

DETAILED SUBMISSION ON THE ACCESS TERMS

SECTION/CLAUSE of the DRAFT COMMERCE COMMISSION STD	COMMENT
General Comments	<p>Telecom supports the Access Terms proposed by the Commission. The Access Terms are generally based on the Access Terms agreed in the TCF and on the Access Terms for the UCLL Co-location Service.</p> <p>Telecom has proposed some small drafting changes to ensure that the Access Terms reflect the requirements of the Service as set out below.</p>
1 Definitions	
2 Interpretation	
3 General	
4 Basic rights and obligations	
Use of the Relevant Facilities	
5 Things the Access Seeker must not do	
6 Things the Access Seeker must do	
Installation and maintenance	
No danger to others	
Rubbish	
Compliance	
Consents and permits	
Access Seeker Equipment	
Notice	
Health and safety	
7 Things the Access Provider will do	

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<p>No danger to others Health and Safety</p>	<p>Telecom generally supports the Commission's inclusion of clauses dealing with danger to others, compliance and health and safety in section 7. Telecom is required to, and does, fulfil these obligations by other statutes, such as the Health and Safety in Employment Act 1992.</p> <p>However, Telecom is concerned that sub-clause 7.3.4 conflicts with the faults and outages provisions in Parts 10 and 11 of the Operations Manual. This sub-clause implies that Access Seekers can gain access to the Relevant Facilities at any time. This is not the case. The process for gaining access to the Relevant Facilities is set out in the Operations Manual.</p> <p>Telecom submits that the process set out in the Operations Manual is appropriate and consistent with other STDs. Therefore, the Operations Manual should prevail over sub-clause 7.3.4 of the Access Terms.</p> <p>Telecom proposes that the phrase "Subject to the Mobile Co-location Operations Manual" should be inserted at the beginning of sub-clause 7.3.4.</p>
<p>8 Rights of Relevant Occupation</p>	<p>Telecom is concerned by the possible application of clause 8.3. Clause 8.3 requires the Access Provider to give the Access Seeker a copy of the lease, licence or other document "if required". It is unclear from this clause when a lease, licence or other document is required to be provided to the Access Seeker.</p> <p>Telecom submits that there are two situations when a copy of the lease, licence or other document should be provided to an Access Seeker:</p> <ul style="list-style-type: none"> • when the Access Seeker's sub-lease requires the Access Seeker to comply with all of the covenants in the Access Provider's head-lease; and • when the Access Seeker chooses to re-negotiate the head-lease with the landowner under section 17 of the Operations Manual. <p>Telecom submits that clause 8.3 should be limited to these two circumstances because providing a copy of the lease is unnecessary in all other circumstances.</p> <p>It is standard practice for Telecom to provide a version of the head-lease where the sub-lease contains a clause requiring the sub-lessee to not do anything that would affect the head-lease.</p> <p>However, Telecom submits that Access Providers should not be required to release commercial information contained in the head-lease agreement even where the head-lease agreement imposes obligations on Access Seekers. Access Providers should be able to delete all information that is commercial and does not relate to the requirements of the sub-lease. This information is not required for the Access Seeker to use the Service. Therefore, releasing this information gives away commercial value to the Access Seeker without any corresponding benefit for the Access Provider.</p> <p>Telecom also submits that the Access Provider should be the party that determines whether information from the head-lease is required by the Access Seeker. The phrase "if required" is ambiguous. It is not clear from clause 8.3 who decides when it is required. Telecom submits that the Access Provider should be the party that determines whether disclosure of the head-lease to the Access Seeker is required. The Access Provider is the only party aware of the covenants and conditions in the head-lease and, therefore, the only party that can assess whether the Access Seeker could do anything that would affect it.</p> <p>Furthermore, many head-leases include a confidentiality covenant. A breach of this covenant by Telecom (or the Access Seeker) may result in a challenge by the lessor. The effect of a breach of a confidentiality covenant may result in the head-lease being cancelled. The Access Provider and the Access Seeker suffer the effect of this cancellation through early termination of the head-lease. The Access Provider may also be required to pay damages under the confidentiality covenant. The Access Provider should be able to protect itself from this situation.</p> <p>Access Seekers will require a copy of the head-lease if it chooses to re-negotiate the head-lease with the landlord. The Access Provider should be required to provide a copy of the lease in these circumstances (ie the Access Provider should not</p>

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	<p>be able to remove commercial information). This information is confidential information subject to section 31 of the General Terms.</p> <p>Therefore, Telecom proposes that clause 8.3 should be amended to:</p> <p>"8.3 In respect of any Relevant Facilities subject to a Relevant Occupation, the Access Provider must:</p> <p>8.3.1 if the Access Seeker's Relevant Occupation requires the Access Seeker to observe or perform covenants in the Access Provider's Relevant Occupation, provide the Access Seeker with a copy of the Relevant Occupation containing those covenants no later than on the first day the Access Seeker is entitled to gain access to the site under the Mobile Co-location Terms (unless the relevant documentation has been already provided under clause 17.2 of the Mobile Co-location Operations Manual);</p> <p>8.3.2 if the Access Seeker intends to negotiate a variation of the Relevant Occupation under section 17 of the Mobile Co-location Operations Manual, provide the Access Seeker with a copy of the lease, licence or other document;</p> <p>8.3.3 observe and perform all covenants relevant to it under the Relevant Occupation; and</p> <p>8.3.4 if the Access Provider believes that a copy of the Relevant Occupation documentation is not required by this clause, it will notify the Access Seeker in writing to explain why.</p> <p>The Access Provider may delete covenants and other information that the Access Seeker does not have to observe or perform under the Relevant Occupation from the Relevant Occupation provided under sub-clause 8.3.1."</p>
<p>9 Decommissioning</p>	<p>Telecom broadly agrees with the Commission's amendments to section 9, but submits that two improvements could be made. Clause 9.1 requires the Access Provider to use "all commercially reasonable endeavours" to ensure the Access Seeker can continue to use Relevant Facilities that the Access Provider intends to decommission. This is a high threshold that may make it difficult for the Access Provider to decommission Relevant Facilities in a timely fashion.</p> <p>Telecom submits that "reasonable commercial endeavours" should be used in clause 9.1. Generally, it will be in the Access Provider's interests to negotiate a commercial agreement with the Access Seeker because the Access Provider intends to decommission the Relevant Facilities and wants to exit the Relevant Facilities in a timely fashion.</p> <p>A change to "reasonable commercial endeavours" will also avoid a situation where the Access Provider continues to use the Relevant Facilities that it would otherwise decommission in order to avoid giving an Access Seeker valuable commercial property without compensation.</p> <p>Clause 9.3 requires the Access Provider to assist the Access Seeker to continue to use the Relevant Facilities that the Access Provider intends to decommission. Telecom is concerned that clause 9.3 will require the Access Provider to transfer assets, such as Masts, to the Access Seeker as discussed in Telecom's submission on Vodafone's STP.</p> <p>The Access Provider should only be required to transfer assets to an Access Seeker if a commercial agreement has been reached with the Access Seeker under clause 9.1 or 9.2. Therefore, Telecom submits that "If commercial terms are agreed in accordance with clause 9.1 or 9.2" should be inserted at the beginning of clause 9.3.</p>
<p>10 Security at Relevant Facilities</p>	
<p>11 Suspension</p>	<p>Consistent with Telecom's submission on the General Terms, Telecom submits that the Access Provider should be able to suspend all of the Service at a site under section 11 rather than a part of it.</p> <p>It is impractical for an Access Provider to suspend part of the Service at a site. In reality suspension of a part of the Service may result in the whole Service being suspended. For example, an Access Seeker would not be able to operate its</p>

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	<p>equipment if an Access Provider suspended electricity supply to a site. Furthermore, it is unclear which part should be suspended.</p> <p>Telecom believes that the Commission intended to limit the suspension of the Service to a particular site. Telecom supports this position. Therefore, Telecom submits that clause 11.1 should be amended to:</p> <p style="padding-left: 40px;">"Where the Access Provider suspends supply of part of the Mobile Co-location Service at a site under the Mobile Co-location General Terms, the Access Seeker's rights under the Mobile Co-location Access Terms are extinguished for the duration of that suspension at that site for that particular part (or site), and, for the same duration: ..."</p>
12 Relocation	
13 Termination	
Termination under the Mobile Co-location General Terms	
Early termination	<p>Telecom submits that the phrase "except to the extent that liability arises out of the acts or omissions of the Access Seeker" should be re-inserted at the end of clause 13.6.</p> <p>The Access Provider should not be liable for the Access Seeker's costs, liability, losses, damages or expenses where the Access Seeker is responsible. The Access Seeker should be given incentives to limit its losses and not cause an event that results in early termination. An Access Provider could be liable for losses that would otherwise have been prevented if this clause is not re-inserted.</p> <p>Furthermore, this limitation on the Access Provider's liability is consistent with the Access Terms in the UCLL Co-location STD. Those Access Terms refer to section 20 of the UCLL Co-location General Terms that provides the Access Provider with similar protection.</p>