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Mr Osmond Borthwick
Manager, Network Access Group
Commerce Commission
P O Box 3351
Wellington

Dear Osmond

**Telecom's comments on the "Application for determination for number portability"
dated 26 March 2003**

- 1 This letter details Telecom's comments on the "Application for determination for number portability" dated 26 March 2003 (the "*Application*") in accordance with the Commission's:
 - 1.1 request dated 7 April 2003; and
 - 1.2 further communication dated 22 April 2003 notifying all parties that it is willing to receive submissions on the Application until 31 May.
- 2 Telecom does not make any claim of confidentiality in respect of any aspect of this letter.
- 3 At this stage of the process, the Commission is primarily concerned with the approach taken in the Application and, in particular, its compatibility or otherwise with the scheme of the Telecommunications Act 2001 (the "*Act*"). Accordingly, in these comments, Telecom has not discussed the many and complex technical issues associated with number portability. Of course, if the Commission decides to investigate the matter subject to the Application, Telecom will happily engage fully to ensure the Commission is in the best possible position to make its determination.
- 4 The Application presents numerous difficulties. A number of these are addressed in this letter, namely:
 - 4.1 the severance of "functions and standards" from "cost apportionment";
 - 4.2 the dual application for both local and cellular telephone number portability;
 - 4.3 the suggested process for allocating the costs associated with the Application; and
 - 4.4 other miscellaneous matters.

- 5 The Application itself fails to comply with various statutory requirements of the Act. In addition, the Commission would be unable to investigate the Application in a manner consistent with the Commission's own obligations under the Act. Accordingly, the Application is invalid and the Commission cannot decide to investigate it.

Severance of “functions and standards” from “cost apportionment”

- 6 The Application seeks a determination of a cost apportionment formula but not of the actual functions and standards giving rise to those costs. In its letter dated 7 April 2003, the Commission understandably queried this particular aspect of the Application and sought Telecom's comments. In short, in response to the Commission's specific request, Telecom has no suggestions as to how the Commission may meet its obligations under sections 37(1)(a) and 40(1)(a) of the Act in the absence of a technical solution or an approved code for either of the designated multinet services in the Application.
- 7 To elaborate, as noted in the Commission's letter dated 7 April 2003, sections 37(1)(a) and 40(1)(a) state that draft determination and the determination *must* include the functions that must be performed and the standard to which those functions must be performed (subject to sections 37(2) and 40(2)). In Telecom's view, it would be impossible for the Commission to meet these requirements in the absence of an application to determine the functions and standards.
- 8 There is a large variation in the possible number portability functions (and standards) and their associated costs (for example, the cost implications of a number portability solution based on call-forwarding are quite different from those of an intelligent network number portability solution). If functions and standards are not settled, or do not at least form part of the application, a determination relating to cost apportionment becomes at best “academic” and, at worst, susceptible to outcomes contrary to the stated purpose of the Act. For example, how could the Commission assess whether a proposed cost apportionment will promote competition for the long-term benefit of end-users when that mechanism is to be applied in respect of an unknown cost? In addition, determining the costs in advance of the solution provides strong incentives for the parties to game the eventual solution to drive costs to the other parties.
- 9 Telecom's view is supported by the wording of the Act itself, which states that an access seeker may apply for a determination of the matters in subsection 31(a) “and” subsection 31(b). The use of “and” is deliberate throughout Subpart 3 of Part 2 of the Act (relating to designated multinet services). Throughout that Subpart “and” is conjunctive and “or” is disjunctive. For example, consider the wording in sections 31 as compared with section 32. In addition, Telecom notes the use of “if any” in section 33 where there is an “and” requirement that may be unable to be met.
- 10 Even if “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. While Telecom remains strongly supportive of the NAD and the process it is undertaking to develop a number portability solution, the fact that it presents difficulties for the Act's processes, and is highly technical in nature, suggests it may be more appropriate for this work to continue under the auspices of the Forum.

The dual application for both local and cellular telephone number portability

- 11 Telecom considers that local and cellular telephone number portability should be treated separately. The Application does not draw a sufficient distinction between local telephone number portability and cellular telephone number portability. This results in a “muddying” of those persons who should be involved in each process. In this regard, the Application insufficiently identifies which applicants are applying for which type of number portability service. This makes it very difficult for Telecom to respond adequately to the application or to engage in negotiations with the applicants for each application in an attempt to resolve the perceived issues.
- 12 In any case, separate consideration of local telephone number portability and cellular telephone number portability is appropriate as:
- 12.1 local telephone number portability service and cellular telephone number portability service have separate descriptions of service in the Act (see Subpart 2, Part 2, Schedule 1) AND the access seekers and access providers which are relevant to each description of service differ;
- 12.2 different considerations come into play in relation to the functions, standards and costs of local telephone number portability and cellular telephone number portability; and
- 12.3 local and mobile number portability operate in separate markets with significantly different characteristics.
- 13 Many of the applicants do not qualify as “access seekers” for local or cellular telephone number portability under the Act. According to the relevant description of service an access seeker for each of local and cellular telephone number portability service must (Schedule 1, Part 2, Subpart 2):
- (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.
- 14 Of particular relevance is requirement (b). Various applicants do not operate a telephone service that relates to local or cellular (as relevant) telephone number portability and accordingly are not eligible to apply in respect of that particular number portability service. In particular, Telecom queries the ability of:
- 14.1 all of the applicants, except TelstraClear and Compass, to apply for local telephone number portability service; and
- 14.2 all of the applicants, except perhaps TelstraClear which currently resells Vodafone’s GSM service, to apply for cellular telephone number portability.
- 15 A single investigation of both the local and cellular aspects of the Application would result in an unnecessary “blurring” of the line between each aspect of the Application, not only in terms of assessing the relevant technical issues, but also establishing which applicant is an “access seeker” in respect of which number portability service. Guidance from the Commission on “who can apply” would be particularly useful because, for designated multinet services, unlike many of the determinations that the Commission has considered to date, an applicant cannot withdraw its application (see section 54).

- 16 In addition, Telecom seeks clarification from the Commission that the applicant is, or applicants are (as the case may be), required to submit separate applications for local telephone number portability and cellular telephone number portability (including an application fee in respect of each application).

The suggested process for allocating the costs associated with the Application

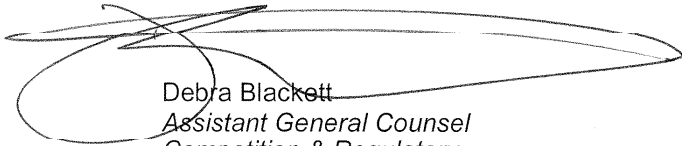
- 17 The Application requests unusual arrangements for the allocation of application/determination costs (see paragraphs 5 and 6 of the Application). The applicants' suggestion for allocation of application costs is not contemplated by the Act or by the Commission's application form. There is no ability under the Act for the Commission to waive the application fee or for fees to be recovered under the levy. The Commission's application form and sections 55 and 56 detail proper processes for allocation of application/determination costs. Allowing an application fee to be waived and/or allowing for recovery of Commission's costs through the levy would encourage frivolous applications.
- 18 The Application states that some smaller applicants may wish to withdraw from proceedings if they face "significant costs". Presumably, if all of these costs are met by Telecom, then those applicants are happy to continue. This is exactly the approach the Act seeks to discourage. In any case, as noted above, section 54 prohibits withdrawal in the manner suggested.

Other miscellaneous matters

- 19 The Application gives rise to a number of other miscellaneous issues. Given the preliminary nature of these comments, it is not necessary to discuss these miscellaneous issues in any detail. However, Telecom takes this opportunity to briefly discuss two other matters:
- 19.1 the suggestion that the Commission monitors the outcome of the Number Administration Deed ("NAD") parties' deliberations; and
- 19.2 the need for detailed, accurate applications.
- 20 Paragraph 21 of the Application suggests that the Commission should monitor the progress of the NAD and should progress falter, the Commission should intervene. This "monitoring" and "intervention" is outside the Commission's jurisdiction. The NAD process is a confidential process which the Commission is not a party to. The Commission has no grounds or authority to intervene in this private process. Under Part 2 of the Act, the Commission may only investigate a matter upon the application of the parties - it cannot decide independently to "step in".
- 21 Telecom does not consider that the Application is sufficiently detailed or accurate. For example, there is insufficient detail about how the cost apportionment principles requested by the applicants would promote competition in telecommunications markets for the long-term benefit of end-users (section 18 of the Act). If applications contain insufficient detail and are inaccurate this will place additional, unnecessary resourcing requirements on both Telecom and the Commission.

- 22 Finally, there are other aspects of the Application that are inadequate. For example, TelstraClear is simply unable to sign the declaration on behalf of all of the applicants. Indeed TelstraClear has not purported to do so – it has only signed for itself.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Debra Blackett', written over a horizontal line. The signature is somewhat stylized and overlaps the line.

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Competition & Regulatory*

- Cc Douglas Webb, Commerce Commission
Kathy Farroba, Commerce Commission
Kevin Millar, TelstraClear Limited
Malcolm Dick, CallPlus Limited
Karim Hussona, Compass Communications Limited
David Diprose, ihug Limited
Paul Clarkin, WorldxChange Communications Limited