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12 January 2009

Osmond Borthwick
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Commerce Commission
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Dear Osmond

RE: Mobile Termination Access Services undertaking applications

I refer to the "Reasons for Commerce Commission decision to investigate mobile termination access services" paper issued by the Commerce Commission (**Commission**) on 6 November 2008 (**Reasons Paper**). In the Reasons Paper, the Commission indicated that under clause 15 of Schedule 3A of the Telecommunications Act 2001 (**Act**), any access provider that wishes to make an undertaking in relation to this investigation must do so by no later than 12 January 2009.¹

In accordance with Schedule 3A of the Act, Vodafone is making undertaking applications in relation to the mobile termination access services (**MTAS**). These undertaking applications are attached. Vodafone considers that each undertaking application complies with the requirements of the Act. The undertaking applications do not contain any confidential information.

The need for investor certainty

We believe these undertaking applications offer an opportunity to create much needed certainty for the industry and consumers.

In April 2007, Vodafone and Telecom both provided court-enforceable Deeds of undertaking to the Crown in relation to mobile termination rates (**MTR Deeds**). In light of these agreements, the Minister of Communications chose not to accept recommendations to regulate fixed-to-mobile (**FTM**) voice termination rates. These agreements with the Crown:

- guarantee an immediate 15 per cent reduction in the price Vodafone charges other carriers to terminate traffic on its network. The amount of reduction will have increased to 25 per cent by 1 April this year (increasing to 30 per cent by April 2011); and
- ensure that the full amount of FTM termination rate reductions provided by Vodafone and Telecom under the Deeds would be passed-through in full to each other's consumers in the retail price of FTM calls.

¹ Commerce Commission, *Reasons for Commerce Commission decision to investigate mobile termination access services*, dated 6 November 2008, para 26

While regulation could have led mobile network operators to lower their termination rates, the existing regime provides no mechanism for the regulator to ensure pass-through to retail consumers. This has always been a concern with access price regulation – it can only affect prices at the wholesale level, and simply hope consequences will flow through to the retail level. For this reason, the pass-through mechanism contained in the MTR Deeds is a significant achievement – so much so that the Australian Competition and Consumer Commission (ACCC) has recently stated that:

“... the ACCC is disappointed it appears there has been no significant reduction in [Australian] FTM prices has emerged (sic) despite earlier expectations....Indeed, the Commission has observed an increase in Telstra’s residential FTM retail prices since 2007.

...

The Commission considers that the approach adopted in New Zealand may also be appropriate. In New Zealand any reduction in mobile termination rates by any MNO is required to be passed through to fixed customers in full under voluntary deeds made between MNOs and the New Zealand Government.”²

As a result of these findings, the ACCC has recently reached a draft decision not to lower mobile termination prices any further for the next three years.

The Deeds in New Zealand have worked. We have honoured our commitments to lower FTM voice termination rates and met our pass-through obligations. The audit reports provided to the Ministry of Economic Development in accordance with the “Deed of Undertaking relating to the provision of cellular termination services” (**Vodafone MTR Deed**) prove this. Already, we have provided over \$30 million through reduced FTM termination rates, and know Telecom will have fully passed through the lion’s share of this given it sends us far more FTM calls to terminate than any other carrier. We cannot, however, be so confident that the other fixed operators asking for lower termination rates have passed through their reductions in termination rates over the same period.

We have also, reasonably, operated under the expectation that if we meet our obligations under the MTR Deed, the Minister of Communications and the Commission will not seek to change the regulatory settings agreed around FTM voice termination during the period covered by the Vodafone MTR Deed. We have kept to our side of the arrangement. It would be particularly unjust if the regulator sought to encourage the Minister of Communications to bank the large reductions in mobile termination rates already provided in the early part of the MTR Deeds (together with the pass through benefits accrued to consumers), but not allow the regulated firms to receive the certainty over the rates they had expected in the later years of the MTR Deeds. We do not expect this is the Commission’s intention.

Importantly, the Deed (and the one entered into by Telecom) provides certainty to Vodafone and Telecom about the prices we can charge for FTM voice termination. Stable and reliable regulatory settings are important for any regulated business. It gives it confidence to make large scale infrastructure investments safe in the knowledge that a predictable approach will be taken to regulate revenue streams it will receive following that investment decision. This is especially important in industries involving large sunk-cost investments, such as in telecommunications networks. This is because these investments rely on many years of revenue streams to recover the large amounts invested. If a regulated business

² ACCC, *Draft MTAS Pricing Principles Determination and indicative prices for the period 1 January 2009 to 31 December 2011*, November 2008, pps. 18 – 19.

witnesses constantly changing regulatory settings, and can't have confidence in agreements made with the Crown, it loses its confidence in making investment decision for the long-term.

Never has such certainty been more important than in the current economic climate. Uncertain economic times are already affecting revenues from telecommunications services. These forces are not expected to abate in the coming twelve months. This is a context which is completely different to when the Commission was last considering this issue. Already firms are having to adjust to broader economic forces that are threatening service revenue levels. In these times, the last thing regulated firms need is a further unanticipated reduction in termination revenues caused by over-turning a 5-year arrangement entered into in good faith with the Crown less than two years after its introduction.

What is needed now more than ever is predictability over regulatory settings. Our undertakings can achieve this. They preserve the value of the Vodafone MTR Deed until its completion in March 2012, and then extend the benefits further by ensuring rate reductions fall to 11cpm by 2014. They also provide a mechanism to ensure full pass-through of these benefits to consumers of FTM calls terminating on Vodafone's network. These rates are replicated in our undertaking in relation to mobile-to-mobile (MTM) voice termination. Finally, our undertaking in relation to MTM text termination ensures the price of text termination will fall to 7.0 cents per text – a rate consistent with the only regulated text termination rate in Europe.

We look forward to working with the Commission and other industry participants to ensure the benefits of these undertakings are made available to consumers.

Form of undertaking applications

Vodafone has chosen to provide three separate undertaking applications – one for each of FTM voice termination; MTM voice termination; and MTM text message termination.

In making three separate undertaking applications, we note the Commission has recently indicated its preliminary view that the MTAS investigation pertains to two distinct services – voice (FTM and MTM) and SMS.³ The Commission invites Vodafone or any other interested party to put to the Commission any alternative views on this point.⁴ Notwithstanding this preliminary view, Vodafone notes that the Commission has previously distinguished between the downstream markets that relate to the provision of FTM and MTM voice calls when analysing whether it is appropriate to make recommendations to the Minister on whether to regulate mobile voice termination services.⁵ Further, given the unique issues involved in considering the implications of regulating FTM and MTM voice termination, and the inter-relationship between undertakings and the Vodafone MTR Deed, we think it is important to distinguish between FTM voice and MTM voice termination in this investigation. Accordingly, we believe providing the Commission with separate undertakings for each of FTM voice, MTM voice and SMS termination provides it with the greatest degree of flexibility when determining whether it is appropriate to accept undertakings provided to it by Vodafone (or any other access provider).

While we have provided three separate undertaking applications, it is noteworthy that there is a common set of terms and conditions (set out at Schedule 3) for all three undertakings. This is consistent with the structure of Vodafone's commercial interconnect agreements.

³ Commerce Commission, Letter to Richard York from Tom Forster re Investigation into Mobile Termination Access Services – Clarification of Undertakings Process, dated 28 November 2008, page 2

⁴ *ibid*

⁵ Commerce Commission, Schedule 3 Investigation into the Regulation of Mobile Termination, Final Report, 9 June 2005 p10.

Submission in support of the Vodafone undertaking applications

Vodafone notes that under clause 16(1) of Schedule 3A of the Act, interested parties must be invited to make written submissions on the application by the closing date specified in the Commission's public notice of the application.

Vodafone intends to make a detailed submission on its undertaking applications, and those of any other access providers who might choose to provide undertaking applications to the Commission.

Given Vodafone is providing three separate undertaking applications, the Commission may wish to give due consideration to an appropriate timeframe for the provision of submissions to an undertaking application. This will especially be the case if other access providers choose to make undertaking applications in relation to the MTAS.

Vodafone believes it would be of benefit to all interested parties if the Commission updated its Indicative Timeline document to indicate how it sees the consultation process in relation to these (and any other) undertaking applications progressing over the course of its investigation into this matter.

Interaction between the FTM voice undertaking and the MTR Deed

The Vodafone MTR Deed includes the prices Vodafone charges for FTM voice termination until 31 March 2012. We believe the MTR Deed should be preserved. It was entered into in good faith with the Crown, is court-enforceable and should be respected as such. Further, it is a good arrangement that provides significant benefits for consumers and regulated businesses alike. Accordingly, we see merit in ensuring that the benefits to consumers captured by the Vodafone MTR Deed are extended further into the future. We have sought to achieve this by having an undertaking term of five years from the registration date, but providing for the commencement of service only immediately after the expiry of the Vodafone MTR Deed. The effect of this is that the terms of the Vodafone MTR Deed would be preserved until 31 March 2012, after which the terms of the undertaking application for the FTM voice termination service would commence.

In order to ensure both the Vodafone MTR Deed and any accepted undertaking in relation to FTM voice termination can operate together, Vodafone is separately writing to the Minister of Communications to seek a minor variation to the Vodafone MTR Deed that would ensure that it remains in place, notwithstanding any acceptance of the FTM voice termination undertaking.

Should you have any further queries in relation to this (or any other) matter related to these undertaking applications, please feel free to contact me on 021 882 429.

Yours sincerely



Richard York
Regulatory Manager
Vodafone New Zealand