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Submission on the Draft Report on the Schedule 3 Investigation into the Extension of Regulation of Designated and Specified Services

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Econet Wireless New Zealand Limited (“**Econet**”) thanks the Commission for this opportunity to offer these additional comments regarding the Commission’s Draft Report.¹

Extension of Regulated Services

1. Extension of the Regulated Services regime, pending release of a complete review of the mobile telecommunications markets, is essential if New Zealand is to achieve a competitive wireless telecommunications environment. As the Commission concluded in the Draft Report, the various regulated services are subject to limited competition. The Telecommunications Act 2001 (the “**Act**”) was enacted to provide a means by which the Commission, working with the industry, could regulate the supply of these regulated services in order to promote competition. Only maintaining the regulated services provided in the Act will support the drive toward creating such a competitive environment; allowing the regulated services to expire will destroy the only pro-active mechanism available to promote the development of competitive services.
2. In agreeing with the Commission’s decision to recommend extension of the regulated services, Econet would like to particularly support the Commission’s decision to recommend the extension of the co-location and roaming services. Econet has noted that the incumbent wireless service providers, however, have submitted comments requesting that the Commission reject its draft conclusions and not extend the co-location and roaming services. Econet believes that the incumbents’ contentions are insupportable, and therefore we offer the following summary arguments in support of the Commission’s recommendation for the extension of these services.

Co-location

3. Econet supports the Commission’s conclusion that “the most optimal sites available for the location of cell towers are already in use and controlled by the incumbent mobile network operators.”² Telecom and Vodafone, however, have both disagreed with the

¹ Commerce Commission Draft Report on the Schedule 3 Investigation into the Extension of Regulation of Designated and Specified Services, release 30 May 2006 (the “**Draft Report**”).

² Draft Report, 147.

Commission's conclusions. Their arguments are, in some cases, mutually inconsistent. The following summarizes the two primary arguments to be deduced from their submittals, and the erroneous conclusions the incumbents draw in arguing against an extension of the co-location regulated service.

Obstacles to Co-Location

4. Telecom opposes extension on the grounds that mobile co-location may, in some circumstances, actually be more expensive than the construction of a new transmission site (a "raw land" build).³ Telecom also objects to the extension of the co-location service on the grounds that Telecom has only limited rights to co-locate third parties on their infrastructure.⁴ In addition, Telecom notes that other government ministries and laws, such as the RMA, may bar outright or effectively prohibit co-location on some sites.⁵
5. Econet agrees that RMA obstacles, community issues, differing coverage objectives, and underlying lease terms might, in some circumstances, limit the desirability of co-locating on certain existing infrastructure. However, this does support a conclusion that all sites, or even a majority of sites, are effectively unusable by third parties. Contrary to Telecom's claims, Vodafone states that it has upwards of 625 sites available for co-location.⁶ Telecom's claim that these concerns are sufficient grounds for rejecting an extension to the co-location services is simply not justifiable; indeed, an examination of these issues merely supports Econet's previous request for amendment of the co-location service, not its removal.
6. Econet agrees that RMA obstacles (and the community interest issues that often go with them) are an important problem, presenting unnecessary hurdles to new entrant's seeking to deploy competing networks. Econet does not see the RMA issues, however, as a reason to find that there is not limited competition in the co-location market. As Econet has already stated in its previous filing, Econet instead sees this as a reason for amendment of the regulated services regime, not as a reason to discard even these limited efforts at promoting a competitive environment.
7. Similarly, while limitations on an incumbent's right to co-locate a new entrant are often limited by underlying lease agreements, these limitations, can readily be addressed by direct agreement between the co-locating party and the land owner. Provisions barring co-location only bar co-location *without consent*; a simple consent request may be sufficient, and otherwise these obstacles can be readily overcome with direct negotiation (usually including some additional monetary remuneration from the new entrant to the owner for the additional burden placed on the land-owner's property). As with the RMA obstacles, the Commission could readily facilitate and promote co-location despite these

³ Telecom New Zealand Limited submission of 28 June 2006, Appendix note (a).

⁴ Telecom submission, App. (b)(i) and (iii), (f).

⁵ Telecom submission, App., (f)

⁶ Vodafone New Zealand Limited submission of 26 June 2006, at 22.

barriers through the recommendation of appropriate legislation. Econet will provide further comment in response to the Commission's continuing review of the mobile services environment.

8. We conclude that while there are some external factors, currently outside Commission control, that may prohibit, complicate, or delay co-location, such external factors do not support a conclusion that the co-location services do not suffer from limitation competition, nor are they sufficient grounds, when compared against the potential pro-competition benefits, to support a Commission recommendation to allow the expiration of the co-location service.

Definition of the Co-location Market

9. Vodafone takes the position that co-location regulation is unnecessary because there is effective competition because there are plenty of alternate sites.⁷ Telecom concurs, stating that both power poles and broadcast towers offer alternatives.⁸ They argue that the Commission's definition of the appropriate market is too narrow.⁹
10. From Vodafone's perspective, there are an almost unlimited number of buildings, lamp-posts, and other structures on which new entrants can locate their facilities. However, not all buildings (or lampposts) are equal. Any experienced network operator knows that the complex interplay of cell sites within a network, the need to minimize (rather than maximize) the extent of coverage in high-density urban areas, RMA limitations, and recalcitrant landlords, all may substantially impair a new entrant's ability to find and lease substitute locations for infrastructure deployment. More often than not it is clear that topographical features inevitably push carriers to the same locations for cell sites. While Vodafone concludes from this that there are an infinite number of sites available, this simply reinforces what is a long-understood tradition in real estate: all real property is unique, and therefore it is *not* readily substitutable.
11. In addition, Vodafone and Telecom seem to miss that the Commission is not denying that there are, in some circumstances, limited substitutions available.¹⁰ The Commission concluded that "there is a scope for some substitutability as new cell sites can be co-located with sites used by [other] organizations" (such as broadcast towers, transmission towers, and the sites of other wireless operators), but that, for reasons more specifically enumerated in their analysis,¹¹ these were not suitable substitutes for co-location on cellular mobile transmission sites.

⁷ Vodafone submission at 13. Telecom similarly states

⁸ At the same time, however, Telecom notes that it is difficult to negotiate access to power poles, and does not address the fact that broadcast towers are few and far between, and usually too high, to provide even regional coverage.

⁹ See Vodafone submission at 14, and Telecom submission at App. (d), (f).

¹⁰ See Draft Report, 133.

¹¹ Draft Report, 134-137.

The Status of Competition in the Co-location Market

12. The final major argument put forth by the incumbent is that extension of the co-location service is not necessary because, they claim, co-location occurs now without redress to the regulated services rules.¹² Contrary to Vodafone's assertions, competition in the co-location market is a long way from being realized.
13. First, in Econet's experience the incumbent carriers with whom Econet would directly compete are reluctant to enter into co-location agreements based upon reasonable (that is, competitive) terms and pricing. We cannot comment on whether or not other wireless entities, not in direct competition with the incumbents, have been able to conclude competitive co-location agreements. Despite Vodafone's assertions to the contrary,¹³ there is a strong incentive for an incumbent to engage in anti-competitive behaviour, particularly where that behaviour will deny, delay, and/or overcharge a new entrant for co-location. Incentives include effectively denying a new entrant access to a critical coverage area (where substitute sites might be completely unavailable or prohibitively expensive), to increasing a rivals' costs (a standard tactic used by incumbents in anti-competitive environments).
14. Second, Vodafone concludes that Telecommunication Forum's Draft Co-location Code will shortly be finalized by the TCF working group, and accepted by the Commission (despite the fact that the previous draft of the Code was rejected by the Commission), and therefore there will no longer be any need for the co-location service. However, the Commission has not yet accepted the Code. Econet continues to have a number of serious, fundamental concerns with the draft Code, which we feel may require the Commission to reject the Code again. Regardless, the Commission may, if and when the Code is approved by the TCF, decide to accept the Code. At that time the Code will supplant the provisions of the co-location service even if the service is extended by the Commission's recommendation pursuant to this review. Therefore, there is no need at this juncture to argue or evaluate the effectiveness of the Code, merely to acknowledge, as the Commission has noted in the Draft Report, that there continues to be limited competition within the co-location market, and therefore a temporary extension of the co-location services is desirable.

Conclusion

15. For the foregoing reasons, therefore, Econet agrees with the Commission that co-location must be managed and monitored to ensure that no new entrant is unreasonably denied access to necessary facilities. Until the Commission has re-evaluated the co-location services regime, only the extension of co-location services can offer any protection.

¹² See Vodafone submission, 26-28. "We are of the view that regulation makes little difference to our behaviour." Vodafone submission at 27.

¹³ Vodafone submission at 14, last bullet point.

Econet believes that the Commerce Commission should immediately allocate resources to a comprehensive investigation of co-location as it is a bottleneck access point where monopolistic and duopolistic behaviour is perpetuated, adversely damaging the NZ consumer. The same concepts of unbundling the local loop and renting space in a telephone exchange to install a deslam unit should be considered when considering co-location policy. The same TSLRIC price points and access availability and access detail should be considered.

Specific illustrations of the failure of co-location

16. The Telecommunications Act of 2001 provided for a co-location requirement which relied on the cooperation of the incumbents to facilitate on a voluntary basis, some activity. In concept it is very similar to the voluntary targets that the government agreed with Telecom on broadband. Over a four-year, six month, 32 day period the TCF failed to deliver a half workable code to the Commissioner. Specifically, after the Telecommunications Commissioner sent a letter to the Co-location Working Party on 20 June 2005, there has been no workable agreement created by the TCF. In recent weeks since unbundling was announced there has been a panic to get a further workable code finished. Specifically, the code under construction is unworkable for the following reasons:

- There is no price included in the code, rendering all detail useless
- There are no standard cell tower descriptions (despite statistical evidence suggesting 84% of cell phone towers have five specific engineering designs)
- There is no capability for rapid multi-access, specifically in the scoping studies
- There are significant leasing and third party issues that are actively promoted by the TCF as barriers and as a mechanism to slow the application process for new entrants
- In analysing the audit trail of ridiculous minutes and meeting notes of the TCF, it is clear that the TCF is a national disgrace and a failure to the NZ consumer when it comes to issues of competition creation in the telecommunications networked industry
- The TCF only has an active role to play in non-competitive industry standard issues such as spam and adult content and text bullying. In fact the TCF is used as a bullying mechanism to drag new entrants through unworkable procedures when requesting co-location to save the country from environmental mess

Roaming

17. Econet supports the Commission's conclusions that roaming (i) consists of two separate and distinct wholesale markets: one for CDMA, and the other for GSM;¹⁴ and (ii) that it is subject to limited competition.¹⁵ Roaming is an essential service. New entrants to the wireless communications market must be able to roam using the pre-existing

¹⁴ See Draft Report at 155-170.

¹⁵ Draft Report at 181.

networks in order to provide a competitive national service while they build out their own infrastructure. As roaming is not yet subject to competitive pressures, the Commission must keep in place the roaming service pending the introduction of competitive pressures on the roaming market.

18. Vodafone challenges the Commission's findings based on what can be summarized as two grounds: first, they argue that there are alternate solutions for incumbents to achieve their roaming objectives. This argument consists of two parts (each of which are briefly addressed below): that GSM and CDMA are substitutable,¹⁶ and, in the alternative, that the decision to make use of roaming itself is a substitutable element in any plan to roll out a communications network that may be replaced by non-roaming means.¹⁷ Second, Vodafone argues that there are already sufficient incentives to ensure roaming agreements are completed.¹⁸

Substitutability of GSM and CDMA Markets

19. As the Commission has previously concluded, GSM and CDMA are not substitutable. No rational wireless company can readily switch between existing technologies once they have started operating. All network infrastructure needs to be upgraded, modified, and/or replaced. In addition, all subscriber units must be replaced. In practice, we know of no instance in which a complete network change-out was attempted by an operating wireless carrier. The closest analogy is the move from 2G to 3G networks, in which circumstances both networks are operated simultaneously while customers, over a period of years, slowly upgrade to new substitute handsets. To argue that any wireless company can readily switch technologies is an absurdity.
20. Vodafone's argument that new entrant's should conclude their roaming agreements before choosing their technology places traditional wireless network deployment on its ear; a classic example of placing the cart before the horse. Settling on the technology is one of the first things a wireless operator decides upon, as it can dictate every aspect of their business plan. To do it in reverse – to select the operating technology last – would completely frustrate any attempt for a new entrant to develop rational business plan. Operating technologies dictate costs, interaction with domestic and international carriers, consumers, and business, affect network design, funding, marketing, and subscriber acquisition strategies and costs. A new entrant simply cannot have its business plan dictated by a temporary roaming agreement with incumbent carriers.
21. Finally, even assuming as correct Vodafone's contention that CDMA and GSM are substitutable, new entrants would still be faced with a duopoly engaging in the same anti-competitive behaviour no different from that of a monopoly. New entrant's will

¹⁶ See Vodafone submission at 30-33.

¹⁷ See Vodafone submission at 34-36.

¹⁸ Econet has long-stated its intent to deploy a GSM network, and its need to enter into a commercially reasonable roaming agreement in order to provide coverage during its network development. Vodafone clearly has a direct interest in ensuring that it can dictate when, and for what price, and under what terms, Econet can roam on Vodafone's existing GSM network.

find it difficult, if not impossible, to conclude roaming agreements with obstructionist, anti-competitive incumbents absent governmental oversight.

Other Substitutes for the Roaming Market

22. Vodafone's other proposed substitutes are similarly flawed. Vodafone's contends that roaming is not necessary as a regulated service as how, when, and under what circumstances an entrant might build a network may obviate the need for roaming.¹⁹ The arguments presented, however, do not support such a conclusion. While any new entrant may rely to a greater or lesser extent on roaming, none of the "choices" listed by Vodafone are sufficient to allow a new entrant to compete in the wireless communications market without roaming. Examining each "choice"²⁰ in turn emphasizes the erroneous conclusion that roaming is not necessary:
- The first three "options": building a complete network, collocating some facilities, and sharing deployment costs with a third party all present the same problem. Once a new entrant has built its stand-alone network, it will no longer need roaming, but the new entrant will need roaming until its network has been completed, regardless of whether or not it is building a complete network on its own, co-locating on some sites, or sharing the costs with a third party partner. See Draft Report at 179.
 - With respect to the fourth option, roaming by its very nature is a discussion of regarding addressing coverage only outside of the new entrant's covered areas, that is, the new entrant must be building, or have already built, some infrastructure elsewhere, or it's not "roaming," it's an MVNO.
 - Finally, as to the last two bullets, these really relate to the creation of MVNOs, not new entrants developing their own infrastructure.
23. We acknowledge that, as Vodafone states in note 35, bullet 1 of its Submission on the Draft Report, that higher roaming prices will tend to encourage network deployment. But the mere incentive to build a network is not a substitute to complete coverage from day one through roaming. It takes years, and substantial investment in infrastructure, to build a network. Until that network is constructed, roaming is essential. We also cannot agree that sharing network costs is a "substitute" for roaming, as it doesn't change the reason roaming is necessary in the first place, it just changes how new entrant's might partner to save costs. Vodafone's assertions here, therefore, amount to no more than an attempt to justify freeing roaming from regulation so that it can provide "incentives" (read: monopoly rents) to new entrants to build their own networks.
24. Finally, Vodafone suggests that wholesale or retail re-selling of an existing network's services is a "substitute" for roaming. However, MVNOs do not create competition. Re-sellers and MVNOs must base their pricing on the costs charged by the incumbent

¹⁹ Vodafone at 34.

²⁰ As listed in Vodafone's submission at 34.

operator whose services they re-sell; this does not create active competition in the roaming services area, as there are no new entrants to resell the service. This assertion seems little more than a request that new entrant's not build new infrastructure, creating competition, but instead simply turn over all their operating costs to the existing incumbents, effectively maintaining the incumbent's dominance of the wireless communications market. Such a conclusion could not be seen as a benefit to New Zealand's telecommunications end-users, and certainly does not seem to demonstrate substitutability for the roaming service.

Necessity of Roaming Regulation

25. In addition to arguing that roaming services are substitutable, Vodafone further contends that regulatory oversight and protection are simply unnecessary, asserting that inherent market incentives promote incumbents to enter into network roaming agreements. However, the incentives offered by Vodafone apply only in a *competitive market*. In an anti-competitive environment, the incumbents have a strong incentive to delay or deny access to their network, or to extort unreasonable sums,²¹ in order to drive the new entrant out of the market. As previously noted, roaming is an essential service for a new entrant, and in an anti-competitive environment incumbent can best protect its monopoly interests by denying access to that service. As the Commission has appropriately concluded, the roaming market is not subject to competition. Therefore, these incentives do not function as they would in a competitive environment.

Conclusion

26. For the foregoing reasons Econet agrees with the Commission that (i) the roaming regulated service is necessary to provide protection against the abuse of market power in providing roaming services, and (ii) the roaming service must be extended until either a competitive roaming environment has been created, or the Commission completes its mobile services review and modifies the roaming service accordingly.

Conclusions

27. In supporting the extension of the regulated services regime, Econet, however, also expects the Commission to investigate the successes and failures of the regime, and to institute an investigation into revising the Commission's approach to regulating the

²¹ We note that Vodafone, at 41 and 42, has offered to the commission financial statements intended to demonstrate that Vodafone's roaming prices are reasonable. As this information has been marked as confidential, we cannot comment with specificity on the sufficiency or accuracy of their statement. However, we would note that the suggestion in the confidentiality claim is that Vodafone is negotiating separate rates with each carrier looking to roam on Vodafone's network, and the mere fact that Vodafone is negotiating separate rates with each carrier leads us to necessarily conclude that they are therefore going to negotiate the best price they can demand. As the roaming service is not-substitutable, this means Vodafone can demand monopolistic prices. If, in these particular circumstances, the roaming rates are not irrational, it might very well be that the roaming service in this case is not a direct competitor to Vodafone, and therefore does not promote anti-competitive pricing. Only a publicly presented, reasonable, rationale rate should be accepted by the Commission as evidence of Vodafone's intent not to charge unreasonable rates.

Designated and Specified Services under the Act. In particular, Econet requests that the Commission evaluate the addition of price regulation and standard terms of service in the collocation and roaming services in order to promote the development of wireless competition.

28. Econet is disappointed that at this juncture the Commission has limited the scope of its review solely to advising the Minister of Communications to extend the regulated services. While we understand there are a number of issues for the Commission to consider, we believe there has been ample time to evaluate, and evidence to demonstrate, the failures of the current regulated services regime, and wish to receive the assurances of the Commission that full consideration on the need for amendments will not be unduly delayed.
29. Maintaining the regulated services regime is a stopgap measure that provides for only the most limited of protections against the predations of the incumbent service providers. We support the Commission's intention to complete its review of the mobile sector, but expect the Commission to do so in a timely manner without any further unnecessary delays. As we stated in our previous submission dated 21 December 2005, the regulated services regime has failed to fulfil the promise of achieving the goals of creating a competitive mobile environment. The continued reluctance of the Commission to accept or propose major alterations to the most significant components and structure of the regulated services ensures the continued dominance of the incumbent carriers and the denial of competition in the mobile communications sector. Econet therefore cautiously supports the Commission's Draft Report on the two-year extension of regulated services under the 2001 Telecommunications Act.
30. Econet is happy to come to the Commission with a ridiculous audit trail of negotiations with the monopolist to discuss prices of roaming. The only rational incentive that an incumbent monopoly has is to offer a new entrant like Econet an MVNO deal to prevent it from building. We refer the Commissioner to the Vodafone presentation at the Telcon 7 Conference of 28 June 2006. It is Econet's position that the lack of regulated roaming has kept a new entrant out of the market since 2001.

14 July 2006

General comments on the
Commerce Commission Draft Report on whether to extend the period of
regulation of ten designated and specified services

Mobile Services Review – page 9

11. Econet commends and respects the Commerce Commission’s mobile review work. Its comments are focussed on two issues:
- i. Access
 - ii. Behaviour of incumbents to “utilise the network effect” to destroy new entrants.

Promotion of Competition – pages 13-15

Econet’s position is:

- Behaviour
- Behaviour
- Behaviour

Anti-competitive network behaviour that incumbents have used, pocket pricing and closed network pricing, specifically the 1998 Saturn decision. These decisions stabbed NZ consumers in the wallet.

Co-location on Cellular Mobile Transmission Sites – page 34

125. Many times because of RMA requirements and natural respect for the environment it means co-location is not a cost reducer but the only way to access communities.

Econet’s position

Econet would like the Commerce Commission to broaden its scope of the problem and understand issues pertaining to third party leases and different environmental guidance from different municipalities.