



Vodafone New Zealand Limited  
Legal Department  
20 Viaduct Harbour Avenue  
Private Bag 92161  
Auckland, New Zealand

Reception +64-9-355 2000  
Facsimile +64-9-355 2005

**20 August 2009**

Ross Patterson  
Telecommunications Commissioner  
Commerce Commission  
P O Box 2351  
**WELLINGTON 6140**

Dear Ross

**RE: INVESTIGATION INTO MOBILE TERMINATION ACCESS SERVICES (MTAS)**

I am writing to raise again the serious concerns Vodafone sees with the Commission's process in its MTAS investigation. The issues are significant and it is important that the Commission is aware that our concerns remain. Vodafone understands that the Commission has concerns too, to avoid gaming of the process and unnecessary delay. While it is necessary for me to ensure that the Commission has fair notice of Vodafone's concerns, I will also take this opportunity to suggest a way in which Vodafone considers its concerns and those of the Commission can be addressed.

**PROCESS ISSUES**

In our letter of 3 April 2009, we set out in detail the issues we identified with the Commission's process to date and how we thought these issues could be addressed to ensure that the Commission met its statutory obligations while observing natural justice. Although we were pleased that in response to our letter the Commission reconsidered its position to allow revised undertakings to follow the release of a draft report, many concerns remain and two are key:

- a) the Commission's failure to undertake cost-benefit modelling for each service it proposes to regulate. This failure means that the Commission cannot discharge its obligations under

section 18(2) of the Telecommunications Act 2001 (**Act**) and also means that affected parties are deprived of the opportunity to be fully informed and be heard; and

- b) access providers do not know what the Commission's final views are on contentious issues. They must before they are given a last opportunity to provide revised undertakings. If this does not occur, there is an unacceptable risk to dynamic efficiency and a risk that the aims of Schedule 3A will not be met.

Our concerns are set out in more detail below.

### **Lack of cost-benefit modelling for MTM, ITM and SMS termination**

We are concerned that even after preparing and releasing a draft report on 30 June 2009 ("**Draft Report**"), the Commission has not undertaken cost-benefit analyses for each service it proposes to regulate. A cost-benefit model is required for each service as each involves different retail services (and, in some cases, different retail markets) and the demands for the respective services differ. A cost-benefit model for FTM only is not a proxy for modelling MTM or SMS.

Without robust cost-benefit modelling:

- (a) the Commission cannot discharge its obligations under section 18 of the Act. It cannot identify, measure or compare the risks and benefits of regulation against the undertakings given by access providers; and
- (b) access providers cannot be fully informed of the basis for the Commission's views nor can they accurately identify the matters they need to address in undertakings and submissions.

The Commission has identified in this context that quantitative analysis is important and informs the qualitative analysis<sup>1</sup>. Vodafone agrees with this. However, the Commission has stated<sup>2</sup> that it is difficult to undertake cost-benefit models for MTM and SMS services. We agree that such modelling is not straightforward but this does not mean it cannot or should not be done. We have consistently argued

---

<sup>1</sup> Commerce Commission "Draft Report on whether the mobile termination access services (incorporating mobile-to-mobile voice termination, fixed-to-mobile voice termination and short-message-service termination) should be come designated or specified services", paragraph 46

<sup>2</sup> Ibid, paragraph xxiv.

that it is required and there has certainly been sufficient time for the Commission to undertake this task. We are aware that other regulators have undertaken cost-benefit modelling for MTM.<sup>3</sup>

We do not understand why the Commission would omit this important step which has, until this investigation, been such an important part of its assessment of efficiencies and which the Commission still maintains is important. Without quantitative analysis, all the Commission has are theories, untested and unsupported by empirical data. Vodafone says done correctly, quantitative analysis of each service would undermine the Commission's theories. Proceeding to regulate in the absence of robust analysis puts at risk the very efficiencies which section 18 was enacted to protect.

The need to produce actual models to inform the qualitative analysis is demonstrated by the FTM cost-benefit model. That model contains major flaws but, when those are remedied, the model does not support regulation.<sup>4</sup> Production of the model has enabled us and other providers to identify and address these flaws. This model is not, of course, a substitute for models of the other services the Commission proposes should be regulated.

#### **Interconnection agreements and new data**

The Commission recently required interested parties to provide to it certain information about commercial interconnection agreements.<sup>5</sup> The Commission subsequently ordered that such information be made available to other parties, subject to certain conditions.<sup>6</sup> We note that the request came after the Draft Report. As stated in our letter of 24 July 2009, if the Commission intends to amend its cost-benefit model for the FTM termination service as a result of the review of such information, then the Commission must allow interested parties to have an opportunity to analyse and comment on the revised model. The same applies to any new or revised data which the Commission has received. This must be done prior to the date on which access providers are given a final opportunity to revise undertakings, otherwise they will be deprived of an opportunity to address in their undertakings any material changes and to provide any available reasonable alternatives to regulation.

---

<sup>3</sup> As we are only aware of one jurisdiction, France, where SMS has been regulated, we do not expect that other regulators have considered or undertaken the modelling of SMS.

<sup>4</sup> Covec, *MTAS Regulation Quantitative Analysis*, 27 July 2009, paragraph 25.

<sup>5</sup> Letter from Commerce Commission to Interested Parties, 22 July 2009.

<sup>6</sup> Letter from Commerce Commission to Interested Parties, 13 August 2009.

### **Further information required**

For each of the reasons set out above, Vodafone considers that the Commission must release a cost benefit analysis for each service it proposes to regulate. Without this the Commission cannot satisfy its obligations under the Act. In order to observe the fundamental requirements of natural justice the models must be provided and affected parties must have the opportunity to submit on those further models.

### **Absence of conclusions on key parameters and assumptions and timing of revised undertakings**

As stated in our submission of 28 July 2009, the Commission's FTM cost-benefit model is highly sensitive to some key assumptions.<sup>7</sup> These include:

- the approach used by the Commission to estimate the cost of mobile termination in New Zealand, and the extent to which costs will decrease over time;
- the extent to which reductions in FTM termination rates will promote competition in downstream markets and the extent of any pass-through of FTM termination rates into retail FTM prices for consumers;
- the extent to which reductions in FTM termination rates will generate detriments to mobile phone users, including by way of the "waterbed effect" and possible reductions in the level of investment by mobile phone operators in network upgrades and quality of service; and
- the extent to which a glide path should be incorporated into an appropriate specification of regulated prices under the factual of regulation.

Each of these assumptions has been contentious and the subject of expert opinion. In some cases the experts' views have been contradictory. In light of this, access providers do not know what the Commission's views are likely to be. Without being provided with the Commission's final conclusions on these key assumptions and parameters, access providers, such as Vodafone, do not have certainty about the Commission's proposed factual scenario and the case, if any, for regulation. Certainty about the purported case favouring regulation is necessary for structuring any further revised undertakings. The concluded view on each underlying factual matter will directly affect the modelling outcome. Only when the Commission has provided its final views on these key assumptions and parameters, can parties consider revising undertakings informed by an understanding of the specific advantages and benefits

---

<sup>7</sup> See for example paragraph 24.

which the Commission concludes would be delivered to end-users through regulation, and which could accordingly be expected to optimally address the commercial and other interests of all stakeholders.

However, in its Draft Report, the Commission states that:

*“Further, the Commission wishes to stress that its preliminary view is that it would be unlikely to allow further opportunities for revised undertakings to be submitted after the Conference on this draft Report unless new substantive issues are raised in submissions on the draft Report which impact on the Commission’s assessment of the undertakings.”<sup>8</sup>*

Not only does provision of revised undertakings following release of the Commission’s concluded views represent the fair and open process the Commission says it wishes to conduct,<sup>9</sup> the legislation requires it. As we said in our letter to the Commission of 3 April 2009, at any time while the Commission is conducting an investigation into a proposed regulatory change, clause 3 of Schedule 3A allows access providers to make offers to provide the service to access seekers on the terms of a written undertaking. This statutory right is limited only by clause 4(2), which sets out that an undertaking cannot be amended after the Commission has made a recommendation in respect of that undertaking in its final report. A process which closes off the opportunity for undertakings before a cost-benefit model has been released for all services (or before concluded views on contentious assumptions and parameters have been communicated), is contrary to the process envisaged by Schedule 3A of the Act. The Act does not permit the Commission to impose a final deadline prior to releasing a proper cost-benefit analysis (and prior to communicating final assumptions and parameters) for all services it is investigating. As we have said, the Commission should release cost-benefit models for each service and its final views on key assumptions and parameters, and should thereafter provide an opportunity for revised undertakings. Failure to do so deprives access providers of their right, under clause 3 of Schedule 3A of the Act, to submit an undertaking (subject to particular requirements) as an alternative to regulation which will avoid the need for that regulation.

If the Commission does not publish its final views on the key assumptions and the cost-benefit model before access providers are given a final opportunity to revise undertakings, undertakings are unlikely to be acceptable alternatives to proposed legislation. If the undertakings are pitched too high, the Commission will not accept them; if they are pitched too low, there is a serious risk to dynamic efficiency

---

<sup>8</sup> Supra, n1, paragraph 20.

<sup>9</sup> Commerce Commission, *A Guide to Regulatory Decision Making by the Commerce Commission for the Telecommunications Sector*, 31 July 2009, paragraph 188.

if they are accepted. The latter poses the worst risk to the long-term benefit of consumers – and indeed the nation’s productivity over time – as it deprives them of access to technologies and services that would otherwise be invested in and available to them. As recently indicated by the Commission, it is:

*... important to take account of the investment incentives facing all ... parties when exercising its judgement in determining the terms of access to regulated services.*

*The Commission has previously indicated that where a tension exists between short-term allocative efficiency and long-term dynamic efficiency, the Commission will give greater weight to the promotion of the latter. The Commission considers that this approach remains appropriate. Ongoing innovation and efficient investment over time can deliver significant long-term benefits to end-users, and the adverse consequences of deterring or delaying such investment may be substantial.<sup>10</sup>*

The Commission can be assured that Vodafone does not request communication of the Commission’s final views on these important matters to enable it to have a further opportunity to debate whether or not the Commission is right in its views. It does so out of a genuine concern that it, and other access providers, are given a fair opportunity to give effect to the aims of Schedule 3A by submitting properly tailored revised undertakings once the Commission’s final views on important, contentious issues are known.

### **Next Steps**

We understand from the Commission that a full consultation process, or any further consultation on matters covered in submissions and cross-submission is not acceptable as the Commission. We understand that the Commission’s view is access providers only seek such a process to delay and game the process. We disagree with the Commission on this view. Vodafone has not been at all disingenuous in raising the issues which it has to date. In order to accommodate the Commission’s concerns but still have some regard to the requirements of the Act and natural justice, Vodafone suggests that the Commission adopt the following revised process:

- a) the Commission prepares and releases cost-benefit models for any service in addition to FTM it proposes to regulate;

---

<sup>10</sup> *Ibid*, paragraphs 134-135

- b) parties have two weeks to submit on the additional models with cross-submissions to follow a week later;
- c) the conference is held;
- d) the Commission releases its final views on key parameters and assumptions;
- e) access providers have two weeks to provide any revised undertakings;
- f) if undertakings are acceptable but there are compatibility issues between them or are close to acceptable but some issue remains in relation to particular terms, a workshop should be held to resolve the issues; and
- g) final report released.

Vodafone invites the Commission to consider the contents of this letter and to commit to a process which addresses its concerns. Vodafone requests the Commission to confirm in writing by 5pm on Wednesday, 26 August 2009 as to whether or not it will amend its process in the way outlined above. In the interim, Vodafone must reserve all rights in this respect.

I look forward to hearing from you.

Yours sincerely,

**Vodafone New Zealand Limited**



David Kreider, Chartered Arbitrator  
**General Counsel \*\***

Mobile: +6421 738 801

Direct fax: +64 9 355 2005

\*\* Licensed solicitor in England, Wales, and Hong Kong. Licensed attorney-at-law in California, Florida, New York, New Jersey, and the District of Columbia, USA.

c.c. [simon.power@national.org.nz](mailto:simon.power@national.org.nz)

c.c. [s.joyce@ministers.govt.nz](mailto:s.joyce@ministers.govt.nz)

