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COMMERCE COMMISSION

Decision

Decision Whether to Investigate an Application for Determination for Designated Multinetwork Services

Decision whether to investigate under section 35 of the Telecommunications Act 2001 (“the Act”) in the matter of an application for determination for designated multinetwork services under section 31 of the Act by:

**TELSTRACLEAR LIMITED
CALLPLUS LIMITED
COMPASS COMMUNICATIONS LIMITED
IHUG LIMITED
WORLDXCHANGE COMMUNICATIONS LIMITED**

- Commission:** Douglas Webb
- Summary of Application:** The parties listed above applied for a determination under section 31 in regard to (a) Local telephone number portability service; and (b) Cellular telephone number portability service.
- Decision:** Under section 35, the Commission has decided to investigate the application for determination concerning the local telephone number and cellular telephone number portability multinetwork services.
- Date of Decision:** 29 July 2003

CONTENTS

INTRODUCTION.....	1
THE APPLICATION	1
DESCRIPTION OF DESIGNATED MULTINETWORK SERVICES.....	3
Local Telephone Number Portability Service.....	3
Cellular Telephone Number Portability Service.....	3
THE FRAMEWORK FOR THE DECISION.....	4
ASSESSMENT OF APPLICATION UNDER SECTION 32 OF THE ACT.....	6
Absence of a Request for Determination under Section 31(a) of the Act .	
LOCAL TELEPHONE NUMBER PORTABILITY SERVICE.....	6
Section 32 (a)	6
Section 32 (b).....	6
Section 32 (c).....	7
CELLULAR TELEPHONE NUMBER PORTABILITY SERVICE.....	7
Section 32 (a)	7
Section 32 (b).....	7
Section 32 (c).....	7
OTHER MATTERS	8
Qualification as Access Seekers	8
Local and Cellular Telephone Number Portability Separation.....	8
Execution of the Application	8
Costs.....	9
COMMISSION DECISION UNDER SECTION 35 OF THE ACT.....	9

INTRODUCTION

1. The Telecommunications Act 2001 (“the Act”)¹ regulates the supply of telecommunications services in New Zealand.
2. The Commerce Commission (“the Commission”) has a range of responsibilities under the Act, including making determinations in respect of designated access services.

THE APPLICATION

3. On 26 March 2003, TelstraClear Limited (“TelstraClear”), CallPlus Limited (“CallPlus”), Compass Communications Limited (“Compass”), ihug Limited (“ihug”), and WorldxChange Communications Limited (“WorldxChange”) (together the “Applicants”) jointly filed with the Commission an application for determination of designated multinet network services under section 31 of the Act (the “Application”). A letter supporting the application was also received from Econet Wireless NZ Limited (“Econet”).
4. The Application sought a Determination by the Commission in regard to:²
 - (a) the local telephone number portability service, and
 - (b) the cellular telephone number portability service
5. Under section 31, an access seeker of a designated multinet network service may, subject to sections 32 and 33, apply to the Commission for a determination of:
 - (a) the functions that must be performed by a system for delivering the service and the standard to which those functions must be performed; and
 - (b) the formula for how the cost of delivering the service must be apportioned between the access seeker and all access providers of the service.
6. The Applicants have sought a Determination in relation to part (b) only; that is, the formula for how the cost of delivering the local and cellular telephone number portability services is to be apportioned between “participants in Number Portability Services”³.
7. On 27 March, pursuant to section 34 of the Act, the Commission notified the applicants and various access providers that it had received the Application. The access providers notified include; Telecom New Zealand Limited (“Telecom”), Vodafone New Zealand Limited (“Vodafone”), and Walker Wireless Limited (“Walker Wireless”).
8. On 7 April the Commission requested comments on the Application from the Applicants and access providers identified earlier and sought specific comment on the fact that the Applicants have sought a Determination of the cost apportionment formula only, and not the functions that must be performed by a system for delivering the service. The applicants were also asked to comment on how the obligations under

¹ All terms and phrases that are defined within the Act have the same meanings in this Decision. All references to Parts, schedules and sections are to the Parts, schedules and sections of the Act.

² Application for Determination for Number Portability, 26 March 2003, paragraph 1.

³ Ibid, paragraph 9.

sections 37(1)(a) and 40(1)(a) of the Act would be met in the absence of a technical solution for each of the designated multi-network services for which an application had been lodged.

9. Section 37(1)(a) of the Act states that subject to subsection (2), the draft Determination must include a description of the functions that must be performed by a system for delivering the service and the standard to which those functions must be performed. Section 40(1)(a) of the Act states that subject to subsection (2), a designated multi-network service determination must include the functions that must be performed by a system for delivering the service and the standard to which those functions must be performed.
10. On 17 April the Commission received a reply from TelstraClear in response to the Commission's request for comment. Within that reply TelstraClear advised that to be able to fully respond it needed to be able to "reference information highly pertinent to the progressions of Long Term Number Portability ("LTNP") development, the current status of the technical solution and degree of industry consensus on this matter"⁴. TelstraClear advised that it was unable to provide the Commission with information of this kind, which would allow the Commission to meet the requirements of section 40(1)(a), due to the confidentiality constraints applying to parties to the Number Administration Deed ("NAD"). The information in question related to work which had been completed by a dedicated NAD working committee on the functions and standards for the long term number portability solution.
11. TelstraClear also advised that it had sought agreement from the NAD parties for the release of this information to the Commission but had been unable to secure the necessary unanimous agreement. TelstraClear suggested that the Commission use its powers under section 15(f) of the Act, and section 98 of the Commerce Act 1986, in order to obtain the relevant information. A request for an extension to the period for comment was also requested, and subsequently granted by the Commission.
12. Comments in response to the Commission's request were received from Vodafone, TelstraClear, Telecom and ihug.
13. In its response, Telecom stated that the absence of a request for the Commission to determine the functions that must be performed by the system delivering the service under section 31(a) of the Act invalidated the application and therefore the Commission cannot decide to investigate. This view was also put by Vodafone, which considers that the Commission is unable to comply with its statutory obligations to include a description of the functions that must be performed by a system for delivering the service, and the standard to which those functions must be performed, when the Application does not seek determination on these elements⁵.
14. TelstraClear stated that the requirements on the Commission under section 37(1)(a) and section 40(1)(a) are limited to the inclusion of a "description" of the functions and standard of performance⁶. TelstraClear contends that the Commission is able to fulfil its statutory criteria by describing the functional elements of the Long Term

⁴ Letter from Forsyth to Borthwick, Request for Comment on Application for Long Term Number Portability, 17 April 2003.

⁵ Letter from R. Ellis, Vodafone: Comment on Application for Number Portability, 17 April 2003.

⁶ TelstraClear response to Request for Comment: Application for Number Portability, 30 May 2003, paragraph 12.

Number Portability solution, without having to exhaustively detail the technical components of that solution⁷.

15. TelstraClear stated that the functional elements of the number portability solution have already been agreed by the NAD parties, who have established a working group entitled the Industry Portability Management System Working Group (“IPMSWG”)⁸. The Commission notes that the IPMSWG has been tasked with developing processes for porting numbers between networks. This working group was established following the completion of a cost benefit study that was commissioned by the NAD parties⁹. The broad functionality required of a suitable technical solution was presented within this publicly available report.
16. On 27 June TelstraClear provided to the Commission public and confidential versions of the NAD information which outline specific aspects of the technical specifications of a portability solution being developed by NAD members.

DESCRIPTION OF DESIGNATED MULTINETWORK SERVICES

Local Telephone Number Portability Service

17. Subpart 2 of Schedule 1 of the Act describes the Local Telephone Number Portability service as:

A service that enables an end-user of a fixed telephone network service to change providers of that service but to retain the same telephone number within a local calling area.

18. The Act defines access providers of this service as:

Every person who operates—

- (a) a PSTN to which numbers have been allocated; and
- (b) a telephone service that relates to that number portability service

19. Access seekers are defined as:

Any person who—

- (a) operates a PSTN to which numbers have been allocated; and
- (b) operates a telephone service that relates to that number portability service; and
- (c) seeks access to that number portability service.

Cellular Telephone Number Portability Service

20. The Cellular Telephone Number Portability service is described at Subpart 2 of Schedule 1 of the Act as:

A service that enables an end-user of a cellular telephone network service to change providers of that service but to retain the same telephone number (including the same cellular network access code).

21. In the case of cellular telephone number portability, access providers are defined as:

Every person who operates—

- (a) a PSTN to which numbers have been allocated; and
- (b) a telephone service that relates to that number portability service

22. Access seekers are defined as:

⁷ Ibid, paragraph 13.

⁸ Vodafone is the current Chair of the IPMSWG.

⁹ A Cost-Benefit Study of Long Term Number Portability in New Zealand: Report for the NAD Management Committee; AAS/LECG, 19 November 2001.

Any person who—

- (a) operates a PSTN to which numbers have been allocated; and
- (b) operates a telephone service that relates to that number portability; and
- (c) seeks access to that number portability service.

THE FRAMEWORK FOR THE DECISION

- 23. The Commission considers the application complies with the criteria specified at section 33.
- 24. Under section 31 of the Act, an access seeker of a designated multinet network service, in this case the local telephone and cellular telephone number portability services, may apply to the Commission for a determination of –
 - (a) the functions that must be performed by a system for delivering the service and the standard to which those functions must be performed; and
 - (b) the formula for how the cost of delivering the service must be apportioned between the access seeker and all access providers of the service.

Absence of a Request for Determination under Section 31(a) of the Act

- 25. Given that the Application seeks a determination only with respect to the cost apportionment formula (part (b)) and not the functions and standards component (part (a)), the question is whether the Application satisfies the requirements of section 31 of the Act.
- 26. The Commission has considered the application requirements of section 31 in the context of the general scheme and purpose of the Act and disagrees with Telecom’s argument that the Commission must interpret sections 31(a) and (b) on a conjunctive basis. The Commission considers that the Act is sufficiently flexible to allow the Commission to address a number of possible scenarios arising in relation to applications for determinations on multinet network services.
- 27. The Commission’s flexibility in dealing with these scenarios is signalled in section 32(c) of the Act:

Despite section 31, no person may apply for a determination—

- (a) of any matters that an approved code already provides for; or
 - (b) if the Commission has already made a determination in respect of the designated multinet network service and the determination has not expired; or
 - (c) **if there is an agreement between the access seeker and all access providers for the supply of the service and the agreement provides for all of the matters set out in section 31.** [Emphasis added.]
- 28. Section 32(c) suggests that a person may apply for a determination in situations where, for example, the agreement between the access seeker and all access providers only provides for some of the matters outlined in section 31.
 - 29. For example, where there is agreement between the access seeker and the access providers on the functions and standards of the system but not on the cost apportionment formula, an access seeker may apply for a determination on the cost apportionment formula under section 31(b), (subject to section 32). Similarly, where the access seeker and the access providers agree on the cost apportionment formula

but not on all or some of the functions and standards, an application on the functions and standards may be submitted to the Commission, (subject to section 32). These scenarios are consistent with the Commission's approach to investigating applications for designated access services and specified services under section 20 of the Act.

30. In neither of these scenarios is there agreement between the access seeker and all access providers which provides for all of the matters described under section 31. These scenarios are, thus, not inconsistent with section 32(c).
31. This approach is consistent with the Commission's ability to regulate its own procedure under section 9(6) of the Act. It is also consistent with section 53(b) of the Act which states that:

For a determination made under this Part, the Commission –

(b) is not bound by technicalities, legal forms, or rules of evidence: ...

32. The Commission considers that it is possible to develop a workable cost apportionment formula, which promotes competition in telecommunication markets for the long term benefit of end-users of telecommunication services in New Zealand, although the specifics of a technical solution have yet to be developed. The Commission notes that in other jurisdictions such as Australia, cost apportionment formulas have been developed independently from the technical solution.

The Number Administration Deed

33. The Commission proposes to consider the deliberations of the NAD during its investigation process and disagrees with Telecom's argument that: "even if the "functions and standards" were to be agreed separately from the Commission's determination regarding cost apportionment, it would be inappropriate for the NAD parties (who do not represent the entire industry or even all of the Applicants) to assume that role. The Commission must consider any approved code (i.e: an industry code made by the Forum) but not the outcome of the NAD parties' deliberations"¹⁰.
34. The Commission may consider, and determine, the appropriateness of using the NAD's work on the functions and standards of number portability for the purpose of its determination under section 53(b) of the Act which states that:

For a determination made under this Part, the Commission - ...

(b) may inform itself of any matter relevant to the determination in any way it thinks appropriate...

35. If there were an approved code for number portability, the Commission would be required to consider the code and not the NAD's deliberations. However, that is not the case at present. The absence of a code does not require the Commission to ignore the deliberations of the NAD.
36. The Commission considers that the absence of an agreement between the NAD members on the technical solution does not preclude the Commission from investigating the Application.

¹⁰ Telecom's comments on the "Application for Determination for Number Portability" dated 26 March 2003, 30 May 2003, paragraph 10.

37. The Commission notes that for the purposes of the draft Determination, the Act only requires that a description of the functions that must be performed by the system for delivering the service be included. The Commission considers that a description of such functionality has already been specified by the NAD parties within the study completed on their behalf by AAS/LECG. A more detailed specification of the functions is required in the final Determination. If the Commission considered after investigation that there was insufficient information to enable it to meet the requirements of sections 36(1)(a) or 40(1)(a) it could decline to continue.

Conclusion

38. The Commission therefore considers that the Application is within the Commission's jurisdiction to investigate, despite the absence of a request for a determination on the functions and standards of a number portability system.

ASSESSMENT OF APPLICATION UNDER SECTION 32 OF THE ACT

39. Section 32 states that no person may apply for a determination –
- (a) of any matters that an approved code already provides for; or
 - (b) if the Commission has already made a determination in respect of the designated multinetwork service and the determination has not expired; or
 - (c) if there is an agreement between the access seeker and all access providers for the supply of the service and the agreement provides for all of the matters set out in section 31.
40. The Commission has reviewed the Application against the criteria specified in section 32 of the Act. The Commission has examined the documents provided in support of the Application, and the comments made on the Application by all parties with a material interest.

LOCAL TELEPHONE NUMBER PORTABILITY SERVICE

Section 32 (a)

41. Section 32 of the Act states that, despite section 31, no person may apply for a determination –
- (a) of any matters that an approved code already provides for;
42. The Commission is satisfied that an approved code in relation to the Local Telephone Number Portability service does not currently exist and accordingly, that the Application meets the requirement of section 32(a) of the Act.

Section 32 (b)

43. Section 32 (b) of the Act states that, despite section 31, no person may apply for a determination –
- (b) if the Commission has already made a determination in respect of the designated multinetwork service and the determination has not expired;
43. The Commission has made no previous Determination in respect of the Local Telephone Number Portability multinetwork service.
44. Accordingly, the Commission is satisfied that the Application complies with the requirements of section 32(b) of the Act.

Section 32 (c)

45. Section 32 (c) of the Act states that, despite section 31, no person may apply for a determination –
- (c) if there is an agreement between the access seeker and all access providers for the supply of the service and the agreement provides for all of the matters set out in section 31.
46. The Application states that “[t]here is no current agreement between any of the Applicants and any access provider on the apportionment of the costs of providing the long-term solution for Number Portability Services”¹¹.
47. The Commission concludes that there is no evidence of an agreement between parties for the provision of a Local Telephone Number Portability service which provides for all of the matters set out in section 31 and accordingly, that the requirement specified by section 32(c) of the Act has been met.

CELLULAR TELEPHONE NUMBER PORTABILITY SERVICE**Section 32 (a)**

48. Section 32 of the Act states that, despite section 31, no person may apply for a determination –
- (a) of any matters that an approved code already provides for;
49. The Commission is satisfied that an approved code in relation to the Cellular Telephone Number Portability service does not currently exist and accordingly, that the Application meets the requirement of section 32(a) of the Act.

Section 32 (b)

50. Section 32 (b) of the Act states that, despite section 31, no person may apply for a determination –
- (b) if the Commission has already made a determination in respect of the designated multinetwork service and the determination has not expired;
51. The Commission has made no previous Determination in respect of the Cellular Telephone Number Portability multinetwork service.
52. Accordingly, the Commission is satisfied that the Application complies with the requirements of section 32(b) of the Act.

Section 32 (c)

53. Section 32 (c) of the Act states that, despite section 31, no person may apply for a determination –
- (d) if there is an agreement between the access seeker and all access providers for the supply of the service and the agreement provides for all of the matters set out in section 31.
54. The Application states that “[t]here is no current agreement between any of the Applicants and any access provider on the apportionment of the costs of providing the long-term solution for Number Portability Services”.
55. The Commission concludes that there is no evidence of an agreement between parties for the provision of a Local Telephone Number Portability service which provides for

¹¹ Application for Determination for Number Portability, 26 March 2003, paragraph 14.

all of the matters set out in section 31 and accordingly, that the requirement specified by section 32(c) of the Act has been met.

OTHER MATTERS

Qualification as Access Seekers

56. In its submission, Telecom contends that a number of the applicants do not qualify as access seekers on the basis that they do not meet the mandatory requirements of the Act in that they do not:
- (a) operate a PSTN to which numbers have been allocated; and
 - (b) operate a telephone service that relates to that number portability service; and
 - (c) seek access to that number portability service.
57. Telecom assert that as many of the applicants do not satisfy requirement (b) they are not eligible to apply in respect of that particular number portability service.
58. The Commission considers that it need only be satisfied that one or more of the Applicants qualifies as an access seeker of the designated multinet services sought within the application in order to meet the required conditions. The Commission determines that in this case TelstraClear meets the specified requirements of an access seeker.
59. The Commission reserves its entitlement to consider the point prior to issuing a draft Determination with respect to the number portability services and will undertake further evaluation and analysis during the course of the investigation in order to ascertain whether all Applicants meet the access seeker criteria.

Local and Cellular Telephone Number Portability Separation

60. Telecom argues that local and cellular telephone number portability should be treated separately and should be addressed in separate applications and determinations.
61. The Commission considers that there is no mandatory requirement for separate applications within the Act and therefore no reason why both local and cellular number portability solutions may not be applied for within a single application. As has occurred in the past, if the Commission concludes that the two elements are best treated separately, then it has the ability to issue an Order under section 9(6) of the Act to effect a separation.

Execution of the Application

62. Within its submission Telecom allege that the Application is not sufficiently detailed or accurate. Specifically, Telecom claim that TelstraClear has signed the Application for itself and no other party (CallPlus, Compass, Ihug and WorldxChange) to the Application has made the required declaration¹².

¹² On the 6 June the Commission received written advice from Compass that TelstraClear was authorised to lodge the application on its behalf.

63. The Commission agrees with Telecom's concern and considers that the Application has not been properly executed by all Applicants as is required by the Commission's standard form application form for multinet network services. Therefore, the Commission requests those Applicants (other than TelstraClear) who qualify as access seekers to sign and deliver declarations (in the required form) to the Commission for the purpose of the Application. The Commission should receive these declarations within three working days of the date of this decision.

Costs

64. The Applicants have requested that the application fee be refunded and that the costs of the determination proceedings be funded by way of the industry levy.
65. An alternative position in relation to the recovery of procedural costs was presented by CallPlus in its submission which asserted that the costs should be borne by way of allocation among the parties based on industry revenue shares as opposed to an equal allocation among the parties. CallPlus argue that this would be a more equitable approach on the basis that the benefits will be shared by the industry generally and therefore should be borne pro-rata.
66. The Commission considers that section 33(d) of the Act is specific in stating that the application must be accompanied by the prescribed fee. Had Parliament intended that applications for multi-network services be funded by the levy or some other method of cost allocation, then the payment of application fees would not be a legislated requirement. The Commission therefore rejects the TelstraClear proposal. The Commission will consider the CallPlus proposal, and any further submissions on costs, in making an order as to the Commission's costs in terms of section 55.

COMMISSION DECISION UNDER SECTION 35 OF THE ACT

67. Following due consideration of the information provided in the Application, and applying the relevant provisions of the Act, the Commission has concluded that it is appropriate for the Commission to investigate the Application so far as it concerns both the local telephone number and cellular telephone number portability multinet network services.

DATED this 29th day of July 2003

Douglas Webb
Telecommunications Commissioner
Commerce Commission