



TUANZ submission to Commerce Commission
Consultation on Vodafone's Standard Terms Proposal
for Mobile Co-Location

INTRODUCTION

TUANZ welcomes this opportunity to comment on Vodafone's Standard Terms Proposal, which we consider to be an important issue for the development of a competitive market for the delivery of cellular mobile telecommunications services to New Zealand end users.

Purpose

The Commission's letter of 30 April to parties to this consultation says that the Commission has a preliminary view that "the STP complies with Section 30G of the Telecommunications Act 2001 and the Commission's notice in respect of the Mobile Co-Location Service".

TUANZ notes that Section 30G is governed by Section 18 of the Act, which clearly states that the purpose of Part 2 of the Act (which includes Section 30G) is "to promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand" (Section 18(1)). The Act does not provide any limitation to that purpose other than the consideration of "efficiency" (Section 18(2)).

Commission's Criterion for compliance

The Commission's notice to Vodafone (8 February) sets out the elements that must be addressed in Vodafone's proposal, but does not suggest any qualitative criteria that might be applied to the elements of the proposal. TUANZ therefore accepts that the proposal may comply with the Commission's notice, to the extent that each of the required elements has been addressed. However, in assessing the proposal, the Commission must refer ultimately to the extent to which the proposed standard terms will be effective in "promoting competition" as required by the Act in Section 18.

Our assessment is that the proposal falls short of providing an effective access regime for Mobile Co-Location, and therefore does not comply with Section 30G of the Act.

Monopoly pricing

We feel it necessary to restate our concern that the Commission's earlier decision not to include Mobile Co-Location in Schedule 1, Part 2 of the Act as a "Designated Service" has substantially limited the pro-competitive potential of this Co-Location service, because the Standard Terms for this service as a "Specified Service" can not include pricing principles.

No matter how reasonable the Standard Terms Determination may eventually be with regard to non-price terms and conditions, none the less any viable co-location arrangement can be delayed or denied over pricing issues, for which an Access Seeker has no regulatory protection under the Act because the service is scheduled as "Specified" rather than "Designated". In many cases a co-location site will be, to all intents and purposes, a natural monopoly. This is likely to invite monopoly pricing from the Access Provider. Access Seekers compelled to accept excessive pricing for this service will be severely disadvantaged in their attempt to provide competition in the cellular telecommunication market.

Greenfields moratorium

Vodafone has noted that the specific terms of the Act require access to be provided only to a facility that is already in operation and "providing services". This means that anyone seeking access to a developing greenfields site in an unserved market can not even lodge an application until the relevant facility is complete and in operation.

TUANZ is concerned that this loophole would encourage a reluctant Access Provider to design and build new facilities in a way that would limit the options for an access seeker, and that an incumbent whose market share enables it to build ahead of the market will have at least several months' head start in any new market.

Incumbent MNOs have absolutely no incentive to cooperate with a new entrant because, as the Commission has previously observed, the market is substantially saturated and incumbents can only lose market share to new entrants in a mature market. We request the Commission to consider this issue seriously and, if necessary, make a recommendation to the Government to amend the Act accordingly.

Telecommunications Carriers' Forum

TUANZ participates in the TCF with non-voting status, and has previously participated in the TCF Working Party on mobile co-location. However, TUANZ was not able to participate in the most recent activity of this Working Party, and therefore is not in a position to endorse its recommendations.

TUANZ is not an Access Seeker and does not represent its members in their capacity as Access Seekers. We therefore do not consider it appropriate to propose specific wording for “alternative or additional terms”. Our comments are on aspects of Vodafone’s proposal that appear to offer too many opportunities to delay and frustrate potential Access Seekers, and thus to impede the development of competition in the market for cellular mobile services, contrary to the purposes of the Act.

COMMENTS ON SPECIFIC ELEMENTS of Vodafone’s Proposal

Performance Degradation

In Section 13 of its STP, Vodafone explores at length the issue of performance degradation that might be caused by co-location of facilities. At para. 143 Vodafone proposes specific technical standards for acceptable levels of interference.

Vodafone also notes that there was “not unanimous agreement” on this issue in the TCF Working Party. We would consider this likely to be an understatement.

TUANZ would be in favour of interference management standards that were based upon appropriate and agreed international benchmarks, so that service performance standards could be extended to give reasonable service level guarantees to end users. However, we have found MNOs to be very reluctant to give firm performance level guarantees to end-users of mobile communications. In most situations, MNOs will list many factors that make performance guarantees difficult or impossible to sustain.

Since the early days of mobile telephony, end users have become accustomed (reluctantly) to highly variable performance. Some of the variation can be attributed to environmental factors beyond the control of the MNO, but other variations are clearly a reflection of under-investment, under-provisioning, under-maintenance, or other cost-related decisions taken deliberately by the MNO. Users have learned to live with call drop-outs, connection failures, break-up, loss of data channel, and highly variable data rates for mobile data services. There is anecdotal evidence that such failures have increased over time as investment has failed to keep pace with usage.

TUANZ is therefore quite unconvinced by Vodafone’s suggestion that very stringent limitations should be put on co-location site design because the risk of service degradation should be weighted higher than competition in the long-term interest of the end user. Our experience would suggest that quality of service to the end user is driven more effectively by competition than by selectively-applied technical standards.

Forecast Horizon

At paras 162-7 Vodafone notes that the Act provides for an Access Provider to decline an access request on the basis of the “Limits on access principles” reference

to “the access provider’s current and reasonable forecast requirements for capacity on the relevant facilities”. Vodafone proposes a 5-year horizon for forecasting its own capacity requirements – in other words to be entitled to decline access to a facility in the case that the Access Provider has a “reasonable” forecast that they might need the facility for their own purposes some time in the next five years.

Telecommunication deployment plans and business cases are revised in response to rapid market developments, and on a far shorter timeframe than five years. For example, could an Access Provider make a five-year forecast based on the assumption that there would be no new competitive entrant to take market share from them?

The product cycle in telecommunications systems is quite rapid, depreciation is also rapid and it is almost axiomatic that ageing equipment is replaced with new equipment that requires less power, less space, and less environmental protection than the previous generation. We see no case for a presumption that the Access Provider’s five-year-out needs will require the same facilities that an Access Seeker is likely to require for immediate market entry. The forecast horizon should be limited to two years and to deployment plans for which contracts are already in place.

In addition, Vodafone propose that this self-nominated forecast should not be subject to the dispute resolution arrangements that are a required part of the proposal. We see this as quite unjustifiable. If an Access Provider feels that there are issues of business confidentiality at stake, then it may make use of confidentiality provisions in the relevant Dispute Resolution process.

OSS Prerequisites

From para 171, the STP sets out prerequisites for the processing of an access request. At 171(c), we note the reasonable proposal that “the Access Provider must have completed any enhancements necessary to its operational support systems (including the entry of data relating to the Charges), to enable it to provide the Mobile Co-location Service”.

Our concern is that there is no requirement for an Access Provider to meet any particular timeframe to enhance its OSS before accepting access requests. The Performance Levels in the STP apply only once an access request has been accepted, and not when this “precondition” is yet to be met.

This contrasts with the firm timeframes set out for Telecom in its Operational Separation Undertaking with regard to OSS enhancements. We suggest that the Determination must include a reasonable but timely deadline for the OSS enhancement. Otherwise, access applications are likely to be delayed substantially.

Remedial actions for KPI failure

The Commission has required a proposal for measures in the event that the Access Provider fails to meet Key Performance Indicators on provision of the access service. The STP contains an appendix setting out Performance Penalties relating to the processing of access requests, on which we would expect comment to come from

potential Access Seekers. We note that these Performance Penalties (Schedule 2, Appendix 2) cover only the process of establishing co-location at a site, and not any issues that might arise after the establishment of a site and that might interfere with the delivery of the Access Seeker's service. We consider that "Performance" here must necessarily involve maintenance and consistency of essential services and conditions at the facility, not simply the establishment process.

The "Remedial Actions" in this STP (para 190) concern the processes by which the Commission itself oversees the Access Provider's compliance with the STD. These consist of no more than a process by which the Access Provider may continue to give quarterly excuses as to why it has not complied with the original KPIs, nor with any subsequent order from the Commission in regard to a failed KPI.

To provide an effective incentive for compliance and to support the processes available to Access Seekers, the Determination should include a time limit (we suggest 90 days) for compliance with a Commission remedial order, after which the Commission will invoke the enforcement provisions of the Act (Section 156B) involving either a civil infringement notice or a High Court penalty order.

Dispute Resolution

TUANZ is in favour of Dispute Resolution arrangements that can reduce recourse to the Courts in commercial relationships. The STP sets out a series of processes: Negotiation, Mediation, Expert Decision, Arbitration, and ultimately Litigation.

Our primary concern is that it seems possible that, in a matter of serious dispute or even concocted dispute, the Access Provider could seek to draw out any formal dispute resolution through each process one after the other, as a means to delay and discourage market entry by access seekers in general. It is quite clear that these tactics of "attrition by process" have been used in similar situations in other markets.

Broadly, the STP offers no incentive for any Access Provider to avoid disputes, other than a general invocation that the processes are to be used "in good faith". We understand that the existence of an unresolved dispute must suspend the timelines set out in the Performance Levels tables, and this could even provide a perverse incentive for an Access Provider to use "dispute" as a means of evading nominal performance targets that attract listed penalties.

Ernie Newman

Chief Executive

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