Vodafone New Zealand Limited
20 Viaduct Harbour Avenue
Private Bag 92161
Auckland, New Zealand

Reception +64-9-355 2000
Facsimile +64-9-355 2006

19 August 2011

Tom Forster
Manager Telecommunications Operations
Regulation Branch
Commerce Commission

By Email

Dear Tom

Draft Review of Designated and Specified Services

Vodafone welcomes the opportunity to provide comments on the Draft Review of Designated and Specified Services under clause 1(3) of Schedule 3 of the Telecommunications Act 2001.

Vodafone agrees with the Commission that the relevant criterion for assessing whether there are reasonable grounds to investigate whether a service should be omitted from Schedule 1 is that competition has developed to an extent that continued regulation is unlikely to best promote competition in telecommunications markets for the long term benefit of end-users.

In other words, regulation should be removed from markets where effective competition now exists.

In addition, Vodafone directs the Commission to the New Zealand Government's statement on "Better Regulation, Less Regulation" in August 2009 committing to review the stock of existing regulation to identify and remove requirements that are "unnecessary, ineffective or excessively costly"[1]. Vodafone notes that the Commission, like all government bodies, needs to comply with the statement.

The assessment of effective competition is primarily a structural issue. Vodafone notes that the assessment of effective competition and the decision to de-regulate a market should not and must not be dependent on whether a particular firm claims regulation is needed for commercial purposes.

The goal of the Commission is not to regulate for a predetermined outcome or to choose winners – the Commission should only interfere in markets where effective competition is not present and it must step away when effective competition develops.

[1] See http://www.treasury.govt.nz/economy/regulation/statement

With this is mind, Vodafone largely agrees with the Commission's preliminary view that competition in most relevant markets has not sufficiently changed to warrant a fresh investigation[2]. However, Vodafone disagrees with the Commission's preliminary view not to investigate the national roaming service. Further Vodafone believes there is a case to limit the application of the mobile co-location STD to RBI funded sites.

Vodafone submits that there is ample evidence to support an investigation into the removal of the national roaming service as:

- the original justification for the regulation no longer holds;
- there is no current use of the regulation as the arrangements between Vodafone and 2Degrees having been agreed on a purely commercial basis and continue until [c-i-c] at least; and
- the Commission is directed by Government to remove regulations that are "unnecessary, ineffective or excessively costly".

Vodafone is further tempted to suggest that the co-location STD should be reviewed due to its continual under-use by 2Degrees. Vodafone notes that despite making exaggerated claims in 2008 to achieve regulation of co-location, 2Degrees has failed time after time to utilise the service. This is despite warnings from the Commission to do so. Vodafone submits that the under-use of the STD is not due to deficiencies in the regulation. This under-use of the STD clearly demonstrates that its regulation is "unnecessary, ineffective or excessively costly". However, Vodafone recognises that the STD has an important role under the RBI initiative and that to remove the regulation at this time might prove problematic. Consideration therefore should be given to limiting the application of the STD to RBI locations. Co-location on non-RBI sites would then be agreed on commercial grounds.

Finally, Vodafone notes that the Commission justifies retention of the regulations because of a possibility of some future negative outcome for 2Degrees. This is not a sufficient justification for ex ante regulation. Rather, the outcomes the Commission refers to justify reliance on competition law remedies – should any party engage in anticompetitive behaviour, 2Degrees and the Commission can seek redress through competition law. The Commission should engage in a much more detailed discussion on the costs and benefits of ex ante intervention compared to reliance on ex post competition law.

Reasons for investigation of national roaming

The Commission has proposed not to commence an investigation into the national roaming service. The Commission states that national roaming is an important service for 2Degrees where it does not have its own network coverage. The Commission concludes "that it is appropriate that national roaming continue as a specified service to provide a regulatory backstop should future commercial roaming negotiations flounder" (para.28).

[2] Vodafone notes that investigation into several markets have recently only been completed, and as such are not subject to the reasonable grounds test. Vodafone provides no comments on the level of competition in these markets.

Vodafone submits that the Commission has failed to properly assess whether there are reasonable grounds for review, as per the approach outlined by the Commission in the Draft Review (see comments above). Vodafone further notes that the Commission's role does not extend to assisting 2Degrees in commercial negotiations – the role of Commission starts and ends at protecting competition, not competitors.

The Commission has failed to assess the current level of competition in the national roaming market. The Commission has made no attempt to compare the level of competition with what existed at the time of the last investigation. Vodafone submits that if the Commission had done so, it would have found that there has been a substantial increase in the level of competition due to new investments. In 2008, the Commission concluded that there was limited competition in two distinct markets – a market for GSM roaming and for CDMA roaming. The Commission stated:

> *The Commission's view is that there are currently no substitutes available for roaming services in New Zealand, and that the market for roaming in New Zealand is made up of two distinct product markets, one for GSM roaming and another for CDMA roaming. [para.47]*

The Commission concluded that each market was characterised by a single supplier of roaming service – Vodafone for GSM and Telecom for CDMA[3]. Consequently, the Commission concluded that there was not effective competition in either market:

> *Each of the wholesale roaming markets that are relevant for this investigation are therefore characterised by a single current supplier of roaming services. [para.76]*
>
> *Given the lack of competitive alternatives in each of the wholesale roaming markets, entrants have had no countervailing power when negotiating with roaming suppliers. [para.80]*

During the consultation, Vodafone drew attention to the future plans of both Telecom and 2Degrees, both of which were planning, or actually commencing, deployment of 3G networks. It was argued that the assessment of sole competitors in each roaming market was not correct given the announced and impending network investments. The Commission made the following comments:

> *Telecom's deployment of a W-CDMA/GSM mobile network will enable it to supply national GSM roaming services. When its network becomes operational it is likely to represent a constraint on the existing supplier in this market. [para.88]*
>
> *NZC is also planning to launch a network in July 2008. However, NZC's entry is premised on being able to secure roaming from Vodafone which will have the only operational GSM network at the time of launch. [para.89]*

The Commission concluded that:

> *Existing competition in the wholesale markets for roaming on CDMA and GSM networks is limited, as there is currently only one supplier in each market. With the launch of Telecom's W-CDMA/GSM network, there will be two suppliers capable of offering wholesale access to GSM roaming services.* ***The entry of Telecom will therefore increase competition in the GSM roaming market once the network becomes operational.*** *[para.90]* Emphasis added.

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[3] Para.76.

Vodafone notes that the Commission itself concluded that the deployment of Telecom's 3G network would increase competition in the GSM roaming market. Such investment has now occurred, and Vodafone believes that competition has indeed increased. Networks have a choice of two competing networks over which to seek supply of wholesale national roaming. Indeed, it's quite possible for an access seeker to obtain some services from one supplier and others from another supplier – or to split supply on a geographic basis. For example, in the main cities, there are three 3G networks and two 2G networks all capable of supporting national roaming services.

Further, the wholesale national roaming network has the same market structure as observed in the New Zealand retail market – with two national coverage networks and three urban coverage networks. Vodafone submits that the national roaming network has the same level of infrastructure competition as the retail mobile market. Consequently, in the absence of material factors that differ between retail and national roaming markets, the same market assessment must be made. Namely, that both markets are effectively competitive. Vodafone submits that this prima facie evidence by itself justifies revocation of the national roaming specification – there can be little doubt the facts warrant a full investigation into the service.

In addition to the significant developments in competition, Vodafone strongly disagrees with the Commission's assertion that regulation is needed to provide 2Degrees a backstop to commercial negotiation. This was the sole reason offered in the Draft Review of Designated and Specified Services for maintaining national roaming.

Vodafone submits that there is no evidence to support a view that 2Degrees requires any form of assistance in its commercial negotiations – or that there is any risk commercial negotiations are likely to stall.

[c-i-c]

Vodafone submits that such price decreases and constant renegotiations show that the market is competitive and that there have been no problems with reaching agreements.

There are therefore no benefits arising from the regulation of the national roaming service, but many costs. A key component of efficient regulation is removal of unwarranted and unused regulation. The Commission should seek compliance with the New Zealand Government's statement on "Better Regulation, Less Regulation" in August 2009 committing all government agencies to introduce new regulation only when it is "required, reasonable and robust" and to review the stock of existing regulation to identify and remove requirements that are "unnecessary, ineffective or excessively costly"[4].

In addition, should the Commission hold the view that there is a remote likelihood of 2Degrees experiencing difficulties in future contract negotiations, Vodafone submits that reliance on ex post competition law is a more efficient approach – and is an approach consistent with the Government's stated policy on regulation reform. At the very minimum, the Commission should investigate in detail the costs and benefits of relying on competition law rather than costly and unnecessary ex ante regulatory intervention.

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[4] See http://www.treasury.govt.nz/economy/regulation/statement

The national roaming service is failing to achieve any of its stated regulatory objectives – and as such there are ample grounds on which to warrant a new investigation into the removal of the national roaming service.

Review of co-location STD

In addition to national roaming, Vodafone submits there is sufficient evidence to conduct an investigation into the co-location STD. Vodafone notes that despite 2Degrees exaggerated claims in 2008 that it would deploy 400 collocated sites, the reality in 2011 is far different – with far less than [c-i-c] % of the claims materialising. The Commission has been misled in the past and is proposing to maintain regulation of co-location purely on the basis of future promises from 2Degrees. The Draft Review of Designated and Specified Services states that:

> *31. There is currently very little mobile co-location within the industry. However, the Commission understands that Two Degrees is planning on extending its coverage from the main cities into provincial New Zealand.* ***Two Degrees has indicated that it intends to make greater use of the regulated co-location service for its network expansion****.*
>
> *32. In addition, Vodafone has acknowledged in relation to its participation in the Rural Broadband Initiative, that the towers built under RBI will be subject to the Mobile Co-location STD, and access will be granted to parties who are not cellular mobile operators on the same terms.*
>
> *33. Co-location reduces the costs of building a network as existing infrastructure can be used to deliver services whilst roll-out of new (or expanded) network occurs. The Commission considers that Mobile Co-location should continue to be regulated to facilitate efficient entry and expansion in the mobile market. (para.31-33)* [emphasis added]

The Commission appears to be stating that the co-location STD has remained largely unused up to now, but 2Degrees has indicated it plans to make greater use of the STD in the future. Because of the "indication", the Commission proposes to maintain the co-location STD. Vodafone notes that Commission has not made any comments questioning the veracity of 2Degrees indication of future use of the STD.

Such unquestioning acceptance is surprising given the Commission's warnings in 2009 to 2Degrees relating to its non-use of the co-location STD[5]. The Commission stated in 2009:

> *"The Commission is disappointed in the number of co-locations that have been completed to date ... This is despite statements from 2Degrees during the STD process that it has budgeted on a significant number of co-locations, and statements at the Mobile Co-location Conference implying that this target is achievable if the co-location protocol is effective.*
>
> *Given the emphasis placed by 2Degrees on the importance of co-location in the lead-up to, and during, the Mobile Co-location STD process, the Commission expected to see a far greater number of co-location builds by this time.*
>
> *... The failure of 2degress to subsequently request these co-locations is likely to have resulted in significant resource deployment and cost being borne by the access providers.*

[5] Commissioner Mazzoleni letter to Mike Reynolds CEO of 2Degrees, 2 June 2009. Ref: 11498.

> *The Commission notes that* ***2Degrees has indicated that it can "confidently plan to build more co-located sites" going forward****. The Commission expects to see an increased take-up of the co-location service by 2Degrees in the future" (pp.2-3)* [emphasis added]

Notwithstanding the warning provided by the Commission in 2009, 2Degrees has still not significantly utilised co-location. Vodafone data shows that since 2008 2Degrees has actually deployed equipment at **[c-i-c]sites** – notwithstanding Vodafone having around [c-i-c] sites that are available for co-location.

Even generously assuming that 2Degrees utilises a similar number of Telecom co-location sites, **2Degrees is likely to have deployed less than [c-i-c] sites over three years**. Vodafone submits that 2Degrees "commitments" must be interpreted in the light of committing to deploy 400 sites in 2008 and by 2011 actually deploying less than [c-i-c] sites.

2Degrees indicated in 2009 that it can "confidently build" more sites; and again in 2011 it "indicates greater use" of the STD. Vodafone submits these claims are meaningless given the historical disregard of its commitments to use the STD. 2Degrees future commitments cannot be reasonably relied upon.

Given 2Degrees observed lack of actual co-location deployments and its continual "commitments" to deploy more, the Commission should not, and cannot continue to, regulate on the basis of commitments for greater deployment.

Vodafone submits that the regulated co-location service is being under-used by 2Degrees, and therefore, a national STD can longer be justified. This is not to say, however, that co-location will not occur – commercial co-location will continue to occur as seen today. It is also pertinent to highlight that Vodafone's RBI Undertaking contains commitments to follow the existing co-location process for RBI sites. This is appropriate given the level of Government assistance. However, for non-RBI sites the imposition of a national co-location STD is a regulatory burden that cannot be justified given its low use.

If you wish to discuss any aspects of the above submission please contact Luke van Hooft on email luke.vanhooft@vodafone.com or on 021 534 918.

Yours Sincerely

Tom Chignell
pp **General Manager, Corporate Affairs**