**NZ COMMUNICATIONS LIMITED**

:

# Comments on the Vodafone undertakings into ROAMING AND CO-LOCATION SERVICES

**Comments on Post Conference submissions & correspondence**

**Public VERSION**

**November 2007**

**Version FINAL**

**NZCL Public Policy Team**

# SUMMARY OF KEY CONCLUSIONS

- NZC believes that the undertaking does not contain changes which are material enough to prevent designation of roaming and collocation and the issuance of targets by the Commerce Commission.

- The Commission should recommend both co-location and roaming for designation.

- Targets for co location must be set and the Commerce Commission must supervise a code for co-location similar to its work on the LLU co location code

# INTRODUCTION

NZ Communications Limited ("**NZC**") thanks the Commission for the opportunity to make yet further submissions on questions outlined in its Draft Report –.

We are concerned with the protracted delay in the implementation of meaningful detailed regulation.

The impact of the 4th iteration of the undertaking is further delay in a commercial outcome for competition

## SUMMARY

## ROAMING

Roaming needs to be designated at TSLRIC and ust include SMS

Roaming must be supervised by the ComCom until a commercial solution is available

No ream improvement in terms & Conditions

A lack of detail is available for operational and technical issues

Pricing is still a concern particularly with SMS & GDA concepts

## CO-LOCATION

NZC have not built one cell site using co-location despite having an agreement with Telecom for over 6months

There is no evidence that there is any incentive for co-location on the part of the incumbents.  Given the consumer and community benefits for co-location, it should be designated with aggressive targets set:

All the evidence suggests Co-location must be designated

- Co-location is exacerbated by council RMA demands
- Little consultation has taken place with the Minister for the Environment on its national standards for roadside telecommunications facilities

The November 7 Commerce Commission decision on Co location for ULL illustrates this aggressive difference between effective ComCom rules and the TCF code

If Telecom or Vodafone were really incentivised to complete co location. There would be several sites built by now

(Page 2)
The commerce Commission has published a 163 page profile and related appendixes operations manual for D-Slam Co location code. This Contrasts aggressively against the co location code of the  TCF which is a weak 23 pages

The difference between the LLU co lo code and the TCF co location code illustrate the problem

The roaming and Co location debate has been running for 6 years

1. We re-iterate our concerns with the delays arising from repeated iterations of the Undertaking process.

2. Indeed, we have yet to see any evidence that a non-regulatory solution can be viable in the absence of the pressure created from a competitive commercial environment. Therefore satisfactory long term resolution of the issues before the Commission through a voluntary Undertaking remains unrealistic.

Simply there is no alternative to designation and regulation of targets and protocols.

3. Competitive solutions cannot arise from voluntary offers drafted by the very parties they are intended to regulate.

4. A comparison of the Fourth Undertaking with the previous versions shows a lack of substantive progress on the critical issues identified in Vodafone's proposals. (See Annexure 1.)

Both Vodafone Undertakings must be rejected

5. NZC has previously presented its view on the minimum requirements of an acceptable Undertaking. These principles are self-evident, constituting minimum requirements for a commercially reasonable agreement for the co-location and roaming services. We again summarise the principles as follows:

   a. Cost-based pricing;

   b. Promotion of economic efficiency for both the access seeker and the access provider;

   c. Provision, with respect to roaming, of seamless hand-over, efficient routing, and access to 3G, data, and SMS services at cost-based rates;

   d. No constraints on otherwise lawful retail conduct and retail competition;

   e. Furtherance of facilities-based entry in order to promote competition at both the wholesale and end-user levels.

6. The Fourth Undertaking continues to be deficient in a number of critical areas. These deficiencies are addressed in brief below and in the attached Annexures.

**7. Co-location**

The ComCom must repeat its LLU co lo success in building a new Co location code for cell towers.

8. <u>Terms and Conditions</u>. Vodafone proposes in its Draft Undertaking to offer co-location services under the terms of the Co-location Code.[1]. We note that the Commission has already recommended re-submitting the Co-location Code to the TCF for further modification. Therefore, reliance on the Co-location Code "or on such terms and conditions as Vodafone and the Access Seeker may agree"[2] does not appear to constitute a reasonable substitute for resolution of the issues noted in the Commission's Schedule 3 proceedings.

9. <u>Targets and Timeframes</u>. NZC has previously noted the success of the LLU proceedings[3] in ensuring rapid access to facilities through the

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[1] Co-location of Radiocommunicatinos Services Regulated under the Telecommunications Act 2001 proposed by the Telecommunications Carriers Forum and approved by the Commission on 7 December 2006, throughout either the "**Co-location Code**" or simply the "**Code**".

[2] Fourth Undertaking, Schedule 3.

[3] See the LLU Co-location Implementation Plan and Co-location Operations Manual.

use of targets and timeframes. Vodafone raises a number of issues with this comparison. None of these issues appear relevant to using similar processes in regard to mobile cellular co-location.

10. Vodafone's objections to the comparison fall into two categories: first, that the Access Seeker plays a critical role in determining how many co-locations actually occur, and second, that the Co-location code contains several similar provisions regarding the timeframes for accomplishing different steps of the co-location process.[4] These observations can be readily addressed and remedied, and should pose no barrier to the Commission defining similar commitments.

11. The first objection can be remedied simply by noting in the requirements that the Access Provider is only required to meet the targets if it receives a number of applications sufficient to do so. (Our proposal, below, specifically addresses this concern.) Indeed, the primary reason to have targets is to ensure that applications are not summarily rejected or delayed for trivial, non-material reasons; the Co-location Code will remedy any interference or construction issues.

12. The second objection simply highlights the failure of the Co-location Code itself. The Co-location Code has failed to realize a single co-location between mobile operators. It is therefore quite clear that these timeframes alone are insufficient: actual targets are essential to realizing co-locations under the Co-location Code.

13. For ease of reference, we reiterate our proposal for targets and timeframes below:

*Concluding and executing at least 30 individual site agreements within 30 days of an access seeker submitting a binding deed and a list of site candidates.*

*Execution of at least 90% of co-location requests within 30 days of receipt of individual site applications.*

*Approval of all resource consent or building permit applications, as deemed reasonably necessary by the access seeker, within 10 days of submission.*

*Commencement of construction on at least 90% of executed co-location agreements within the later of (i) 30 days of execution, or (ii) 5 days receipt of a resource consent or any other necessary governmental permit or approval.*

*A universe target of having an acceptable database of information( as per the EWNZ 2006 submission request)*

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4 We note, in addition, that Vodafone makes several objections to classifying co-location as a service. We find no rationale for this statement: while the nature of certain aspects of LLU and mobile facilities co-location are not identical, we do not see how Vodafone's observations amount to any material barrier to co-location targets and timeframes.

5 Including, as noted at the Schedule 3 Co-location Conference, Vodafone effectively re-capturing a co-locating parties share of the capital costs within the short period of time remaining on a lease, re-calculated (and repaid again) after the lease is renewed.)

6 Fourth Undertaking, Schedule 1, clause 2.2.

7 Fourth Undertaking, Schedule 1, clause 1.1.

8 Clause 3.2

9 Clause 3.3

10 Id.

11 In other words, Vodafone seeks to obtain through its Undertaking that which it thinks it cannot obtain through direct negotiation. This is a particularly cynical view considering that Vodafone is pursuing the Undertaking process in order to avoid regulation after having failed to agree to allow other parties to co-locate on commercially reasonable terms.

12 In the case of co-location in particular, while the Co-location Code provides certain timeframes and procedures intended to mitigate Access Provider caused delays, recent experience with the failure of the Telecom Co-location implementation process shows that the current provisions of the Co-location Code are insufficient.

14. **Price.** Vodafone's pricing proposal remains essentially unchanged from its previous Undertaking.[5] We therefore summarise our previous pricing concerns below.

15. Operating Costs. The Commission has requested that the price of co-location be based on the access seeker's *pro rata* share of use of the access provider's mast. We note that Vodafone appears to have accepted this recommendation with respect to a calculating the capital contribution component of the monthly rental,[6] but has not done so with respect to the operating expenditures.[7] This biased shifting of the burden of OpEx requires remedy.

16. We also note that the revised formulas for capital contributions and monthly rentals do not discriminate between ground and tower space. As previously noted, we believe that 50% of the operating costs should be considered "ground space" costs, and 50% of the "tower space" costs. In addition, we note that Vodafone continues to argue that 2G/3G antennas should be treated as two antennas. This distinction creates unnecessary inefficiencies and inequities, and is at cross-purposes with the goals and objectives of the Act.

17. Replacement Capital Cost. There remain several fundamental flaws with the methodology used to determine the value of the facility ("C" in the formulas used by Vodafone). We continue to support the classification of sites in broad categories to determine average facility costs, as has been done in similar co-location arrangements with Telecom and Woosh. Such classifications would more realistically capture the actual value of the facilities and the leases, and would also reduce the need for repeated re-valuation of tower structures, which will within such broad categories have only marginal cost differences.

18. In addition, NZC remains concerned that the "replacement cost" may be used to artificially inflate the actual costs. The replacement capital cost must be based on a Modern Equivalent Value formation. The Capital Cost must be modified accordingly.

19. Two additional issues require additional comment: First, under the capital contribution approach, there is no facility for refunding the Access Seeker for capital contributions or monthly rentals paid by a future Access Seeker. Second, while Vodafone has agreed to an independent valuation, we note that the Valuer's reference is limited to either agreeing or disagreeing with Vodafone's calculation.[8] Vodafone then has sole responsibility for re-calculating the valuation, "taking into account the Valuer's report,"[9] but not committing to follow the Valuer's report, the valuation coming out of that re-calculation continuing to apply without modification.[10] It would be more appropriate for the Valuer to determine the value of "C" itself.

20. Asset Life. In addition, there remain concerns with the asset life of the facilities. Under the monthly rental calculation, the fee will provide for the Access Seeker repaying the full cost of the tower in 20 years (even if the asset is maintained for a longer period), or such time as remains on the lease (even if the lease is shorter), therefore substantially increasing the cost of renting the facility. We believe that the appropriate lifetime of any facility be treated as 35 years (less 1 day), the realistic life of a standard long term telecommunications facility investment.

21. Pre-tax Interest Rate. Vodafone still proposes a pre-tax WACC rate of 15.7%, especially considering that this is essentially a long-term lease with a sound tenant and reliable security. We think the pre-tax WACC rate should be set at a fixed 8%, a more appropriate reflection of the risk involved in providing the co-location services. We note that commercial property leases with similar tenants yield a per annum pre-tax interest rate of less than 8%.

22. **Reciprocity.** The co-location Undertaking is offered on the condition that the Access Seeker provide a co-location service substantially similar to the service offered by Vodafone in its Fourth Undertaking. This appears to be a condition precedent, that is, Vodafone must approve the co-location agreement terms and conditions offered by the Access Seeker. This gives Vodafone a great deal of leeway and preferential treatment with respect to co-locating on an Access Seeker's towers, on terms better than Vodafone is willing to offer itself.

23. As noted in our comment on the previous Undertaking submission, this requirement takes the Undertaking out of the scope of the Schedule 3A process and the current regulatory proceedings: in effect, it appears to be an effort to gain by the indirect regulation of third parties more through the Undertaking process more than Vodafone is willing to give.[11] This is particularly troubling considering that new entrants are more likely to be investing in more co-location-friendly behaviour, including building co-locatable towers, optimizing antenna space, and otherwise promoting the efficient use of its network infrastructure.

24. The Schedule 3A Undertaking process is intended as a substitute for regulation of an Access Provider. It would appear contrary to the purpose and structure of the Act if the Access Provider were to be able to obtain, through avoiding regulation itself, preferential terms with third parties who are not party to, or have agreed with, the terms and conditions of the Undertaking.

The cell towers must be moved to the structural separated vehicle

The Wholesale charter of Telecom has been breached as NZCL 's requests have been subordinated to the telecom W-CDMA build

**The case for setting targets**

There is a bottleneck access problem with co-location. There are environmental and end user benefits in facilitating co-location where it is possible. Co-location is economically efficient and will lead to a lower cost mobile phone industry, and a more innovative mobile market as competition promotes more bespoke services. The access bottleneck is created in co-location because of tight environmental laws but also because many hilltops are scarce natural resources.

In today's world of tight RMA conditions, cellphone towers are a bottleneck access point, just like local exchanges for a D-Slam network.

**Telecom & NZC negotiations have exposed the following difficulties**

1) No dedicated wholesale team exists for co-location negotiations.
2) The time delay associated with Telecom reveals an absolute lack of urgency.
3) Different groups of executives rotating around the process.
4) A refusal to agree standard site type names.
5) Confirmation that no horizontal separation is available.
6) Subordination of the NZC requests to the WCDMA roll out.
7) A conflicted executive is supervising the negotiations.

**Roaming**

25. Vodafone's Draft Undertaking still remains critically short in a number of areas, including:

    Price;

    Marketing and sales;

    Efficient implementation of routing;

    Key technical implementation terms and timeframes.

26. Price. In this fourth iteration of the roaming Undertaking, Vodafone has finally created certainty regarding the price at which roaming will be made available (it is no longer unknown number to be re-calculated on an exclusion-zone basis by Vodafone from time-to-time). However, the prices remain far above the cost-based solution recommended by the Commission, as we have previously noted.

27. Terms and Conditions of the Undertaking. NZC has previously noted its concerns with the terms and conditions of the Vodafone Undertaking. As these terms have seen little change, rather than repeat our earlier observations, we provide comment on the more critical terms in the attached Annexure 2. Our comments in this Annexure would help to bring the Undertaking more in line with international best practice.

Roaming can only be declared a success after a service has run for several years.

28. Efficient Implementation of Routing. We think it would be appropriate for the Undertaking incorporate implementation and testing commitments similar to those used in LLU implementation, which Vodafone discusses in the context of the co-location Undertaking. Testing would therefore include specific procedures for quick and efficient resolution of any issues arising in the testing period.

Its inevitable that in a one GSM market regulation and supervision will be needed

29. Vodafone's Fourth Undertaking also continues to lack a means for ensuring efficient routing of roaming traffic.

30. Technical Terms and Timeframes. The definition of technical and operational requirements is now limited to a period of approximately 65 days (rather than the previous 145 days). This is a marked improvement. However, the Fourth Undertaking still lacks any commitment to service levels, or means of adequately curing any failure on Vodafone's part to meet such service levels. Instead, the Fourth Undertaking still incorporates a number of very broad provisions allowing Vodafone to suspend, terminate, or interrupt services. While Vodafone has agreed to a general "equivalency of service" provision, the clauses implementing that requirement include an enormous variety of opt-outs from the equivalency obligation, effectively neutering it.

The cell towers must be moved to the structural separated vehicle

## Conclusion

The Commission may make a recommendation to the Minister to accept a Schedule 3A Undertaking only if the Commission is satisfied that the Undertaking complies with the Act and the standard access principles set forth in clause 5 of Schedule 1 of the Act, and any limits on those principles set forth in clause 6. As noted above, in the attached Annexures, and our previous submissions, this Fourth Undertaking remains inconsistent with the standard access principles:

The Wholesale charter of Telecom has been breached as NZCL 's requests have been subordinated to the telecom W-CDMA build

The undertaking lacks the necessary commitments to providing access to the roaming and co-location services in a timely manner. Implementation and testing of roaming, and the review, approval, and subsequent testing of co-location, are either open-ended, or subject to unjustified and unnecessary delays.[12]

In today's world of tight RMA conditions, cellphone towers are a bottleneck access point, just like local exchanges for a D-Slam network.

The service standards are not consistent with international best practice. The co-location undertaking, in particular, substantially limits the rights of an Access Seeker. Their use of co-location facilities is subordinated to the interests of the incumbent, and overly burdensome review and approval requirements not found in competitive international co-location agreements. Similarly, the roaming undertaking, for reasons summarized above and in the attached Annexures, among other issues previously noted, remains far short of international best practice in terms of efficient and timely implementation and routing principles, standard terms and conditions, and service level commitments.

The terms and conditions of service are not consistent with the terms and conditions of service on which Vodafone offers the same services to itself.

The timeframes for the provision of information, and the level of detail contained within the information, is not equivalent to that provided to Vodafone's own business units. Indeed, the information has been sparse or entirely unavailable throughout most of these discussions, including the basis for calculating roaming costs and tower costs, to the feasibility of co-location or components of roaming implementation. While we understand that certain costs may be highly confidential and restricted from disclosure (such as internal costs relating to the pricing calculations for retail services, and certain components of network operations costs), a substantial amount of information has been labeled as confidential, even where it might directly impact the cost or nature of a service being offered. (In particular, we cannot even benchmark as accurate Vodafone's prior and current proposals regarding the "headline" rate for roaming, or how roaming costs will change based on network roll-out.)

For the foregoing reasons, we do not believe the undertaking complies with the Act and recommend that the Commission recommend that the Minister not accept the Fourth Undertakings.

NZ COMMUNICATIONS LIMITED

# Comments on the Vodafone undertakings into Roaming and co location services & post conference correspondence

# APPENDIX

**Public version**

**14th November 2007**

**Version 1.3**

## APPENDIX CONTENTS

1. **Comparison of Undertakings**

2. **National Roaming – NZC response to Vodafone Undertaking**

3. **Comparison between the Co location code for Cell Towers ( TCF) and the Co location code for LLU**

4. **Appendix listing database required for effective co location**

5. **Targets for Co location**

6. **Targets for roaming**

## 7. Annexure 1

### Comparison of Undertakings

| | **Undertaking I 19 January** | **Undertaking II 22 May** | **Undertaking III 31 August** | **Undertaking IV 2 November** |
|---|---|---|---|---|
| **Roaming** | | | | |
| Price | | | | |
| - Voice | 21.5c | 15.0c and increasing | 15.0 and increasing | 14.8c increasing to 19.5c |
| - SMS | 9.5c | 6.1c and increasing | 6.1c and increasing | 4.9c increasing to 6.4c |
| - Data | 4.9c | 31.2c and increasing | 31.2c and increasing | 31.9c increasing to 42.1c |
| - Cost based? | ✘ | ✘ | ✘ | ✘ |
| - GDA | | | ✘ | ✘ |
| - Upfront fees | Unspecified amount | 1 cpm incl. in headline rate | $2.0m<br>1 cpm incl. in headline rate | Removed, but headline rate effectively unchanged. |
| Non-price Terms | | | | |
| - MVNO's | ✘ | ✘ | ✘ | ✘ |
| - Resellers | Vodafone approval required | ✓ | ✓ | ✓ |
| - In-bound International Roamers | ✘ | ✘ | ✘ | ✘ |
| | | | | |
| **Co-location** | | | | |
| Price | | | | |
| - Tower valuation | $275,000 and up | Silent – left to later negotiation. No recourse to dispute resolution | Silent – left to later negotiation. Non-binding dispute resolution | Silent – left to later negotiation. Non-binding dispute resolution |
| - Yield / Rate of Return on tower | 13% p.a. | 15.7% | 15.7% | 15.7% |
| - Opex pro-rated according to usage | ✘<br>(Evenly split regardless of usage) | ✘<br>(Evenly split regardless of usage) | ✘<br>(Evenly split regardless of usage) | ✘<br>(Evenly split regardless of usage) |
| - No re-calculation of asset life (no excessive recovery of Capital Costs) | ✓<br>(On this point, this was the fairest of all Vodafone Undertakings) | ✘ | ✘ | ✘ |

## Annexure 2

## National Roaming – NZC response to Vodafone Undertaking

### Undertaking

| Page | Clause | Clause | Comment |
|---|---|---|---|
| 3 | 2.1 | Term | The Undertaking has a term of 5 years from the date of its registration by the Commission, not the date of acceptance by an Access Seeker. An Access Seeker will therefore only have access to roaming for a very short period of time after it has completed the processes required to implement roaming under the terms of the Undertaking As previously noted, we think that an initial 5 year term, commencing upon Vodafone's acceptance of a Deed signed by an Access Seeker, with a single automatic annual renewal thereafter would be more appropriate. |

### Schedule 1 – Service Description

| Page | Clause | Clause | Comment |
|---|---|---|---|
| 5 | g) | Cellular mobile services and functionality used in non-mobile applications; | Delete. This exclusion limits the ability of the Access Seeker to compete in the retail market. |
| 6 | k) | Any information services provided to Vodafone End Users; | Amend to "any information services provided by Vodafone to Vodafone End Users;". The clause in it's current form is too broad and prevents Access Seeker End Users from accessing third party information services if those same services are available to Vodafone End Users e.g. MetService |
| 6 | o) | Mobile commerce services; and | Delete. This exclusion limits the ability of the Access Seeker to compete in the retail market. |
| 6 | p) | Customer self-service applications. | Delete. This exclusion limits the ability of the Access Seeker to compete in the retail market. |

### Schedule 2 - Pricing

| Page | Clause | Clause | Comment |
|---|---|---|---|
| 7 | 1 | Price | NZC remains fundamentally opposed to the way that Vodafone has approached pricing. The economic arguments that Vodafone have used to justify it's approach apply if, <u>and only if</u>, the "base price" (14 cpm) is cost-based. This is not the case; the base price that Vodafone is using is at least double the true cost of the underlying service. |
| 7-8 | 2 | Waiting period for access to other services. | Delete. Vodafone has not implemented the Commission's preliminary recommendation that there be no delay in the availability of roaming on new technologies. As the Commission has previously noted, factors other than will be sufficient to encourage |

| | | | |
|---|---|---|---|
| | | | investment in 3G and other technologies. A competitive roaming Undertaking must include access to future technologies. |

**Schedule 3 – Terms and Conditions**

| Page | Clause | Clause | Comment |
|---|---|---|---|
| 9 | 1.1 | **Access Seeker End User** means any end-user of the Access Seeker Mobile Services who is entitled to receive Access Seeker Mobile Services; but excludes:<br>a) any Access Seeker Reseller (except when they are themselves an end-user of the Access Seeker Mobile Services); and<br>b) any in-bound international roaming customers. | Delete b) any in-bound international roaming customers. The ability to provide service to in-bound international customers is essential for an Access Seeker to be able to compete on an equal footing with the incumbent operators. If an Access Seeker isn't able to allow in-bound international roamers then they will find it difficult to sign international roaming contracts and therefore the Access Seeker End Users will not have as many international roaming destinations to choose from. A recent example of this is Telecom's inability to offer international roaming to a wide number of destinations adversely affecting their ability to compete in the retail market. In this case it was Telecom's technology choice that caused the restriction. In this case, it'd be an artificial restriction created by Vodafone.<br><br>Preference would be to apply the **Vodafone End-user** definition:<br>Means any end-user of the Vodafone End User Service who is entitled to receive the Vodafone End User Service, but does not include the Vodafone Group, the Access Seeker or the Access Seeker Group. |
| 9 | 1.1 | Definition of - **Access Seeker Customer** and **Access Seeker End User**<br><br>**This means that Voda will inevitably prevent MVNO capability of a new entrant because Voda will always be able to negotiate a better MVNO than the new entrant . ( this is because a new entrant can't "buy pre owned " customers) –ie Telstra , Warehouse , etc** | Read together, these two clauses suggest that the only MVNO arrangement that an Access Seeker can enter into is a straight reseller type arrangement where the Access Seeker still "owns" the end user. If an Access Seeker were to enter into a more traditional MVNO type arrangement where the MVNO owns their own customer, then the MVNO end users would not be able to access roaming on the Vodafone network. |
| 9 | 1.1 | **Access Seeker Mobile Network** means, subject to **Clause 3.16,** any operational 3G W-CDMA and/or 2G GSM and GPRS Cellular Mobile Network in New Zealand that:<br>a) the Access Seeker wholly owns and has a right of access to; or<br>b) the Access Seeker does not own or wholly own, but which the Access | Following on from comment above, if an Access Seeker MVNO then approaches Vodafone for roaming services (since the Access Seeker is precluded from on-selling the service to them), this Clause precludes the MVNO from accessing the Undertaking (as they don't wholly own the network that they're using). |

| | | | |
|---|---|---|---|
| | | Seeker has acquired rights of access to in accordance with this Undertaking,<br>and is used to provide the Access Seeker Mobile Services. | |
| 9 | 1.1 | **Access Seeker Mobile Services** definition | Amend to make reciprocal with definition of **Vodafone End User Service**<br>Means any telecommunication service provided by Vodafone directly, or through a Vodafone Reseller, which may or may not be used by a Vodafone End User. |
| 12 | 1.1 | **Chargeable Text Message** definition | Concern is that Vodafone is trying to strip away termination revenue from the Access Seeker. |
| 20 | 2.1d) | Any security required by Vodafone under **Clause 23** has been provided to Vodafone's satisfaction. | Amend to: any <u>reasonable</u> security required by Vodafone under **Clause 23** has been provided to Vodafone's satisfaction. |
| 25 | 3.17 | If the Access Seeker wishes to change the Technical Specifications, the Access Seeker may notify Vodafone. The Access Seeker and Vodafone will then meet and endeavour to negotiate any such changes to the Technical Specifications, insofar as they apply to the Access Seeker. There will be no recourse to dispute resolution under **Clause 24** if the parties do not agree on those changes. | Under Clause 1.2 (page 19), for the purposes of construction, the Technical Specifications take precedence over the Implementation Plan and Operational Procedures. Therefore, the Technical Specifications are of critical importance to Access Seekers. However, Vodafone is seeking to 'set this in stone' now without any future recourse to dispute resolution.<br>Delete – "There will be no recourse to dispute resolution under **Clause 24** if the parties do not agree on those changes."<br>Insert – "If the parties do not agree on those changes within 10 working days, either party may refer the matter to dispute resolution under **Clause 24**." |
| 29 | 9.3 | However, if, on or before the end of the relevant calendar year, Vodafone and the Access Seeker have not agreed on any changes to the rates for each category of Chargable Roaming Traffic, then the rates that applied immediately prior to the end of that calendar year, shall continue to apply. There will be no recourse to dispute resolution under **Clause 24** if the parties have not reached agreement by the end of that calendar year. | Delete – "There will be no recourse to dispute resolution under **Clause 24** if the parties have not reached agreement by the end of that calendar year."<br>Insert – "If the parties do not agree on those changes within 10 working days, either party may refer the matter to dispute resolution under **Clause 24**." |
| 31 | 11.1c) | Ensure all information it gives Vodafone is correct and complete; | This clause is onerous on the Access Seeker. Insert a "good faith" qualification. |
| 31 | 11.1d) | Ensure that its use of the Vodafone Roaming Service complies with any acceptable use policy, as notified by Vodafone to the Access Seeker from time to time; | Delete – this Clause gives far too much discretion to Vodafone and creates significant uncertainty for an Access Seeker. |
| 33 | 12.2a) | Use any brand in the sale, marketing and advertising of the Access Seeker Mobile Services that Vodafone in good faith considers is likely to bring the Vodafone brand into disrepute; | Delete – this Clause gives far too much discretion to Vodafone and creates significant uncertainty for an Access Seeker. |
| 35 | 14.3 | Access Seeker End Users will be, and only they will be, the ultimate recipient of: | Delete – this Clause specifically excludes MVNOs (where the MVNO "owns" the end |

| | | | |
|---|---|---|---|
| | | a) the Vodafone Roaming Service; and<br>b) the Access Seeker Mobile Services. | user and also excludes in-bound international roamers. Both are critical to a new entrant. |
| 39 | 17.4g)ii | If the Accounting Expert decides that there is an Invoice Error and the amount of the invoice is reduced by 5% or less after correction, then the Access Seeker and Vodafone will equally share and pay the costs of the Accounting Expert; and | Delete. 17.4g) is currently very one-sided in favour of Vodafone. This and the following suggested change evens it up. |
| 39 | 17.4g)iii | If the Accounting Expert decides that there is an Invoice Error and the amount of the invoice is reduced by more than 5% after correction, then Vodafone will pay the costs of the Accounting Expert. | Amend to – "If the Accounting Expert decides that there is an Invoice Error and the amount of the invoice is reduced, then Vodafone will pay the costs of the Accounting Expert. |
| 41 | 17.11 | Penalty interest rate is "Bill Rate (as at the Due Date) plus 5% per annum…" | Clauses 17.10 and 17.11 are currently very 1-sided in favour of Vodafone.<br>Amend to "1%"<br>This makes Clause 17.11 reciprocal with Clause 17.10 |
| 48 | 22 | Liability | The Undertaking must be enforceable by the Access Seeker. If Vodafone defaults or acts in bad faith, there must be some penalty to Vodafone for causing direct or indirect financial loss to the Access Seeker for the bad faith acts of Vodafone. Of particular concern is the limitation on liability in Clauses 22.2 and 22.3.<br>The risk allocation in this article is also substantially one-sided: while there is a similar combined liability cap, the scope of actual liability of Vodafone in 22.2 vs. the Access Seeker in 22.11. This is particularly troublesome considering that the Access Seeker is more likely to suffer harm from Vodafone's actions than Vodafone is likely to suffer harm from the Access Seeker's actions due to the nature of the services being provided by Vodafone. |
| 54 | 26.2i) | In the case of a Text Message from a third party network that is handed over to Vodafone via interconnection links at an interconnection handover point that is to an Access Seeker End User roaming on the Vodafone Network and that is delivered by Vodafone to the Access Seeker End User's Handset, roaming charges would be payable by the Access Seeker for the termination leg of the roaming service provided by Vodafone. | This Clause is crafted to deny an Access Seeker termination revenue for Text Message traffic terminating to their End Users who are roaming on the Vodafone network.<br>Amend to:<br>"In the case of a Text Message from a third party network, Vodafone would then hand over that Text Message to the Access Seeker via interconnection links for termination. The Access Seeker would then hand that Text Message over to Vodafone via inter-network roaming links for termination to the Access Seeker End User's Handset." |
| 54 | 26.2j) | In the case of a Text Message from a Vodafone End User to an Access Seeker End User roaming on the Vodafone Network, that is delivered by Vodafone to the Access Seeker End User's Handset, roaming charges would be payable by the Access Seeker for the termination leg of the roaming service | This Clause is crafted to deny an Access Seeker termination revenue for Text Message traffic terminating to their End Users who are roaming on the Vodafone network.<br>Amend to:<br>"In the case of a Text Message from a Vodafone End User, Vodafone would then |

| | | | |
|---|---|---|---|
| | | provided by Vodafone. | hand over that Text Message to the Access Seeker via interconnection links for termination. The Access Seeker would then hand that Text Message over to Vodafone via inter-network roaming links for termination to the Access Seeker End User's Handset." |
| 54 | 26.3 | Notwithstanding **Clause 26.1**, Text Messages may be handed over by a third party network to, and accepted by, Vodafone subject to Vodafone's interconnection arrangements with that third party network. Text Messages that are to an Access Seeker End User roaming on the Vodafone Network that originate from a Vodafone End User shall be delivered by Vodafone directly to the Access Seeker End User. | Delete. This Clause is crafted to deny an Access Seeker termination revenue for Text Message traffic terminating to their End Users who are roaming on the Vodafone network.<br>Allow **Clause 26.1** to prevail. |

**Schedule 4 – Technical Specifications**

Under Clause 1.2 (page 19), for the purposes of construction, the Technical Specifications take precedence over the Implementation Plan and Operational Procedures. Therefore, the Technical Specifications are of critical importance to Access Seekers.

In addition, there remains an absence of service level commitments. An agreement to commit to certain standards of service, with mechanisms within the contract for enforcing such commitments, are a missing critical component.

**Schedule 5 – Deed of Acceptance for Vodafone Roaming Service**

| **Page** | **Clause** | **Clause** | **Comment** |
|---|---|---|---|
| 71 | 8 | We undertake to make available to Vodafone, at any time when we operate a Cellular Mobile Network in New Zealand and at any time requested by Vodafone, a telecommunications service that is the same or substantially similar to the Vodafone Roaming Service on terms that are the same or substantially similar to the terms on which Vodafone makes available the Vodafone Roaming Service under the Undertaking (except that Vodafone would not be regarded as an Excluded Operator). | Delete. Vodafone has no requirement for a national roaming service. This Clause will unnecessarily add costs into an Access Seekers network build. The same arguments that Vodafone have used against Telecom being an Access Seeker can be used to justify deletion of this Clause. |

## Annexure 3

Comparison of the Colocation code as set by the TCF with the Co location code set by the TCF illustrates the failure of the TCF in generating an effective code.

NZCL reiterates its observation that the TCF is not the forum to conclude a workable co location code despite 5 years of negotiation and a failed code in 2005a workable code has not been created.

In 2005 NZCL predecessor company Econet wrote a paper listing the requirements of an effective code THIS will be resubmitted to the Commerce Commission under separate cover

1) A data base profiling incumbents towers
2) Ability to have standard cell tower types
3) Requirement to optimise the headframe space by incumbents
4) Rules on the reservation of space
5) Targets to deliver
6) Radio interference can't be used as an excuse to not co locate
7) Common industry definitions to prevent confusion amongst councils
8) obligations to reasonably assist with RMA

Evidence of the failure of the co location code is illustrated by

1. No databases required
2. No multiple applications for similar sites
3. Incumbents can refuse
4. No sensitivity to RMA
5. No Co –ordination with the ministry for environment national standards on road side telecommunications facilities

The contents pages of the 2 Co location codes best illustrates the failing of the TCF code

The TCF is not the vehicle to fix the current un workable code , this is because the negotiating dynamics are not commercial . Vodafone and Telecom participate in negotiations with NZCL. NZCL has no board representation or direct vote .

NZCL predecessor participated in 5 years of TCF co location code negotiations, the outcome is appalling

**APPENDIX 3 - TABLE OF CONTENTS TCF CO LOCATION CODE as produced by the TCF**


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2 Interpretation
3 Co-location
4 Terms
5 Sites
6 Access Seeker's Obligations
7 Access Provider's Obligations
8 Mutual Obligations
9 Destruction of or Damage to the Site
10 Health & Safety
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13 Notices
14 Confidentiality
15 Assignment
16 Severability
17 Liability
18 Termination
19 Dispute Resolution


TCF – Master Co-location Agreement: Annexure 4 of the Co-location Code

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**Appendix 4 Requirement for a network operator site database**

**Location information**

1) Telecom property identification number
2) NZMG co-ordinates of location

**Land Information**

1) Legal identification of property
2) Landowner name
3) Landowner contact details
4) TNZ method of land occupancy ( ownership lease etc)
5) Terms and conditions of the land occupancy ( ie copy of the lease)
6) Copies of existing resources consents held for the property

**Site Information**

1) site plan
2) land plan
3) site access details
4) Site electrical supply and capacity information

**Access Track Information ( if applicable)**

1) Who built the access track
2) Who owns the land under the access track
3) When was the access track built
4) How much did the access track cost to build
5) Who paid for the access track

**Electrical supply information ( if applicable )**

1) Who paid for the electrical supply?
2) When was the electricity supplied?
3) What did the electrical supply installation cost

**Tower information**

1) "as built " construction drawings of the tower and foundations including tower head and antenna mounting details
2) Tower earth diagram
3) Details of antenna feeder and cable trays routes

**Base structure information**

1) As built " construction drawings of the base structure including the antenna mounting details
2) Earth diagram
3) Details of antenna feeder and cable tray routes

**Equipment shelter information**

1) As built construction drawings of equipment shelter including installed and proposed equipment racks

**Radio communications act Information**

2) Copies of all MED licenses applicable to the site

**Annexure 5**

**Targets for Co location – A practical application which benefits NZ consumers**

1) a site database for all cell towers
2) a per annum built target for incumbents of 500 sites
3) a time frame around processing of not more than 30 days
4) a co location manuals written with ComCom supervision
5) movement of cell towers to the ANS unit of Telecom
6) a wholesale charter is created for tower access

**Annexure 6**

**Targets for roaming - A practical application which benefits NZ Consumers**

1) Roaming manual to be CP of a deal
2) Renewal terms to be available until competitive tendering is available
3) TSLRIC pricing available for SMS and voice