13 November 2007

Dr Ross Patterson
Telecommunications Commissioner
Commerce Commission
44-52 The Terrace
WELLINGTON

Dear Ross

COMMERCE COMMISSION ROAMING INVESTIGATION - VODAFONE UNDERTAKINGS ROAMING AND COLOCATION

Thank you for the opportunity to comment on the recently amended Vodafone Undertakings dated 2 November 2007. We set out our comments and concerns on the recent amendments below.

Vodafone Mobile Roaming Undertaking (Roaming Undertaking)

Discriminatory Treatment of Use of New Network Technology

1. At clause 3.3, Vodafone has effectively drafted a technology self preservation clause. That clause provides that Vodafone may utilise any new radio access network technology for a period of 3 years before it will include that new technology in the Roaming Undertaking. During this 3 year period, Vodafone may use this new technology as part of its own network, meanwhile continuing to fortify its market power (currently around 52% of the market share in New Zealand's mobile market) in what is effectively a duopoly market, whilst it blocks inclusion of the new technology from the Vodafone Roaming Service.

2. Kordia is extremely concerned by this exclusionary behaviour and Kordia believes that Vodafone is basing the 3 year exclusion of new radio access network technology on the erroneous view that Vodafone will be the first mover on any new technologies. Kordia anticipates that it could potentially contend for the status as the first mover with future radio access network technology.

3. Accordingly, Kordia considers that the benefits of roaming and the Vodafone Roaming Service should equally apply to any new radio technologies arising *as soon as reasonably possible*.

4. At clause 3.16, Vodafone has drafted that if new radio technologies develop, amendments to the terms and conditions of the Roaming Undertaking to allow roaming by an Access Seeker using the new technology may only be permitted if agreed by negotiation. Kordia believes that clause 3.16 is discriminatory and will not lead to

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effective competition as it does not encourage roaming for new technologies, but enforces the presumption that Vodafone should be entitled to deny roaming access unless it is favourable to them (pursuant to future negotiations).

5. Access Seekers are only offered undertakings to negotiate, which are explicitly excluded from the dispute resolution provisions.

6. Vodafone's obligation to negotiate set at a very low level standard of reasonable behaviour.

7. By allowing Vodafone to explicitly deny access for three years unless new negotiated terms are arranged pursuant to clause 3.16 (which is a sizeable period of time given the speed of technological developments) on any new technologies, the Commission will be allowing Vodafone to entrench its marker power.

8. Kordia submits that clauses 3.3 and 3.16 of the Roaming Undertakings need to be amended to permit an Access Seeker whose network will use new technologies, and satisfies a reasonable roll out threshold, to roam on Vodafone's network where any compatible technology is used by the Vodafone Network.

Pricing of Roaming Service

Vodafone's Projected Costs are too high

9. Clause 9.2 provides that prices will be reviewed annually with any relevant changes in the market pricing to be taken into account. Accordingly, Kordia notes that there will be further opportunities to address the pricing issue, but even the projected rates proposed are of concern, and should be addressed prior to registration of the undertakings.

10. The increasing cost, putatively designed as "incentive pricing" to incentivise build out, is effectively "penalty pricing" for failure to build out at 10% population rates. This is contrary to the arguments raised by the Commission in the Draft Report (and supported by Kordia in submissions) that threshold roll out standards would decrease competition and should not form part of the regulations/undertakings in mobile telecommunications.

11. Kordia has observed a number of statistics with New Zealand and comparable countries which Kordia submits that these are relevant for the Commission to consider before accepting the Roaming Undertakings:

    - In New Zealand, Vodafone currently holds a 52.4% market share as the second entrant in the effectively duopoly market, behind Telecom.

    - In Australia, Vodafone is the third market presence and holds an 18% market share.

- In countries like Denmark, Ireland, Finland, and Sweden statistics on market share indicate that the third market entity can expect to obtain market share of over 15 percent and less than 20 percent. In those countries Kordia understand that the third mobile operator has market share percentages that range from 15% to 19.4%.

12. Such statistics raise concerns that the price factor methodology proposed by Vodafone is not economically sustainable.

13. It is unlikely that third entrants in the mobile market (let alone any other following market entrants) will consider an extensive build out in the first five years. Given that international experience and oligopoly economic theory strongly indicates that they are unlikely to obtain anything beyond a 19 percent market share, the proposed pricing based on a 10% population build out is not appropriate, and will adversely affect new entrant's decisions to compete in the current duopoly market.

14. Technological advances over time will likely result in the decrease in the cost of supplying the roaming service. Accordingly, the upward trajectory of pricing is not reflective of technological trends.

15. Further, Kordia submits that the price factor methodology proposed does not reflect the different approaches to build out that different entities will face, much of which will depend upon where they are placed in the market and whether they are seeking to operate in a fixed or cellular or mixed market.

Recent Market Developments

16. Kordia considers that certain recent market developments should be considered by the Commission.

(a) Trend Towards Mixed Technologies

17. Kordia notes that Vodafone has recently launched the "Vodafone at Home" service. This service is provided by a small device containing a SIM card that connects directly to a user's home handset. The service operates in such a way that it uses the technology of the cellular mobile network and competes directly with a fixed line service.

18. This indicates the increasing importance that the cellular market will have. Further, it establishes that the pricing factor methodology proposed by Vodafone is not suitable. The pricing factor methodology is based on the behaviour of a solely cellular market entity who may wish to build out quickly to garner more market share. However, the market is moving towards a merge of mixed technologies.

19. Kordia considers that where fixed lines are being competed with by mobile network operators, the mobile network build out process will alter so that the mobile operators

build out at a much slower pace, as they concentrate on the high population density areas first before building out any further sites. This type of mobile business which offers a mixture of the fixed and mobile service is directly inconsistent with the pricing factor methodology.

(b) New 3.5GHz Radio Spectrum

20. The Government is seeking to promote new entrants into the broadband wireless access service, with the emphasis on improving rural and provincial areas access to broadband and high speed internet services, by making available further 3.5GHz radio spectrum licences in such areas. These licences are open for allocation only to interested regional parties. Such parties may include commercial operators who may also choose to compete in the mobile market.

21. Kordia observes that the two market developments listed above will provide scenarios where build out decisions will not likely correlate with the proposed pricing factor methodology which provides for annual increases of 10% population coverage.

Disputed Assumptions from the Pricing Methodology

22. The pricing methodology is based on a fallacy that as time goes on, build out will necessarily occur in the lower (average) cost areas (assumed to be the high population density areas).

23. These assumptions do not assist the market and in particular, penalise less populated markets as they price in a way that perpetuates the view it is less profitable to service the less populated areas. That is not necessarily the business case for Kordia.

24. Entrants should be able to test less populated markets and not be subjected to the increasing price factor.

25. In short, market entrants may intend to enter into more targeted zones, although they are not necessarily lower [average] cost. Market entrants should be encouraged to test the market themselves and make the contestability for some of the areas previously *considered* "high [average] cost" open for the market to prove or disprove this.

Yours faithfully

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