



TUANZ Comment on Commerce Commission consultation Draft Mobile Co-Location Standard Terms Determination

TUANZ welcomes the Commerce Commission's invitation of 25 July to provide comment on the draft Standard Terms Determination.

TUANZ congratulates the Commission on a draft that reflects an effective and balanced consultation process.

We appreciate that several points raised by TUANZ in earlier submissions have been taken up by the Commission. We comment here on certain issues on which we believe the effectiveness of the Determination could be strengthened. We also indicate support for draft provisions on which we have not previously commented.

1. Access Principles and Limits on those Principles.

TUANZ strongly supports the Commission's interpretation (para 25) that the limits on Access Principles set out in the Act are not absolute, but must in every case be the subject of judgment by the Commission. "Limits" are not blanket exclusions, and the listed limits are each factors that require case by case evaluation. In any particular instance, the Commission must balance the practical or equitable weight of any of these limits against the purposes of the Access Principles as defined particularly by Section 18 of the Act.

2. Compliance with Access Principle 3 – "like for like" coverage.

TUANZ commends the Commission's decision that like-for-like coverage is an implied element of consistency in terms and conditions, as required by Access Principle 3. We note, however, that implementation of that principle will raise site by site issues of cost-sharing between Access Provider and Access Seeker. It may also, in our view, imply an obligation on an Access Seeker to make investments on each site sufficient to deliver coverage equivalent to the Access Provider. The Access Provider alone cannot be responsible for the delivery of the Access Seeker's like-for-like coverage, only for not obstructing it.

Therefore whilst TUANZ agrees that this interpretation of Access Principle 3 is generally in the long term interest of the end user, we note that it may in some instances also raise the site capital cost for an Access Seeker, if like-for-like coverage is required from the outset. Just as an Access Provider may reserve capacity for

future service expansion, we suggest that an Access Seeker should not have to demonstrate that like-for-like coverage is to be delivered at commencement of service so long as it is part of a forward development plan.

3. Review of service designation if pricing becomes an issue.

The Commission has noted TUANZ's submission regarding the weakness of scheduling Mobile Co-Location as a Specified Service and thus excluding service pricing from any related determination. The Commission has not addressed this issue in the context of the current Determination process, but has twice (para 49, para 103) foreshadowed a possible review of the status of the service:

"If circumstances change in the future, and price becomes a barrier to Mobile Colocation, the Commission intends to immediately review the status of Mobile Co-location as a specified service."

TUANZ submits that there is a practical nexus between issues of "pricing" and issues of cost-sharing between Access Provider and Access Seeker. Elements of cost and investment on a site could either be carried by an Access Seeker as capital investment, or carried by the Access Provider and recovered from the Access Seeker through service pricing. Therefore, if an Access Seeker makes a credible complaint that disagreements on cost-sharing are preventing effective implementation of the Determination, the Commission's commitment to "immediately review" should be triggered. The Commission should also consider providing more information in the Determination as to how it would decide that circumstances have changed and that price has "become" a barrier to Mobile CoLocation.

4. Greenfields Process

TUANZ supports the Commission's proposal (paras 157-160) that greenfields sites for mobile telecommunication service facilities should be subject to a process for determining terms and conditions for immediate or future co-location access. In relation to the Act, such a process would be pro-competitive and therefore consistent with Section 18. In industry terms, it also encourages efficient investment. End users have long term interests in efficient infrastructure location for environmental as well as for competitive service delivery benefits.

TUANZ recognizes that coordinated greenfields developments may result in joint venture arrangements that may not be subject to the normal Access Provider/Access Seeker relationships between parties. TUANZ considers that a robust and effective CoLocation Determination may give rise to the incidental benefit of encouraging joint-venture or third-party facility arrangements that support an open competitive service market outside the domain of service regulation.

5. Dispute Resolution and Compliance Enforcement

TUANZ notes that the Commission has made a number of proposals relating to penalties for non-performance under a CoLocation agreement. We support a monetary penalty scheme as set out in Schedule 2 – Service Level Terms.

The Commission has acknowledged TUANZ's earlier submission that the Dispute Resolution arrangements could be subject to gaming for delay, but has not at this stage drafted any remedy for that weakness.

The Commission has also referred to the common provisions in the Act that allow for a Party, or the Commission, to seek remedies for non-compliance through the High Court.

TUANZ is not confident that these provisions give Access Providers sufficient incentive to comply with the spirit of the Determination, at a level and with a degree of timeliness that will serve the purpose of encouraging competitive investment in the provision of mobile telecommunication services. However, TUANZ recognizes that these issues ought to be of primary concern to Access Seekers, and would support a dispute resolution and compliance enforcement regime that is acceptable to Access Seekers.

Ernie Newman

Chief Executive

22 August 2008