

22nd August 2008

Mr Bruce Officer
Chief Advisor
Telecommunications Branch
Commerce Commission
Wellington
New Zealand

Dear Commerce Commission

Re: Submissions regarding the Commerce Commission Draft STD

I attach the NZ Communications Limited (NZCL) submissions regarding the Draft Standard Terms Determination (Draft STD) for the specified service Co location on Cellular Mobile Transmission Sites.

NZCL have persevered for a considerable period in attempting to negotiate access to incumbent operator's cell sites in order to minimise the environmental impact of new cell towers in local communities and to build a mobile network that would enable us to bring increased competition and the resulting consumer benefits to the New Zealand mobile market.

NZCL are faced with the significant challenge of catching up with those incumbents who have had an 18 year head start in building infrastructure. Co-location has been advocated and in fact legislated for since 1999. In our opinion no meaningful progress has been made simply because the incentives on incumbents to provide co-location are such that it is clearly in their commercial interests *not* to provide access.

New Zealand lags the rest of the OECD in mobile pricing, innovation and usage. Co-location would assist in changing that situation by helping to facilitate new market entry. It is perhaps worth noting that New Zealand is fast catching up in broadband and land line performance as a consequence of a pro-active regulatory position which saw, among other things, structural separation of Telecom and local loop unbundling – the fixed line equivalent of co-location. Incentives were created through regulation to facilitate unbundling in Telecom exchanges and competition and consumers have benefited as a result. A similar exercise to regulate mobile co-location is therefore in our view essential in the interests of facilitating mobile competition and bringing much needed benefits to mobile users.

We compliment the Commerce Commission on its thorough job delivering the Draft STD to the new entrant wireless community. While much has been achieved we believe that a handful of major issues remain. These are;

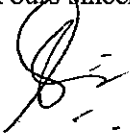
- a. The complexity and length of the Draft STD should be considerably reduced.
- b. The performance penalties should be meaningful, to reflect the adverse impacts on competition and consumer benefits resulting from delays in facilitating mobile co-location.

- c. Consideration should be given to using national roaming access obligations at appropriate prices as a tool to remove negative incentives on incumbents to provide co-location (as national roaming and co-location are broadly substitutes for each other and act as alternative mechanisms for networks to share facilities).
- d. The Common Format Site Database should be maintained independently of the industry participants, with the management provider being accountable to the Commerce Commission.
- e. There needs to be greater transparency of the terms on which an Access Provider provides the Mobile Co-location Service to itself.
- f. Standard Site Types must be agreed with the same urgency of the database preparation so that all industry participants understand what they are, and all sites are classified to facilitate co location within the shortest possible time. Our concern is that the procedure to agree standard tower types could be protracted and acts as a barrier to progress.
- g. Clarifications to the mandatory Greenfields Co-location process are made to ensure that an Access Seeker is not penalized for building a new site where co-location was not otherwise available.
- h. Antenna minimization and re-arrangement activities must be mandatory in a number of circumstances, including in relation to new site builds, mast extensions and swap outs.

| We are available to share more research and practical experience with you on any of these matters

Thank you for your consideration of our position

Yours sincerely



Tex Edwards

New Zealand Communications Ltd.

NZ COMMUNICATIONS LIMITED



**Submissions to the Commerce Commission
in relation to the Draft Standard Terms Determination for the Co-location on Cellular
Mobile Transmission Sites Service**

Prepared by NZ Communications Ltd

22 August 2008

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22 August 2008

OVERVIEW

NZ Communications Limited (“NZCL”) provides the following submissions in relation to those matters on which the Commerce Commission has requested submissions in its draft Standard Terms Determination for Co-location on Cellular Mobile Transmission Sites – Public Version (25 July 2008) (“Draft STD”).

While NZCL has made specific submissions in relation to each of the documents forming the Draft STD and the other specific questions raised by the Commerce Commission, we make the following high level observations which remain of considerable concern to NZCL:

- (a) Despite mobile co-location first being raised in 1999, no significant mobile co-locations have taken place in New Zealand since that date. This has occurred notwithstanding a number of attempts at industry self regulation. We believe that the lack of progress is due almost entirely to the weak/negative incentives of Access Providers to facilitate access to Access seekers.
- (b) At present, an Access Provider’s commercial interests appear to be best served by ensuring that co-location with a new entrant is not facilitated. This remains the case despite a number of commercial and regulatory attempts to remedy those effects including the amendments made in the Draft STD. Set out in Appendix 2 to these Submissions are some additional NZCL observations (which supplement our previous Submissions regarding Vodafone’s Standard Terms Proposal) regarding the relative incentives and a proposed remedy that ensures that those negative incentives are replaced by positive ones. We consider the potential use of imposing roaming obligations on an Access Provider as a tool to remove the disincentives experienced by an Access Provider when considering co-location. The benefits of this approach are clearly set out and we would encourage the Commission to consider this as a remedy.
- (c) Ensuring that real positive incentives exist is a key issue for the ultimate success of the STD. If performance penalties are imposed then they need to be meaningful and reflect the adverse impact on the whole telecommunications market of the failure to provide mobile co-location in a timely manner. Penalties in the Draft STD would need to be substantially increased. The current proposal in the Draft STD does not take into account the wider impact on the market. We maintain that it should and remedies need to be increased appropriately.
- (d) The Draft STD is lengthy (some three times the length of the Australian equivalent) and immensely prescriptive. This degree of complexity can either be used as a tool (where we have willing buyers and willing sellers) or as a weapon to be used to delay progress (if either buyer or seller is unwilling). In this regard we note that one of the requirements of clause 5 of Schedule 1 to the *Telecommunications Act, 2001* (“Act”) expressly applicable to the Mobile Co-location Service, is that the service must be supplied to a standard that is consistent with international best practice. NZCL considers that, while much of what is prescribed in the Draft STD will reflect that standard, the significant complexity of the documentation must be taken into account when determining whether the service as a whole meets that standard. To NZCL’s knowledge, no other co-location regime requires such extensive documentation, with most regimes operating in other mature jurisdictions relying on a fraction of the proposed documentation and any measure that can be introduced to reduce the size and complexity of the documents would be positive.
- (e) We acknowledge and agree with the observations of the Commerce Commission in relation to the pro-competitive effect of mobile co-location and its positive impact on the long term interest of end users. Appendix 1 to these Submissions contains a supporting extract from the Ministerial Inquiry into Telecommunications 1999.
- (f) An approach which may significantly simplify the arrangements reflected in the Draft STD, and which in our view will add considerable probity to the

proposed arrangements, would be to appoint a third party to build, operate and maintain the Common Format Site Database, answerable to the Commerce Commission but funded by users. NZCL understands that businesses specialising in such work exist, including a company called Tarantula who we understand will be making some submissions in this regard.

- (g) One of the key requirements of clause 5 of schedule 1 of the Act is that the Mobile Co-Location Service must be provided on terms and conditions that are consistent with those terms and conditions on which the access provider provides the service to itself. NZCL has a concern not addressed in the Draft STD, of how an Access Seeker, or even the Commerce Commission can assess that this key access principle is being complied with. NZCL advocates any mechanism which may facilitate this, including for instance the provision by each Access Provider of 6 monthly reports in which they provide evidence of conformity with this access principle.

In consideration of some specific comments made below and the observations referred to above, NZCL agrees with the observations made, or the changes proposed, by the Commission.

KEY CHANGES

The following list summarizes the key changes which, in NZCL's view, are required to the Draft STD to meet the aspirations of the New Zealand community in relation to the Mobile Co-location Service:

- a. The complexity and length of the Draft STD should be considerably reduced.
- b. The performance penalties should be meaningful, to reflect the adverse impacts on competition and consumer benefits resulting from delays in facilitating mobile co-location.
- c. Consideration should be given to using national roaming access obligations at appropriate prices as a tool to remove negative incentives on incumbents to provide co-location (as national roaming and co-location are broadly substitutes for each other and act as alternative mechanisms for networks to share facilities).
- d. The Common Format Site Database should be maintained independently of the industry participants, with the management provider being accountable to the Commerce Commission.
- e. There needs to be greater transparency of the terms on which an Access Provider provides the Mobile Co-location Service to itself.
- f. Standard Site Types must be agreed with the same urgency as that of the database preparation so that all industry participants understand what they are, and all sites are classified to facilitate co location within the shortest possible time. Our concern is that the procedure to agree standard tower types could be protracted and act as a barrier to progress.
- g. Clarifications to the mandatory Greenfields Co-location process are made to ensure that an Access Seeker is not penalized for building a new site where co-location was not otherwise available.
- h. Antenna minimization and re-arrangement activities must be mandatory in a number of circumstances, including in relation to new site builds, mast extensions and swap outs.

RESPONDING TO COMMISSION’S REQUEST FOR SUBMISSIONS

1. The Mobile Co-location Terms

1.1 The Commission’s preliminary views on key issues relating to the Mobile Co-location Terms are set out in this draft STD. The Commission invites submissions on any issues discussed in this document.

(a) General Terms

No	Issue	Comment	Pathway to Resolution
6	Agreement on Charges	Notwithstanding the status of the Mobile Co-location Service as a specified service, NZCL remains concerned that the provision of the Service by Access Provider to Access Seeker can be frustrated by failure to agree Charges. While it is understood that Charges cannot be regulated while the current regulatory regime remains in place, NZCL’s experience over the course of the last 8 months indicates that obliging parties to act reasonably and promptly in Charge negotiations is of paramount importance.	Re-insert as a pre-requisite the following: <i>“Agreement on Charges</i> <i>The Access Provider and the Access Seeker must agree all Charges payable by the Access Seeker. If any Charges have not been agreed prior to the Access Date, upon written request from either the Access Provider or the Access Seeker, the Access Provider and the Access Seeker must, within 10 Working Days, endeavour to agree the amount of any Charges payable under the Mobile Co-location Terms.”</i>
New 6.5A	Access to Security	For the avoidance of doubt, terms relating to the Access Provider’s right of access to Security need to be provided.	Insert a new clause 6.5A as follows: <i>“6.5A Access to Security</i> <i>The Access Provider may only access the Security as expressly permitted by this Mobile Co-location Terms and only to the extent permitted by same in each instance.”</i>
9.5	Objections to Change	There is a step missing in the objection process being that, if there is an objection received to a change, there is no mechanism provided for Access Providers and Access Seekers to be informed of same. In addition, there is no requirement for the Telecommunications Carriers Forum to give Notice to all interested parties on the same date. The proposed amendment resolves both of these issues.	Delete the first sentence of clause 9.5 and insert the following: <i>“If any Access Seeker or Access Provider objects to a proposed change under clause 9.4, the Telecommunications Carriers Forum must give Notice of same to all other Access Providers and Access Seekers within 5 Working Days of receipt of such objections, and all Access Providers and all Access Seekers have 10 Working Days from the date of such notification by the Telecommunications Carriers Forum to negotiate</i>

			<i>and agree the proposed change.”</i>
10.1.5	General	The absolute obligation contained in clause 10.1.5 will generally not be possible for any Access Seeker to meet in all circumstances, and is out of character with the other obligations contained in clause 10.1.	Delete the word “ <i>never</i> ” at the commencement of clause 10.1.5 and insert the words “ <i>use all reasonable endeavours to ensure it does not</i> ”.
15.1	Other Invoice Disputes	There is a typographical error.	Delete the word “ <i>either</i> ” in the first line of clause 15.1.
16.5	Cost to Recovering Charges	The Access Seeker should be given a reasonable time to pay the Access Provider’s reasonable expenses incurred by the Access Provider in exercising its rights to recover any Charge.	In clause 16.5, delete the words “ <i>on demand</i> ” in the first line and insert the words “ <i>within 10 Working Days from a claim by the Access Provider for payment of same</i> ”.
20.1	Outages	The notice that should be provided by the Access Provider should be a written notice as that term is defined using the word “Notice”.	In clause 20.1, delete the word “ <i>notice</i> ” in the first line and insert the word “ <i>Notice</i> ”.
20.3.2	Planned Outages	A similar comment is made here as in relation to clause 20.1.	Delete the word “ <i>notice</i> ” in the first line and insert the word “ <i>Notice</i> ”.
21.3	Responsibility for Faults	Given the amendments to clause 21.1 and 21.2, this clause should be mutual.	Replace clause 21.3 with the following: <i>“Despite the Access Seeker’s responsibilities under clause 21.2 and the Accesses Provider’s responsibilities under clause 21.1, this clause 21 does not create any right for the Access Seeker or the Access Provider (as the case may be) to access any property controlled by the other or fix any cable, equipment or thing unless expressly provided otherwise in the Mobile Co-location Terms.”</i> 35.5
35.5.5	Termination of Supplier by the Access Provider	Clause 35.5.5 is not a continuation of clause 35.5 but a separate clause.	Re-number clause 35.5.5 as clause 35.6.

(b) **Mobile Co-location Service Description**

No	Issue	Comment	Pathway to Resolution
1.2	Mobile Co-location Service	NZCL's concern is that the word "co-location" is used in clause 1.2, which does not assist the reader in understanding what co-location means. It should be made clear, using language consistent with the Australian legislation, that the Mobile Co-location Service enables an Access Seeker to install, maintain, operate and remove the Access Seeker's equipment on an Access Provider's Relevant Facilities.	Delete clause 1.2 and insert a new clause 1.2 as follows: <i>"The Mobile Co-location Service is a service (and its associated functions, including any associated functions of the Access Provider's operational support systems) that enables an Access Seeker to install, maintain, operate and remove the Access Seeker's Equipment (including any necessary supporting equipment) on or with the Relevant Facilities."</i>
3.1	Mobile Co-location Service Assistance	Reference will now need to be made in clause 3.1 to the Multi-site Application Process.	

(c) **Mobile Co-location Service Level Terms**

No	Issue	Comment	Pathway to Resolution
6.1	Reporting on Service Levels	A mechanism is required to enable the Access Seeker to provide information to the Access Provider that a Service Level has been breached and for that information to be included in the report referred to in the existing clause 6.1.	Insert a new clause 6.1 prior to the existing clause 6.1 as follows: <i>"Without limiting any obligation of the Access Provider pursuant to this SLT, an Access Seeker may at any time provide a Notice to the Access Provider providing details of Service Level Default detected by the Access Seeker, acting reasonably, and same must be included, without limitation, in the monthly performance report referred to in this clause 6 and the report referred to in clause 7 below."</i>

(d) **Mobile Co-location Operations Manual**

No	Issue	Comment	Pathway to Resolution
6.2.4	Operations Pre-requisites	Provide greater certainty in relation to timing.	In clause 6.2.4, delete the words “ <i>in a timely manner</i> ” and insert the words “ <i>as soon as practicable</i> ”.
9.1	Access Provider Forecasting	NZCL is supportive of new clause 9.1.	
17.4.3	Right of Relevant Occupation	As the variation to the right of Relevant Occupation necessarily requires negotiations with a third party, the requirement set out in 17.4.3(g) can only be the subject of the Access Seeker’s reasonable commercial endeavours. It would be an odd result for the Access Seeker not to be able to co-locate because it was not able to achieve the requirements of 17.4.3(g).	At the commencement of clause 17.4.3(g) insert the words “ <i>use its reasonable commercial endeavours to</i> ”.

21	Mobile Co-location Site Built – Stage 5	NZCL reiterates its view that clause 21 is overly complex. The implementation phase does not require three periods. Site Implementation is all that is required.	NZCL reiterates its suggested amendments as set out on page 23 of its “ <i>Submissions to the Commerce Commission (New Zealand) in relation to the Standard Terms Proposal for the Co-location on Cellular Transmission Site Service – Public Version (20 April 2008) of Vodafone New Zealand Limited</i> ” dated 20 May 2008.
24.4.1	Mast Revision and Extension	When assigning places on the revised or extended mast, the Access Seeker should have the option of requiring that the provision of clause 26 are implemented when the antennas are installed.	In the eighth line of clause 24.4.1, delete the word “ <i>However</i> ” and insert the words “ <i>except in circumstances where the Access Seeker wishes to avail itself of the provisions of clause 26 (in which case the provisions of that clause shall apply).</i> ” In the last line of clause 24.4.1, insert the words “ <i>third party</i> ” before the word “ <i>engineer</i> ”.
24.4.2	Mast Revision and Extension	NZCL’s view is that the revised or extended space would not have existed but for the Access Seeker’s efforts and expense and as a result any additional space should be at the unrestricted disposal of the Access Seeker.	In clause 24.4.2, change the words “ <i>Access Provider</i> ” to “ <i>Access Seeker</i> ” and delete the words “ <i>and shall not be Access Seeker Space</i> ”. In the second last line of the clause, change the words “ <i>Access Seeker</i> ” to “ <i>Access Provider</i> ”.
25.4	Mast Replacement	NZCL’s view is that an Access Seeker would not have replaced the mast if it had been structurally capable of accommodating mobile co-location. It would be an odd result then that the Access Provider should benefit from the Access Seeker’s expense in the event that a third party Access Seeker wished to use that replaced mast, at least until such time as the original Access Seeker had recovered its costs of that replacement.	At the end of clause 25.4.1, insert the words, as a new paragraph, “ <i>Notwithstanding the above, the Access Seeker is solely entitled to all subsequent co-location rental revenues from other Access Seeker, or alternatively a reasonable abatement of its own rental until all of its costs relating to the construction of the replacement Mast had been reimbursed</i> ”.

26.3.1	Antenna Re-arrangement/ Antenna Minimisation Rights and Obligations	While it is appropriate that the Access Seeker bear the cost of the design of the proposed location of the antennas, the cost of purchasing the new antennas must remain with the Access Provider. The Access Provider will obtain significant revenue from the Access Seeker as a result of engaging an antenna minimisation. Further for the arrangement to be otherwise, an incentive will be provided to Access Providers to use inefficient technology which may have the effect of frustrating new Access Seeker in rolling out their network.	In clause 26.3.1(c) delete the words “(and purchasing the Access Provider’s new antenna where Antenna Minimisation is employed)”. Insert a new clause 26.3.1A: “For the avoidance of doubt, the Access Provider must bear all costs of purchasing new antenna where Antenna Minimisation is employed.”
26.3.2	Antenna Re-arrangement/ Antenna Minimisation Rights and Obligations	A key item to be provided by the Access Provider to the Access Seeker wishing to use antenna minimisation is the local RF plan to ensure the Access Seeker will regain the required cell footprint (azimuths).	At the end of clause 26.3.2, insert the following words: “Without limitation, promptly upon request, the Access Provider must provide to the Access Seeker the Access Provider’s local radio frequency plan relating to the Relevant Facility proposed to be the subject of Antenna Re-arrangement or Antenna Minimisation.”
28.2	Relocation	The Access Seeker should not be required to undertake any relocation without a third party engineer confirming that same is required (if the Access Seeker so request).	In clause 28.2.2, insert at the end the words “, or circumstances where the Relocation is determined by a third party engineer, engaged at the Access Seeker’s expense, as not being required.”
32	Standard Site Types	NZCL remains of the view that Standard Site Types must be agreed before the STD regime is implemented. Please see our previous Submission in relation to Vodafone’s Standard Terms Proposal in this regard.	3 rd party engineers should be engaged by the Commission to ensure that Standard Site Types are agreed simultaneously with the databases

(e) **Mobile Co-location Access Terms**

No	Issue	Comment	Pathway to Resolution
7.3.1	Things the Access Provider will do	There appears to be a typographical error at the end of clause 7.3.1.	At the end of clause 7.3.1, delete the words “Access Provider’s Invitees” and insert the words “Access Seeker’s Invitees”.
13.1.2	Termination	Make good activities must be to the Access Provider’s reasonable satisfaction.	Insert the word “reasonable” before the word “satisfaction” in the third line of clause 13.1.2.

13.2	Termination	The Access Provider's rights should be to remove the Access Seeker's Equipment at the Access Seeker's costs and store same. It is too severe for the Access Provider to own the equipment.	At the end of clause 13.2, delete the words "will be entitled to treat the Access Seeker's Equipment as its own and may retain or dispose of all or any part of it as the Access Provider sees fit" and insert the words "will be entitled to remove the Access Seeker's Equipment and store same at the Access Seeker's reasonable cost and must, as soon as practicable thereafter, notify the Access Seeker of those reasonable costs incurred by the Access Provider and the location of storage of the Access Seeker's Equipment and enable the Access Seeker to make payment of the Access Provider's cost for the collection of the Access Seeker's Equipment." Delete clause 16.3.
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(f) **Mobile Co-location Interference Management and Design**

No	Issue	Comment	Pathway to Resolution
7.4.3(d)	Antenna Separation	There is no engineering basis for this clause.	Delete clause 7.4.3(d)

2. Access principles and limits on those principles

2.1 The Commission has considered how best to balance the access principles and limiting factors in considering the terms of this draft STD. The Commission invites submissions from parties on whether this balance is appropriate.

No	Issue	Comment	Pathway to Resolution
	International Best Practice	As noted elsewhere in these Submissions, NZCL continues to have concerns that the Mobile Co-location Service will not be supplied to a standard that is consistent with international best practice as the documentation has become so complex and out of step with other international examples that it is both expensive and overwhelming for an Access Seeker to comply with it. Our concern is that Access Seekers may simply prefer building new sites wherever possible to avoid dealing with such a complex process.	Any mechanism which may assist in simplifying the document, such as the timely outsourcing of the Common Format Site Database to an experienced Database Manager, should be considered.
	Terms and Conditions of	As noted elsewhere in these Submissions, NZCL is	6 monthly reports, to be made publicly available, are

	Provision to Self	concerned that there is little or no transparency provided to enable either an Access Seeker or the Commission to assess the terms and conditions on which an Access Provider provides the service to itself.	required from each Access Provider to the Commerce Commission in this regard. The Commission could use its powers under section 69ZC of the Act to further ensure that an Access Provider is at all times providing the Mobile Co-location Service to Access Seekers on terms and conditions consistent with those on which an Access Provider is providing the service to itself.
	Moves, Adds and Changes	NZCL agrees with the observations of the Commerce Commission in paragraphs 24 and 25 of the Commerce Commission's introductory document to the Draft STD.	

3. Operates a “cellular mobile telephone networks”

3.1 The Commission invites submissions on the list of eligible Access Seekers and Access Providers in paragraph 96 above.

No	Issue	Comment	Pathway to Resolution
		NZCL is satisfied with this list of current eligible Access Seekers and Access Providers.	

4. Additional service levels

4.1 The Commission invites submissions on the level of detail in the Service Levels in Appendix 1 of the Service Level Terms provided in the draft STD

No	Issue	Comment	Pathway to Resolution
Appendix 1	Service Level Detail	NZCL refers to its submissions on Service Levels elsewhere in this document	

5. Service level time periods

5.1 The Commission invites submissions on the time periods set out in Appendix 1 of the Service Level Terms

No	Issue	Comment	Pathway to Resolution
Appendix 1	Service Level Times	Subject to NZCL's submissions elsewhere in this document, NZCL is satisfied with the Service Level times set out in the Schedule.	

6. Service level capacity limits

6.1 The Commission invites submissions on the Service Level capacity limits in the Service Levels in Appendix 1 of the Service Level Terms provided in the draft STD

No	Issue	Comment	Pathway to Resolution
		NZCL refers to its submissions on Service Levels elsewhere in this document.	

7. Performance penalties for individual service level defaults

7.1 The Commission seeks submissions on the penalty rate of 20% of the service charge

No	Issue	Comment	Pathway to Resolution
Appendix 2	Performance Penalty	<p>The following comment is without limitation to NZCL's general observations made elsewhere that the current performance penalty regime is insufficient to ensure efficient mobile co-location.</p> <p>NZCL's concern is that, now that the draft STD no longer anticipates that each service attribute will be the subject of a particular charge (as the previous Schedule S of the Mobile Co-location Operations Manual has been deleted) there is no guarantee that the Performance Penalties will ever be able to apply if the charging arrangements entered into between the Access Provider and the Access Seeker do not facilitate same. In our view, Performance Penalties are better set at a dollar figure chargeable for each instance in a calendar month when the Access Provider's performance falls below the specified Tolerance Level with such amount, indexed for inflation and otherwise reviewable by the Commission from time to time. In NZCL's view, in relation to Items 1, 3, 6, 8, 9, 11, 13, 15, 19, 20 and 21 of Appendix 1, the Performance Penalty should be \$2000 for each instance in which the Tolerance Level is exceeded.</p> <p>In relation to Items 2, 4, 5, 7, 10, 12, 14, 16 and 17, the Performance Penalty should be \$2000 multiplied by the number of instances during the calendar month when the Access Provider's performance falls below the specified Tolerance Level.</p> <p>In relation to Item 22, the Performance Penalty should be \$2000 for each Fault Restoration Hour that the Service</p>	Remove the incentives of incumbent operators not to co-locate and replace with positive incentives for them to co-locate.

		Level Default continues not to be resolved.	
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8. Performance penalties for cumulative delay days

8.1 The Commission seeks submissions on the inclusion of delay day penalties as a central component of the penalty regime for the Mobile Co-location STD, and the use of a penalty rate of \$500 per site per day to expedite service delivery.

NZCL would recommend that the Commission contemplate replacing performance penalties with a National Roaming obligation as described in Appendix 2 which would have the advantage that it would largely (although not entirely) forgo requirements to impose penalties throughout the STD as the access seeker would not be disproportionately disadvantaged by lack of access to co-location.

No	Issue	Comment	Pathway to Resolution
Appendix 3	Performance Penalties for Cumulative Delay Days	On the understanding that the Performance Penalties for the cumulative delay days would be in addition to the individual Performance Penalties calculated pursuant to Appendix 2, NZCL supports the approach taken by the Commerce Commission. To ensure that the Cumulative Performance Penalty acts as sufficient incentive NZCL proposes that (e) be amended from \$500 to \$2000	

9. Common format site database

9.1 The Commission invites submissions on possible penalties or incentives to ensure the provision of accurate information in an Access Provider's Common Format Site Database

No	Issue	Comment	Pathway to Resolution
31 Ops Manual		NZCL agrees with the observations of the Commission in relation to the Common Format Site Database but for the comments below and our comments in the Introduction above. The comments below are provided in the event that the Commerce Commission does not wish to implement NZCL's preferred position of a independently operated central Common Format Site Database. A key observation here is that Access Seeker forecasting cannot be accurately undertaken until such time as the Standard Site Types are agreed and fully incorporated in the Common Format Site Database.	An independent engineer should be engaged to determine Standard Site Types so that same may be used for classification purposes on and from the Determination Date.
31.3	Common Format Site Database	The Common Format Site Database must also contain the sites classification (if applicable) pursuant to the Standard Site Types, as built construction drawings and a photograph which depicts the entire site.	In clause 13.3.1 insert the following new sub-clauses: <i>“(q) the classification of the Relevant Facility, if applicable, as a Standard Site Type;</i>

			<p>(r) <i>the “as built” construction drawings for the Relevant Facilities; and</i></p> <p>(s) <i>a photograph or photographs of the Relevant Facilities which depicts all the Relevant Facilities at the Site.</i></p>
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Service Level	Penalties and Incentives	<p>NZCL submits that there should be penalties on each Access Provider in relation to both:</p> <p>(a) failure to update the Common Format Site Database completed on the last Working Days of each month in the sum of \$2000 per day; and</p> <p>(b) in the event that the Common Format Site Database does not contain, at least monthly, all the accurate information required by clause 31.3.1 in the amount of \$2000.</p>	
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10. Greenfields co-location

10.1 The Commission invites submissions on the merits of incorporating a compulsory Greenfields co-location process in the Mobile Co-location STD.

No	Issue	Comment	Pathway to Resolution
12 Ops Manual	Greenfields Co-location	<p>NZCL generally supports the observations of the Commission in relation to compulsory Greenfields Co-location. NZCL understands that the requirement for compulsory Greenfields Co-location is to ensure that Access Providers do not, with an intent to subvert the co-location process, build facilities in a new potential cells which are never capable of being co-located. NZCL however is of the view that caution is required in this regard to ensure that Access Seekers are not inadvertently inhibited in rolling out their networks by the need to ensure that the provisions of clause 12 of Mobile Co-location Operations Manual need to be complied with in relation to each and every site they build. In its present form, a definition of “Greenfield Site” is broad enough for this to be the inadvertent outcome.</p> <p>For the avoidance of doubt, the Greenfields co-location provisions should also ensure that an asymmetrical approach is taken such that if an Access Seeker is required to construct a new site in a cell already occupied by an Access Provider, it will not be required to engage in the Greenfields co-location process with that Access Provider.</p>	

12.2.1	Greenfields Sites	In its present form the definition of “Greenfield Site” is a “location where there is no existing Relevant Facility”. The use of the word “location” is too broad and should be qualified so that that location is not one which is required to obtain the same or substantially the same network coverage as that currently obtained by any other Access Provider’s Relevant Facilities and where the new site is required to be built because the Access Seeker has been unable to co-locate with an existing Access Provider in that cell for whatever reason.	Amend clause 12.2.1 to read as follows: <i>“A new Relevant Facility can be established where the Access Provider and the Access Seeker, in conjunction with any other Access Provider or Access Seeker, have an interest in providing mobile services in a location in relation to which there is no existing Relevant Facilities which can provide for the transmission and reception of Telecommunications in a Cellular Mobile Telecommunications Network (a Greenfields Site). For the avoidance of doubt, a proposal by any Access Seeker to construct a new Relevant Facility to service a location will not be considered a Greenfields Site where such construction is required because of the limitations of any proximate existing Relevant Facility or the conduct of the Access Provider which owns that existing Relevant Facility, which existing Relevant Facility could have been the subject of the Mobile Co-location Service to obtain network coverage in or about that location in the Cellular Mobile Telecommunications Network of that Access Seeker.</i> ”
12.3.1	Greenfields Parties	To avoid double definitions clause 12.3.1 can be abbreviated.	Delete clause 12.3.1 and insert the following in its place: <i>“An Access Provider must use its best endeavours to inform Access Seekers that it intends to establish a Greenfields Site, and the Access Provider will become the Access Provider for the purpose of establishing the Greenfields Site (Greenfields Access Provider).”</i>
12.4.1	Sharing Proposal	If the Greenfields co-location process is to become compulsory, a time period must be included in clause 12.4.1 so that an Access Seeker is not disadvantaged from responding positively to a proposal of Greenfields Access Seeker.	In clause 12.4.1, insert at the end of that clause “ <i>within 20 Working Days of the notification referred to in clause 12.3.2.</i> ”

12.4.4	Sharing Proposal	If the Greenfields co-location process is to become compulsory, it must also be the case that an Access Seeker cannot unnecessarily delay the process. As a result, clause 12.4 needs to place limits on the time in which the Access Seeker can make the relevant request, particularly given the timing extension that follows in clause 12.4.5.	Insert at the end of clause 12.4.4 the following: <i>“and in any event not later than 5 Working Days after it receives the Sharing Proposal.”</i>
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11. Provisioning and mobile co-location tasks

11.1 The Commission invites submissions on possible amendments to the Multi-Site Application process to ensure that it is suitable for the rapid roll out of a mobile network

No	Issue	Comment	Pathway to Resolution
14 Ops Manual	Multi-site Applications	NZCL is in favour of the Multi-site Application process as set out in the drafts Terms and Determinations. NZCL makes further observations on the Multi-site Application process below.	
14.1.2	Overview	As discussed in section 9 of these Submissions above, the Common Format Site Database must contain information regarding Standard Site Types in order for this clause to have operation.	
14.2.2	Process for Multi-Site Application Project	In order for NZCL, or any Access Seeker, to provide binding forecasts for a quarter, agreement on Standard Site Types must have occurred and each site in the Common Format Site Database must be appropriately classified as a result.	
14.2.3	Process for Multi-site Application	The Access Provider must act reasonably when determining the form for the Multi-site Application so as not to frustrate the giving of a Multi-site Application.	At the end of clause 14.2.3, inset the words <i>“acting reasonably”</i> .
14.2.6	Process for Multi-site Application Project	Clause 14.2.6 contains a number of variables which would enable an Access Provider to frustrate a Multi-site Application.	Delete clause 14.2.6 and insert a new clause 14.2.6 as follows: <i>“The Access Provider will notify the Access Seeker within 3 Working Days of receipt of its Multi-site Application whether such application complies with the requirements of this clause 14. If the Multi-site Application does not comply with the requirements of this clause 14, such application will be rejected and the Access Provider will provide the Access Seeker with the written reasons for such a decision.”</i>

14.2.8	Process for Multi-site Application Project	Time periods are required to apply to the Access Provider when requesting further information from the Access Seeker.	Amend clause 14.2.8 by inserting after the words “ <i>a Multi-site Application</i> ” appearing on the second line the words “ <i>which request for further information must not be made later than 5 Working Days after the date of receipt of the Multi-Site Application.</i> ”.
14.2.9	Process for Multi-site Application Project	In clause 14.2.9(b), there must be an outer limit to time frames which may be proposed by an Access Provider in the Multi-site Application Project.	In clause 14.2.9(b) insert after the word “ <i>time frames</i> ” the following “ <i>(which time frame must not exceed a total of ten working days</i> ”
14.2.9(c)	Process for Multi-site Application Project	Ideally, the Service Levels will anticipate service levels which will apply to Multi-site Project Plan as a fall back position.	

12. Remedial Action

12.1 The Commission has not, at this stage, included any additional terms regarding remedial actions in the Implementation Plan. The Commission seeks further submissions on this issue.

No	Issue	Comment	Pathway to Resolution
7.2	Remedial Actions and Outcomes where the Access Provider does not meet the KPIs	There must be financial penalties applying to Access Providers who fail to meet the KPI’s set out in clause 7.1. The provision of the Common Format Site Database is absolutely essential to the efficient provision to Access Seekers of the Mobile Co-Location Service.	Delete clause 7.2 and insert a new clause 7.2 as follows: <i>“If the Access Provider has not met one or more KPI’s set out in clause 7.1 it must immediately notify the Commission and the relevant Access Seeker in writing, do all such things as are necessary to achieve same as soon as practicable and without limitation, must pay to the Access Seeker the sum of \$2000 for each day that it has failed to comply with the relevant KPI.”</i>

Appendix 1

Extract from “*Ministerial Inquiry into Telecommunications, 1999*”.

“... 3.1 The 2GHz Spectrum Auction

The provision of a cellular telephone service requires access to suitable radio spectrum. Access to radio spectrum is facilitated by the Crown under the Radiocommunications Act 1989. This is generally done by way of a competitive bidding process. The Government is now auctioning the management rights to spectrum in and around the 2 GHz (3G) band. Some of this spectrum is suitable for 3G services. The acquisition of 3G spectrum is subject to “caps” that limit the amount of spectrum any one party can acquire. This approach, supported by the Inquiry, will enable four parties to acquire 3G spectrum.

The decision by the Government to set aside one of the 3G blocks for development by a pan-Maori trust provides an important opportunity for Maori to be involved in electronic communications infrastructure development.

In the notice of intention to conduct the auction, the Government stated that:

“Bidders are particularly advised to note that the inquiry is giving consideration to the following issues:

- *whether mandatory roaming on compatible cellular networks or mandatory airtime resale should be considered as a means of reducing barriers to entry, and, if so, what terms and conditions would be appropriate;*
- *spectrum allocation policy, including use-it-or-lose-it provisions;*
- *whether mandatory co-location would be desirable for the building and upgrading of network facilities, and how this would best be achieved.”*

Handsets for provision of 3G services in the 2GHz band are still being developed and some standards are still in the process of being finalised. In addition, because of the huge international demand, manufacturers may not be able to satisfy the demand for handsets in the early stages. Accordingly, it will be two to four years before new entrants are able to offer commercial services in the 2GHz band. In the meantime, Telecom and Vodafone will be offering near-3G services (i.e. 2½G) in the 800 - 900 MHz bands. In future, Telecom and Vodafone will be able to offer full 3G services in these bands.

By virtue of their first-mover advantage in this new enhanced data service market, they are likely to have developed a very sizeable customer base before any new entrant is in a position to offer competing services in the 2GHz band. There is a significant risk, therefore, that the benefits from additional competition in the provision of mobile telephone services will not be as great as they could be, both in the near term (prior to 3G), and once 3G services become available. The Inquiry considers that strong competition in the 3G band is vital to the future of telecommunications in New Zealand. The following recommendations for specified services are directed at that objective.

8.3.4 Co-Location of Transmission Sites

There is a limited market for co-locating transmission facilities in New Zealand. For example, Broadcast Communications Limited (BCL) and other broadcasting operators have offered co-location for some time.

One option for a new provider would be to seek to co-locate at existing sites owned by other providers. Some countries mandate co-location. This minimises any difficulties faced by a new entrant in securing suitable sites and facilitates obtaining any necessary resource consents. Co-location by competitors is characteristic of radio broadcasting. Co-location by different types of service provider (for example, broadcasters and cellular operators) has also occurred. Co-location has generally not, however, occurred between competitors in the cellular services market in New Zealand.

3G cellular services need a greater number of cell-sites than previous wireless technologies. Thus, as 3G networks are rolled out, it can be expected that there will be an increasing demand for sites suitable for the location of transmitters and receivers. Securing appropriate sites may prove more difficult for new entrants than for existing service providers, who will be able to utilise their existing sites to some extent.

The Inquiry considers that co-location should be specified immediately. Co-location is a desirable way to facilitate network build-out, entry into the cellular services market, and thus efficient competition. Co-location can also reduce the number of cell-sites in any area, given that different operators can utilise the same site, thus bringing significant environmental benefits, efficient use of existing infrastructure and generally facilitating consents under the Resource Management Act.

The Inquiry notes that the Major Spectrum Users Group has begun work on a code for co-location. The Inquiry recommends that this work centre on the Forum.

Mandatory co-location is not intended to prevent new entrants from establishing their own cell-sites, if that is their preferred means of building a network; i.e. specified co-location is an obligation to deal fairly with those seeking the service, it is not an obligation to request the service or accept the service if offered.

The Inquiry considers that the standard access obligations should apply for co-location and it should be available to any access seeker where:

- sufficient space is available; and
- there is no material interference with reception of transmissions by existing users. ...”

Appendix 2

Observations on the relationship between co-location and roaming to create appropriate incentives on Access Providers to provide timely and efficient co-location.

Co-location negotiations have been ongoing for many years without significant numbers of sites being built. It's worth noting that co-location constitutes just one mechanism by which networks can effectively share infrastructure of which there are several. The problem with agreeing *usable and practical* co-location protocols is that they require both willing buyers and willing sellers for them to be workable in practice. Co-location may be difficult to implement with, or without regulatory intervention until such time as access providers become genuine willing sellers as the complexity of the task at each site can be exaggerated and exploited if an access provider is unwilling or indifferent to co-location provision. The complexity means that there is scope for protracted negotiations on a site by site basis which would ultimately delay and frustrate an access seeker in its efforts to achieve access.

Positive incentives for incumbents to provide co-location can be limited or non-existent if the act of providing co-location access is viewed as contributing to the company's demise by providing another operator with assistance to get to market sooner or with better coverage than it might otherwise have done. Why would an access provider assist an access seeker in its efforts to get coverage when that coverage would be used to compete directly with the access provider in the retail market? It is counter-intuitive.

Incentives to provide access can be further reduced if an access provider expects to receive national roaming revenues from the access seeker at any particular co-location site. If those roaming revenues are expected to exceed any payments that may be made through a co-location arrangement then there are further disincentives for the access provider to make sites available, indeed it follows that there would be very strong incentives for the access provider to delay co-location access for as long as possible.

Remedies and incentives are therefore an important aspect of the code.

If it is recognised that co-location and national roaming are broadly substitutes for each other as they can both be used by an access seeker to provide mobile coverage in the vicinity of a site, then one logical remedy that could be considered is to try to remove all the incentives for an access provider to delay or effectively deny access. This could be achieved by obliging the access provider to supply national roaming access at the site at a price that reverses the incentives on the access provider to conclude a co-location arrangement (from negative to positive). If the access provider was obliged to provide national roaming at the site then that site would effectively become a shared facility. And if the price of national roaming at the site was capped at the marginal cost of service then any strong incentives that the access provider may have not to co-locate would be removed and replaced with incentives to co-locate.

The result would potentially be as follows:

1. Any competitive incentives that the access provider may have had to deny access to the access seeker (due to the perception that this would facilitate the seeker in gaining coverage) would be removed as the access seeker would be able to benefit from the existing infrastructure through national roaming prior to putting up antennas.
2. Any strong disincentives to co-locate due to the provider's cannibalisation of expected roaming revenues would also be removed because the opex cost savings (and potentially cash contributions) associated with co-location would exceed any expected returns that might be received from the provision of national roaming at marginal cost. The access provider's best interests would be served by enabling co-location.

The incentives for an access provider to agree co-location would therefore move from being low/negative to being positive and effectively turn unwilling providers into willing providers of co-location.