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21 August 2009

Dr Ross Patterson
Telecommunications Commissioner
Commerce Commission
P O Box 2351
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Dear Ross

RE: PROPOSED RELEASE OF RECLASSIFIED VODAFONE INFORMATION

I am writing further to the email exchanges between the Commission and Vodafone/MGF Webb regarding the Commission's decision to reclassify information in its draft report on MTAS. I have reviewed the email exchanges and am surprised that the Commission persists in its view that the information is appropriate to be reclassified. I set out below my understanding of the issues and how Vodafone sees that they are best dealt with.

On 6 November 2008, the Commission issued an order under section 100 of the Commerce Act ("**Confidentiality Order**") to protect confidential information supplied to, or obtained by, the Commission in its MTAS investigation. On several occasions, Vodafone supplied its information to the Commission regarding the split of on-net and off-net revenues and traffic volumes ("**On-net Information**"). Vodafone requested that the Commission classify the On-net Information as Commission only ("**COI**"). The Commission reviewed all COI information and announced that this information must be reclassified as restricted information ("**RI**") under the Confidentiality Order. Vodafone was given no choice but to resubmit the On-net Information as RI. Similar information was provided by Telecom about its revenue and traffic volumes. Telecom's On-net Information was also reclassified from COI to RI.

On Wednesday afternoon the Commission advised of its decision to reclassify information as public which was previously classified as COI. The information in question is based on an aggregation and averaging of the On-net Information from Vodafone and Telecom ("**averaged information**"). The Commission advised that it would release the reclassified averaged information that very afternoon. MGF Webb responded to the Commission's advice saying that they were concerned that there might be an issue for Vodafone and asking for time to consider and respond.

At 10.30am on Thursday, 20 August 2009, MGF Webb replied to the Commission, on Vodafone's behalf, setting out why Vodafone considered that the averaged information the Commission had decided to reclassify as public must remain confidential. The reason was that Vodafone was advised by its economic experts that disclosure of the averaged information would enable Vodafone and Telecom to work

backwards using other information each held, to calculate close estimates of the on-net revenue and traffic volume of the other. In Vodafone's view, this should have been enough to dissuade the Commission from reclassifying the information as public.

That same day, at 10.48am, Telecom responded to the Commission. Its response was similar to Vodafone's but it added that Telecom's retail mobile team had advised that estimates of Vodafone's on-net revenue and volumes "would be very valuable [to them] indeed".

In the circumstances, Vodafone does not accept that the Commission has any basis upon which it can presently justify reclassifying the information, however, it does accept that it is appropriate that the averaged information be reclassified from COI to RI. Certainly the public interest does not demand that the information be made public if the information is not COI. As with all RI, other parties involved in the MTAS investigation have access to the averaged information. This will enable the information to be used by all sides of the debate, while still protecting the averaged and On-net Information. In this way, the section 100 orders allow any public interest to be served. In those circumstances, there is no principled decision other than to apply a RI classification to the averaged information.

Vodafone understands that the Commission questions the risk to Vodafone and to Telecom should this information be publicly released as the Commission intends. I understand that this is because the Commission asked a Telecom internal economist (who did not have access to the averaged information) for his estimates of Vodafone's revenue and volumes. We understand that the person in question was only given approximately 20 minutes to undertake the estimates and that the estimates were not close. This provides little comfort to Vodafone. Telecom's economist did not have access to averaged information and had little time to undertake the estimates. We do not know whether or not the economist had access to the market information that will be held by the Telecom retail mobile team and others within Telecom, which will inform any analysis should this information be made public. Vodafone is concerned that given appropriate time and market intelligence, if the averaged information is made public, Telecom may be able to refine its estimates and they will be very valuable to Telecom and prejudicial to Vodafone.

Vodafone does not consider it reasonable in the circumstances that it should be put in the position of having to prove to the Commission the closeness of the estimates it could make to Telecom's On-net Information. This will not eliminate risk to Vodafone as we do not know what other relevant and helpful information Telecom may hold. We do not have anyone in-house qualified to do this and who is also entitled to access COI or RI. Covec could do this for us, with the assistance of market information from others, but it will take time and, at present, Covec needs to focus on preparing for the MTAS conference, which is just over a week away. If the Commission persists in its view that Vodafone must prove conclusively that the estimates are close enough to be prejudicial, we will need a calendar week, following the conference, to perform the exercise properly.

In general, Vodafone questions the appropriateness of requiring parties, who are already investing significant time and resources into a Commission investigation, to be put to the further time, risk and expense of determining conclusively and to the Commission's satisfaction whether the expert advice they have received on confidentiality issues is correct. We are concerned at the precedential effect of this stance. We are also concerned that Vodafone be permitted to continue to focus our limited resources on

the actual investigation at hand, rather than on last-minute diversions created by the Commission about confidentiality or other matters. We consider that any risk attaching to the publication of prejudicial commercial information by the Commission should be reason enough for the Commission to maintain protection of the information. Without such assurances, the Commission will undermine its own process.

If the Commission still intends to reclassify and publish the information, without affording the parties a proper opportunity to determine the actual prejudicial effect of the release of the averaged information, then Vodafone asks to be provided with at least two working days' notice prior to release of the averaged information. This will enable us to consider and determine whether any steps are necessary to protect the information.

Please let me know how the Commission intends to proceed.

Yours sincerely,

Vodafone New Zealand Limited

A handwritten signature in blue ink, appearing to read 'David Kreider', with a long horizontal stroke extending to the right.

David Kreider, Chartered Arbitrator

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