

Final Decision on whether to investigate omitting National Roaming from part 3 of Schedule 1

Decision No. [2013] NZCC 15

Determination under section 1(3) of Schedule 3 of the Telecommunications Act 2001

The Commission: Dr Stephen Gale
Pat Duignan
Anita Mazzoleni
Elisabeth Welson

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Acronyms and abbreviations

2G	Second generation cellular network, characterized by digital transmission rather than analogue used by the first generation of cellular networks
3G	Third generation cellular network, based on the IMT 2000 set of radio technology standards as recognised by the ITU
Act	Telecommunications Act 2001
EBITDA	Earnings before Interest, Tax, Depreciation and Amortization
MHz	Mega Hertz
NR	National Roaming
RBI	Rural Broadband Initiative

Executive summary

1. The Commerce Commission (Commission) is required to consider, at intervals of no more than five years after the date on which a specified service came into force, whether there are reasonable grounds to commence an investigation into whether the service should be omitted from the list of specified services in Schedule 1 of the Telecommunications Act (the Act).¹
2. The Commission released a draft decision on 31 July 2013 seeking submissions on its preliminary view that there are not reasonable grounds to commence a Schedule 3 investigation into whether to omit the National Roaming (NR) service from Schedule 1 of the Act.
3. Having considered the submissions received on the Commission's preliminary view, the Commission's final decision is that, on balance, there are not reasonable grounds to commence a Schedule 3 investigation into whether to omit the National Roaming service from Schedule 1 of the Act.

Legislative framework

4. Part 3 of Schedule 1 of the Act describes NR as:²

A service (and its associated functions) that enables transmission of cellular mobile traffic by means of the access provider's cellular mobile telephone network between (but not including) the cellular mobile device of the access seeker's end-user and the access seeker's handover point (or equivalent facility) and that enables an end-user who subscribes to an access seeker's cellular mobile service to use services (except value-added services) within the area where the access provider has a cellular mobile telephone network, but which is outside the coverage area of the access seeker's cellular mobile telephone network.

5. Clause 1(3) of Schedule 3 of the Act requires that the Commission consider, at intervals of not more than five years after the date on which a designated service or specified service comes into force, whether there are reasonable grounds for commencing an investigation into whether the service should be omitted from Schedule 1 of the Act.
6. The Commission may not consider under clause 1(3) of Schedule 3 of the Act whether or not there are reasonable grounds to commence an investigation into omitting a designated service or specified service earlier than 12 months before the end of the five year interval.³
7. Where a designated service or specified service is amended or altered, the effective date of that service coming into effect is the date the altered or amended service

¹ Clause 1(3) of Part 1 of Schedule 3 of the Telecommunications Act

² Part 3 of Schedule 1 includes other features of the NR service such as conditions. This quote only relates to the "description of service" component of the NR service.

³ Schedule 3, clause 1(4). The Commission may, however, commence a separate investigation on its own initiative at any time in order to propose any amendment to the NR service.

came into effect. The NR service was amended on 11 September 2008. Therefore, the current five year interval for the NR service ended on 11 September 2013.⁴

8. The Commission released its preliminary view on 31 July 2013 and invited submissions until 23 August. Given that one party requested the opportunity to introduce some changes to its submission, and the Commission considered those changes would contribute to more robust decision making, all parties that originally submitted were allowed to revise their submissions by 18 September.
9. A review by the Commission under clause 1(3) of Schedule 3 of the Act is limited to considering whether there are reasonable grounds for commencing an investigation into whether the service should be removed from Schedule 1. It does not extend to considering introducing a new service or amending an existing service.
10. If the Commission decides that there are reasonable grounds for commencing an investigation into whether a designated service or specified service should be omitted from Schedule 1 under section 66(b), the Commission must commence the investigation not later than 15 working days after making that decision.⁵
11. In reaching its view, the Commission must make the decision that will best give, or is likely to best give, effect to the purpose set out in section 18 of the Act.⁶
12. The Commission considers that reasonable grounds to investigate whether a service should be omitted from Schedule 1 exist where competition has developed to such an extent that continued regulation is unlikely to best promote competition in telecommunications markets for the long-term benefit of end-users.
13. The Commission's 31 July 2013 preliminary view was that there were not reasonable grounds to commence a Schedule 3 investigation into removal of the NR service from Schedule 1 of the Act. We expressed the reasons as follows:
 - 13.1 Roaming is not competitive. Telecom's network is 3G and uses the 850MHz and 2100MHz frequencies, whereas both Vodafone and 2degrees offer a 2G/3G network using the 900MHz and 2100MHz bands. As a result, 2degrees customers who use 2G handsets can only roam on Vodafone's network. NR regulation is an important backstop, in case commercial negotiations break down in future; and
 - 13.2 The allocation of the digital dividend may influence mobile competition. The 700MHz auction provides an opportunity for a new entrant to purchase spectrum. A new mobile provider might require a NR arrangement while it rolled out its network on the 700MHz spectrum.

⁴ The latest Gazette notice was published on 14th August 2008, available at www.legislation.govt.nz/regulation/public/2008/0251/latest/DLM1450501.html Telecommunications (National Roaming) Order 2008 (SR 2008/2511). The effective date of this Order is 28 days following the publication in the Gazette, therefore the date from which to determine the five year period is 11 September 2008.

⁵ Schedule 3, clause 1(5).

⁶ Section 19 of the Act.

14. This document discusses the submissions received on the Commission's draft decision and presents the reasons for largely confirming our preliminary views in our final decision.

Submissions on the Commission's draft decision

Competition in roaming

15. We remain of the view that NR is not competitive for 2degrees on 2G. As 2degrees has pointed out, the Vodafone and Telecom spectrum bands for 3G are also not compatible for 2degrees, other than for some more expensive multiband phones.⁷
16. Vodafone and Telecom say that 2degrees could focus on the 3G network and, that by adopting such a commercial strategy, two wholesale roaming providers would be available.
17. We have a different view. Before 2degrees chose its technology, it had a choice between Vodafone and Telecom as roaming providers. After making that choice, the two providers are no longer practical substitutes.
18. Having chosen the 900MHz band, 2degrees is committed to Vodafone as its roaming provider. 2degrees would be vulnerable to 'hold up', that is, over-charging, if there were not the expectation of a commercial arrangement established by the specified service, backed up by the possibility of designation. If subjected to over-charging, 2degrees only recourse would be a rapid scrapping of phones, and in our view, this could harm competition.
19. If parties were behaving competitively, we would expect to see long-term commercial roaming agreements that would avoid the hold-up risk.
20. Telecom considers 2degrees to be an established and growing operator with over 20% market share (by subscriber). Vodafone goes further and submits that "2degrees now operates a 2G and 3G network reaching approximately 90% of New Zealand's population, and national roaming on Vodafone's network extending 2degrees' coverage beyond that. This is significantly beyond the 65% of population coverage that must be included in an access seeker's network plan, and implies that the conditions of the national roaming specified service should no longer apply to 2degrees".
21. Our view is that the 65% coverage condition is not also a threshold for the roaming entitlement to end. Under competitive conditions, we would expect roaming to be a longer-term feature of the market, with the boundary between a network and residual roaming areas being determined commercially.
22. In the absence of evidence that competitive long-term roaming contracts are reliably available, we don't think the NR market is clearly competitive enough to warrant undertaking an investigation now into omitting NR from Schedule 1 at this time.

⁷ Multiband phones appear from Vodafone's website to cost upwards of \$500.

Entry based on the 700MHz auction

23. We also remain of the view that NR could be a valuable provision for a new mobile provider while it rolled out its network on the 700MHz spectrum—and hence promote competition.
24. 2degrees submitted that “Removing the obligation to provide national roaming would cause significant regulatory and market uncertainty for 2degrees, especially the case in the context of the forthcoming 700MHz spectrum auction for mobile broadband and the current Telecommunications Act Review. In particular, if the 700MHz auction results in significant sub-1GHz disparities, regulated national roaming in rural areas is likely to be an appropriate competition safeguard. Roaming may also be required in the case that a new entrant emerges at the auction.”
25. Telecom’s view is that any potential new entrant would face a competitive wholesale roaming market with three providers available and that “considerations around 700MHz are best dealt with under MBIEs auction rules”.
26. Our view is that the same difficulties could arise for the entrant as have affected 2degrees. Before investing, the entrant may have a choice of roaming partners, but we cannot be sure that suitable long-term contracts would be competitively available. 2degrees “is strongly of the view that commercial roaming arrangements with Vodafone have only been secured against the threat of regulation...”
27. Vodafone submitted that it “does not consider that these [NR] conditions, entitling a new operator to request legacy 2G networks services, are appropriate or necessary for a future efficient entrant to enter the New Zealand mobile market.”
28. We agree that, in future, entry incorporating 2G seems unlikely. However, the NR service that we are required to consider by clause 1(3) of Schedule 1 is the regulated service, as currently framed. This is a technologically neutral service.

Co-location as an alternative to roaming?

29. Telecom and Vodafone argue that network expansion is facilitated by co-location, stating that Rural Broadband Initiative (RBI) infrastructure was specifically designed to allow the co-location and is available to all operators on an open access basis.
30. 2degrees’ view is that co-location is not a substitute to NR as often it is not a practical option and may be in certain cases more costly than building a new site. It adds that co-location also does not “future-proof requirements to upgrade the site when capacity demand increases, or as new technologies such as 4G require deployment of additional radio equipment”.
31. The Commission noted in its final report of the Schedule 3 investigation that there are important differences between the two services and their respective roles in an entrant’s ability to offer coverage: “Roaming provides the entrant with the ability to offer, at launch, mobile services beyond its initial network reach, and this ability to offer national coverage is generally accepted as being an important feature of a mobile service. Co-location relates to the gradual deployment of the entrant’s

network. As a result, in the short term, co-location is not likely to be a substitute for roaming, as roaming offers immediate coverage.”⁸ Even with the RBI, we still hold this view.

Commission’s final decision

32. On balance, having considered the submissions received on our preliminary view, the Commission’s final decision is that there are not reasonable grounds to commence a Schedule 3 investigation into whether to omit the National Roaming service from Schedule 1 of the Act at this time. National Roaming remains a relevant service for competition in mobile telecommunications markets.

⁸ Schedule 3 Investigation into Amending the Roaming Service. Final report 10 March 2008, page 12, paragraph 60.