes. I think in terms of the term, we said it is not for
10 the Commission to say what the Commission thinks is an acceptable term, we leave
11 it to the parties to make that judgment based on the factors outlined.

12 **MR WESLEY-SMITH:** Just to clarify, is that the position - the Commission's position the
13 same in respect of the term for any undertaking, or is that just in respect of the term
14 for glide path? Because, I guess, one of the questions that we've had in our mind is
15 you've got a five year CBA and you've got a cost path that you've set out for five
16 years. So to the extent that you've got any views of what sort of term would you
17 like to see a regulated undertaking apply for - or how you'd deal with a regulator
18 undertaking that was for a shorter period of time in your CBA? Any thoughts on
19 that issue would be helpful.

20 **CHAIR:** Again I think we are in a position where we have to say to parties have to make
21 their own judgment about the glide path. We've indicated the factors that would be
22 taken into account. But we can't be more specific because it's really for you - I think
23 it - do you want to add to that?

24 **MS MAZZOLENI:** Same with term, John. I mean, you know, that's entirely your
25 decision and we'll make an assessment of the length term benefits to end users of
26 that term.

27 **MR WILLIS:** Ed Willis, from Commission staff. I don't know if this is helpful John but
28 there are some provisions in Schedule 3A of the Act which do - talk to term. The
29 ones that I would just bring to your attention are clause 7(1) of Schedule 3A says
30 that basically an undertaking is for a period of five years. So that would be the
31 default position, I guess. But that - Clause 7 goes on to say that it could be a short
32 period if certain factors are - the Commission considers there's certain factors and
33 thinks that's a good idea. So I guess from your perspective if you think a shorter

1 period would be appropriate, it would be up for you to look at those factors and try
2 and present a case to the Commission.

3 **CHAIR:** Any other questions from Telecom?

4 [No further comments]

5 Well, thank you all -

6 **MR WIGLEY:** May I just -

7 **CHAIR:** Oh sorry, I didn't give you an opportunity.

8 **MR WIGLEY:** Just trying to clarify something I think, Tom asked a question before about
9 the relevance of the 2degrees and Vodafone ICA and how that feeds into the fix and
10 my general recollection is that it's mentioned in the Draft Report and I don't think it
11 feeds into the quantitative stuff yet, but it's kicking - it's in there somehow as some
12 sort of potential factor. As I understand it, that's still a live issue and I wouldn't
13 have thought that the Commission had got to the point yet of the granularity of
14 actually thinking about how it feeds in, so I'm assuming that's just something that's
15 up in the air as to how it's going to be applied in the Final Report etc?

16 **MS MAZZOLENI:** I think that's pretty much what we clarified, that it will be addressed
17 in the final report vis-à-vis the undertakings. I'm still struggling to see the relevance
18 of that.

19 **MR WIGLEY:** At the moment it's just up in the air. I think Tom was trying to get some
20 clarity around the degree to which it was factoring into the Commission's thinking
21 right now in terms of undertakings, but I am assuming that it hasn't been addressed
22 in really great detail, it's just something that's part of the process to be considered
23 later?

24 **MR CHIGNELL:** Sorry, maybe I can clarify the relevance for you Anita. So the
25 relevance is that if we're seeking to put an undertaking down we going to take into
26 account lots of information, partly the benchmarks and partly the cost benefit model
27 that you've put forward as well and I guess our goal is to try and beat that somehow,
28 otherwise it's going to be difficult for the Commission to approve an undertaking.
29 So how you model something like the 2degrees Vodafone interconnect agreement is
30 quite relevant, because in our view it should influence the way the model works,
31 because it is the factual. Well sorry, it could be in the counterfactual and the factual,
32 it just depends. I mean, I can't say more because it's obviously confidential but I
33 think we've had that discussion before.

1 **CHAIR:** We are looking at undertakings from all the parties to govern the entire industry.

2 It is a factor. It will be considered in our final report.

3 **MS MAZZOLENI:** Well, you've really confused me now. Are you saying now it's a

4 factual, as well as a counterfactual?

5 **MR CHIGNELL:** I think we'd need a closed session to discuss any further around the

6 terms of the agreement.

7 **MS MAZZOLENI:** I don't think the terms are relevant to that.

8 **MR CHIGNELL:** I think they are.

9 **CHAIR:** Certainly in terms of this session, I mean, we are aware of the issues, we are

10 aware of the arguments on both sides and we've indicated today our current thinking

11 on the issues that are important in terms of guiding you. But it's your decision what

12 decisions you make in terms of your undertaking.

13 **MR WIGLEY:** So to be clear, that is precisely what - the clarification I was seeking to

14 gain, is what the Chair has just said.

15 **CHAIR:** Thank you. Okay we can now draw this Conference to and end. Thank you very

16 much for your contribution and we look forward to seeing some undertakings

17 perhaps in a week and a half.

18

19 **[1.05 pm]**