NOTICE SEEKING CLEARANCE UNDER SECTION 66 OF THE COMMERCE ACT 1986 OF A PROPOSED ACQUISITION OF 850MHz RADIO SPECTRUM RIGHTS BY TELECOM NEW ZEALAND LIMITED

4 APRIL 2008

PUBLIC VERSION

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COMMERCE ACT 1986: BUSINESS ACQUISITION SECTION 66: NOTICE SEEKING CLEARANCE

4 April 2008

The Registrar
Business Acquisitions and Authorisations
Commerce Commission
PO Box 2351
WELLINGTON

Pursuant to section 66(1) of the Commerce Act 1986, notice is hereby given seeking **clearance** of a proposed business acquisition.

1. SUMMARY OF APPLICATION

Background

1.1 Telecom and Vodafone both own management rights to radio spectrum in the 800/900MHz frequency range. These rights expire in 2011/2012.

1.2 In April 2007, Cabinet agreed that the management rights to this spectrum will be renewed upon expiry, but that:[1]

(a) if Telecom or Vodafone sell at least 5MHz of 800/900MHz spectrum on the secondary market to a person who does not currently hold spectrum in these bands within six months of the renewal offer being made, Telecom/Vodafone will be able to purchase the remaining management rights in the 800/900MHz frequency range that expire in 2011 or 2012; and

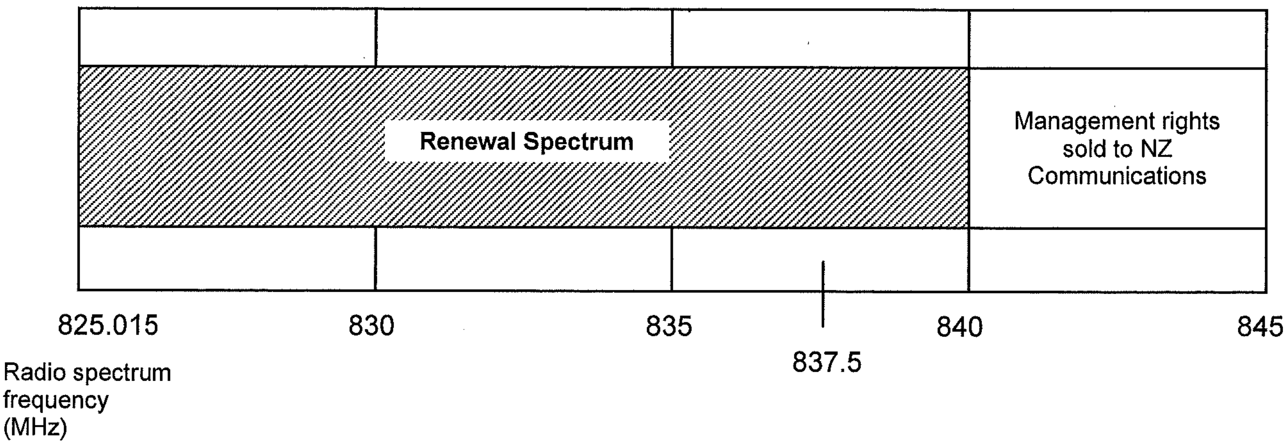
(b) if Telecom or Vodafone do not sell at least 5MHz of 800/900MHz spectrum on the secondary market to a person who does not currently hold spectrum in these bands within six months of the renewal offer being made, 7.5MHz of the radio spectrum (in relation to each party that does not sell at least 5MHz of 800/900MHz spectrum) in the 800/900MHz frequency range that expires in 2011 or 2012 will be offered by auction.

1.3 In November 2007, the Ministry of Economic Development ("**MED**") made an offer ("**Offer Document**") to Telecom to renew, for a period of approximately 20 years following expiry of existing rights, management rights in relation to:

(a) frequency range 825.015MHz to 837.500MHz (and its 870.015MHz to 882.500MHz pair); and

(b) frequency range 837.500MHz to (845.000 - δ)MHz (and its 882.500MHz to (890.000 - δ)MHz pair), where δ is the spectrum that must be sold to the "person who does not currently hold spectrum in the 800 or 900MHz spectrum bands" ("**new entrant**") (δ must be between 5MHz and 7.5MHz inclusive).

1.4 Telecom entered into an agreement on 5 December 2007 to sell management rights in relation to 5MHz spectrum (paired) in the 850MHz frequency range to New Zealand Communications ("**NZ Communications**"). Telecom and NZ Communications intend to settle this agreement in the next few weeks. This means that the management rights in relation to which Telecom has a renewal right covers the frequency range 825.015MHz to 840MHz ("**Renewal Spectrum**"). The following diagram shows the relationship between the Renewal Spectrum and the spectrum sold to NZ Communications (note: the diagram does not display the spectrum pairs in the 870.015 to 890 range):



Clearance application

1.5 The terms and conditions of MED's offer are set out in the Offer Document. Clause 5.1 requires that the Purchaser (Telecom) deliver to the Chief Executive of MED a statutory declaration specifying that either:

(a) the acquisition does not involve a breach of section 47 of the Commerce Act 1986 ("**Commerce Act**"); or

[1] Cabinet Paper *Arrangements for the Renewal of Radio Spectrum Management Rights Used for*

(b) a clearance or authorisation has been obtained under sections 66 and 67 of the Commerce Act for the acquisition.

1.6 Telecom considers the renewal of Telecom's management rights in relation to the Renewal Spectrum does not breach section 47 of the Commerce Act. However, for the avoidance of doubt, Telecom has elected to obtain clearance from the Commerce Commission ("**Commission**").

1.7 Telecom seeks clearance from the Commission to renew management rights in relation to the Renewal Spectrum.

Market definition

1.8 Consistent with the approach in Vodafone's *Notice Seeking Clearance Under Section 66 of the Commerce Act 1986 of a Proposed Acquisition of 900MHz Radio Spectrum Rights by Vodafone Mobile NZ Limited* ("**Vodafone Clearance Application**"), Telecom believes it is appropriate, for the purposes of this application, for the relevant markets to be defined as the *national wholesale and retail markets for mobile telecommunications services* ("**relevant markets**") and that the relevant time period to be considered ought to include the next three to four years at a minimum, because that is the period over which the acquisition will affect entry into the relevant markets.

Factual

1.9 In the factual, Telecom would hold management rights to the Renewal Spectrum for the next 23-24 years. The factual would not result in any market aggregation and in fact, with NZ Communications' purchase of spectrum from Telecom and Vodafone, reflects a disaggregation of previous ownership of spectrum rights. Given the high level of competition in the relevant markets, primarily between Telecom and Vodafone, and now enhanced by NZ Communications' acquisition of 800/900MHz spectrum from both Telecom and Vodafone, the acquisition will not result in a substantial lessening of competition in the relevant markets.

Counterfactual

1.10 As background to explaining the counterfactual, it is important to first set out the following:

(a) Telecom operates a CDMA network in the 850MHz band. This network has in excess of 2 million customers and has coverage in around 97% of the area of

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Cellular Services 10 (recommendation 11).

the country where people live. Due to favourable propagation conditions, the 850MHz band is especially suitable for wide area coverage. Spectrum in this band is essential to Telecom's mobile telecommunications network.

(b) [

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(c) [

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1.11 Now we turn to the counterfactual. If Telecom is not granted this clearance, Telecom would be forced to apply for a clearance to acquire a smaller amount of spectrum, with any remaining spectrum being subject to the auction upon expiry of the management rights in October 2012 ("**post-expiry auction**").

1.12 **If Telecom did not obtain clearance to acquire any spectrum**, presumably that spectrum would be auctioned post-expiry, which would result in Telecom having no automatic right of renewal of any management rights in relation to spectrum in the 850MHz band. **[**

]

1.13 **If Telecom obtained clearance to a lesser amount of spectrum, [**

] Lack of certainty as to prospective spectrum holdings (including whether Telecom could subsequently acquire additional spectrum rights in the post-expiry auction) would force Telecom to scale back or cancel any planned investment in this area. If Telecom did obtain further spectrum at the post-expiry auction, it would then be in a position to invest and compete effectively in the relevant markets. However the delay in investment and competition would severely inhibit competition in the relevant markets prior to 2012 (and beyond due to the delay in investment). It is also important to note that if Telecom is not cleared to acquire management rights in relation to the Renewal Spectrum, the sale of management rights to remaining spectrum in the 850MHz band will only be able to be used in a meaningful manner by a new entrant if a substantial amount of spectrum is sold to the new entrant.

An additional, say 2.5MHz, made available to the market by denying it to Telecom, would have no, or an insignificant, impact on competition in any of the relevant markets. The MED has concluded that a new entrant requires 5MHz to be viable, [

] NZ Communications has twice the amount of spectrum that the MED considers necessary for the operation of a national mobile network and any incremental spectrum rights it might obtain in the 850MHz spectrum would have no significant impact on its ability to compete in any market. Given that:

- the detriment to Telecom of having any less than 15MHz of spectrum in the 850MHz band is major and immediate; and
- this effect is compounded if a substantial amount of spectrum is sold to a third party (which would be necessary to enable the third party to use the spectrum meaningfully),

Telecom considers that the acquisition by it of the Renewal Spectrum will enhance competition and will not result in any substantial lessening of competition in any market.

Effect of acquisition on competition in relevant markets

1.14 We consider that the acquisition will not result in a substantial lessening of competition because:

(a) it will not result in market aggregation; and

(b) Telecom's continued presence in the relevant markets, including planned future investments, will enhance competition in the relevant markets going forward.

1.15 We consider that there is significant competition in the relevant markets already, primarily between Telecom and Vodafone, who are able, well-resourced, and vigorous competitors. Further, NZ Communications, now, or soon to be, in possession of 10.8MHz of spectrum in the 800/900MHz band, will bring additional competition to the relevant markets through the development of its own mobile network. NZ Communications' acquisition of spectrum and its roaming agreement[2] gives it large

[2] As noted in the Vodafone Clearance Application: "On 16 November 2007, Vodafone entered into a roaming agreement with NZC, enabling NZC to offer mobile telecommunications services using

amounts of flexibility and certainty in its network arrangements, providing it with scope to expand as it grows its customer base. There is also current and potential future competition in the relevant markets from other players through mobile roaming, co-location, and wholesale access to mobile networks:

(a) We note that the Commission has indicated in its *Schedule 3 Investigation into Amending the Roaming Service* that:[3]

> The evolution of the mobile market will increase the choice for roaming available to an access seeker by the end of the year.

It has also indicated that it considers that:[4]

> ... the terms of the national roaming service should be amended to promote new entry by ensuring that it is technology neutral and to clarify some uncertainty in the current service

and has made recommendations to the Minister of Communications accordingly.

(b) Further, the standard terms development process to determine the non-price elements of co-location of a mobile operator's equipment on another operator's transmission site is currently underway. This will make co-location a more viable option for new entrants to compete in the mobile telecommunications market.

(c) A number of market players have wholesale access contracts.

1.16 [

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Vodafone's network in areas in New Zealand where it will not initially have a network ... Since then, NZC has completed its first due diligence exercise involving inspection of Vodafone's site files."

[3] Commerce Commission *Telecommunications Act 2001: Schedule 3 Investigation into Amending the Roaming Service* (10 March 2008) iii.

[4] Commerce Commission *Telecommunications Act 2001: Schedule 3 Investigation into Amending the Roaming Service* (10 March 2008) iii.

1.17 Accordingly, Telecom considers that clearance should be granted under section 66 of the Commerce Act to renew management rights in relation to the Renewal Spectrum.

2. THE BUSINESS ACQUISITION

2.1 Telecom New Zealand Limited seeks clearance to acquire management rights in relation to the Renewal Spectrum.

2.2 The management rights in relation to the following spectrum would come into effect on 9 September 2012:

(a) 825.015MHz to 835.005MHz; and

(b) 870.015MHz to 880.005MHz.

2.3 The management rights in relation to the remaining Renewal Spectrum would come into effect on 30 October 2012.

2.4 The management rights in respect of the Renewal Spectrum would expire on 28 November 2031.

2.5 If Telecom is not utilising the spectrum to the satisfaction of the Chief Executive of MED, the rights may expire earlier.

2.6 Because Telecom intends to sell 5MHz (paired) of spectrum to NZ Communications, the acquisition would result in Telecom owning the management rights to 15MHz of radio spectrum (paired) in the 800/900MHz range.

3. PERSON GIVING NOTICE

3.1 This notice is given by:

Telecom New Zealand Limited
PO Box 570
WELLINGTON

Telephone:	04 498 9059
Fax:	04 498 9176
Attention:	Group Company Secretary

3.2 All correspondence and notices in respect of the application should be directed in the first instance to:

Russell McVeagh
Vodafone on the Quay
157 Lambton Quay
PO Box 10-214
WELLINGTON

Telephone: 04 499 9555
Fax: 04 499 9556
Attention: David Clarke / Willie Lewis

Email: david.clarke@russellmcveagh.com / willie.lewis@russellmcveagh.com

4. CONFIDENTIALITY

4.1 Confidentiality is sought in respect of all items deleted from the public copy of this application ("**confidential information**"). The items are indicated in the non-public version in square brackets ("**[ ]**").

4.2 In respect of the confidential information, confidentiality is claimed under section 9(2)(b)(ii) of the Official Information Act 1982 on the grounds that the information is commercially sensitive and valuable information which is confidential to the participants, and disclosure of it is likely to give unfair advantage to competitors of the participants and/or would unreasonably prejudice the commercial position of the persons involved.

4.3 Telecom requests that it be notified of any request made to the Commission under the Official Information Act for release of the confidential information. Telecom also requests that the Commission seek and consider Telecom's views as to whether the information remains confidential and commercially sensitive at the time responses to such requests are being considered.

5. DETAILS OF THE PARTICIPANTS

5.1 The acquirer is:

Telecom New Zealand Limited
PO Box 570
WELLINGTON

Telephone: 04 498 9059

Fax: 04 498 9176
Attention: Group Company Secretary

5.2 The owner of the asset is:

Her Majesty the Queen in right of the Government of Zealand
c/- Ministry of Economic Development
33 Bowen Street
PO Box 1473
WELLINGTON

Telephone: 04 472 0030
Fax: 04 473 4638
Attention: Manager, Radio Spectrum Policy and Planning

6. WHO IS INTERCONNECTED TO OR ASSOCIATED WITH EACH PARTICIPANT?

Telecom New Zealand Limited

6.1 Telecom New Zealand Limited is a wholly owned subsidiary of Telecom Corporation of New Zealand Limited (collectively "**Telecom**"). The group of companies associated with Telecom Corporation of New Zealand Limited includes, among others, Telecom Leasing Limited, Telecom Mobile Limited, and Xtra Limited.

The Crown/Ministry of Economic Development

6.2 No persons are interconnected or associated with the Crown or MED that are relevant to this application.

7. BENEFICIAL INTERESTS IN OTHER PARTICIPANTS?

7.1 Not relevant to the acquisition.

8. LINKS BETWEEN PARTICIPANTS, OTHER PERSONS IDENTIFIED AT PARAGRAPH 6, AND EXISTING COMPETITORS

8.1 Telecom is about to sell management rights in relation to 5MHz of spectrum (paired) in the 850MHz frequency range to NZ Communications. Telecom is confident that this, combined with the spectrum NZ Communications obtains from Vodafone, will be sufficient spectrum to enable NZ Communications to enter, and vigorously compete in, the mobile market.

8.2 Telecom has interconnection agreements with a number of companies and is required by regulation under the Telecommunications Act 2001 to have various relationships with its competitors, including arrangements with access seekers for designated and non-designated services. For example, Telecom has recently entered into an agreement with TelstraClear to resell services provided using Telecom's CDMA network.

9. DIRECTORSHIPS

9.1 The directors of Telecom New Zealand Limited do not hold directorships in telecommunications companies other than Telecom.

10. BUSINESS ACTIVITIES OF PARTICIPANTS

General

10.1 Telecom New Zealand Limited and its interconnected bodies corporate are suppliers of telecommunications services in New Zealand and Australia. They provide a full range of telecommunications products and services, including local, national and international telephone services, mobile services, data and internet services.

Spectrum

10.2 The background to the nature of radio spectrum used for telecommunications, the existing management rights for that spectrum, and the renewal process for those rights in relation to the spectrum in the 800/900MHz range has been fully outlined in sections 9-10 of the Vodafone Clearance Application.

800/900MHz range

10.3 Telecom holds management rights in relation to 20MHz (paired) in the 850MHz band, which we use for the delivery of our CDMA (mobile services). However, as noted above, Telecom will reduce its holding from 20MHz to 15MHz paired in the 800/900MHz band, on completion of the sale of 5MHz to NZ Communications.

Other spectrum

10.4 Telecom holds management rights in relation to 64MHz of spectrum in the 2.3GHz band but these rights expire in 2010 and, rather than permitting incumbents to renew these rights, Cabinet has decided to auction them. It follows that, within two years of Telecom having access to the 2.5GHz spectrum, which the Commission has granted Telecom clearance to acquire from 1 January 2009, Telecom will no longer hold management rights to spectrum in the 2.3GHz range. Telecom has 15MHz of 3G spectrum (paired) in the 2.1GHz band and 25MHz of spectrum (paired) in the 1800MHz range. Telecom also has management rights in relation to a 7MHz pair of spectrum in the 3.5GHz range.

11. REASONS FOR/INTENTIONS IN RESPECT OF THE ACQUISITION

11.1 Telecom requires the management rights to the Renewal Spectrum to continue as well as to develop its operations in the wholesale and retail mobile network markets.

11.2 Spectrum in the 800/900MHz frequency range is essential to Telecom's mobile telecommunications network. Telecom has invested heavily in developing its 2G CDMA mobile telecommunications network based on services provided over the 800/900MHz range as well as in the 2.5GHz band. [ ]

11.3 Further, Telecom intends to spend in excess of $300 million building a WCDMA network, also known as UMTS, and GSM network. WCDMA/UMTS is a mobile voice and high-speed data technology that is part of the International Telecommunications Union's 3G wireless standards. WCDMA/UMTS typically uses GSM/EDGE technology as the underlay network technology. WCDMA/UMTS technology gives users broad device selection, global roaming, true broadband speeds, and clear voice calls. Coverage will be provided using a blend of WCDMA/HSPA at 2100MHz and GSM/EDGE at 850MHz technologies. The 850MHz spectrum will be utilised to ensure strong rural coverage is achieved, with 2100MHz spectrum employed largely in cities and large metropolitan areas. As noted in the Commission's *Review of Cellular Mobile Market Entry Issues,* in order to provide cellular coverage in remote/rural areas, access to spectrum in the 800/900MHz range is important to minimise site costs. Because of its propagation qualities, spectrum in these bands requires a lesser number of cell sites than higher frequencies to provide a given level of coverage.[5]

11.4 [

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12. HORIZONTAL AGGREGATION

Market definition

12.1 Before discussing whether there would be horizontal aggregation of business activities as a result of the proposed acquisition, the relevant markets need to be defined.

12.2 As indicated above, Telecom's view is that the relevant markets should be defined as the *national wholesale and retail markets for mobile telecommunications services* ("**relevant markets**") and that the relevant time period to be considered ought to include the next three to four years at a minimum, because that is the period over which the acquisition will affect entry into the relevant markets. We have arrived at this view based on analysis of previous Commerce Commission decisions.

12.3 In Commerce Commission Decision 479 (acquisition by Vodafone of management rights and licences in the 900 MHz spectrum range auctioned by the government), the Commission concluded that "the relevant market is the national market for the supply of mobile telephony services".[6] The Commission considered a number of other telecommunications services to determine whether these could be closely substitutable with mobile services (fixed networks, public access cordless telecommunications services ("**PACTS**"), paging services, private mobile radio services, trunked private mobile radio, mobile satellite services, microwave services, and wireless local loop), and concluded:

> The Commission has not identified any existing combination of telecommunications services, which could be closely substitutable with mobile services, thus no existing supplier substitutes are included in the mobile telephony market. No substitutable services have been identified because the conditions of supply of mobile services are unique in terms of factors such as the radio spectrum required or the use of cellular radio base stations. A number

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[5] Commerce Commission *A Review of Cellular Mobile Market Entry Issues* (10 October 2006) 13 (para 48).
[6] Commerce Commission Decision 479 *Vodafone Mobile Ltd NZ and 900 MHz Spectrum* (1 November 2002) 14.

of other telecommunications services are complementary services, not substitutes, to mobile services on the supply side.

12.4 In terms of the functional dimension, the Commission said:[7]

> In this instance the Commission considers that any market power issues raised by the proposed acquisition can be assessed fully at the functional level which could be directly affected - that is, the wholesale functional market.

However, as the retail mobile services market will be impacted by the acquisition, Telecom considers that, in the context of this acquisition, the retail market for mobile telecommunications services is a relevant market.

12.5 As discussed in Decisions 413 and 423, it is arguable that 3G services are not sufficiently distinct from existing mobile telephony services to place them in a discrete market.[8] However, in both decisions, the Commission took the conservative approach of assessing the impacts of the relevant acquisition in both the 'national mobile telephony' and 'third generation mobile telephony services' markets. In Decision 479, the Commission noted this approach and said that:[9]

> The [900 MHz] spectrum band, which is the subject of the application, is not suitable for 3G services. Accordingly, the proposed acquisition would not affect currently, for instance, entry by 3G service providers. Accordingly, the Commission does not consider that it is necessary to consider a discrete 3G services market in its analysis of this application. However the Commission recognises 3G services may be a potential constraint on providers of mobile telephony services ...

12.6 Telecom considers that whether 3G services are included in the market definition for the purposes of this clearance application will not impact on the competition analysis because, in either case, the acquisition will not lead to a substantial lessening of competition in the relevant markets.

12.7 As noted above, the Commission has indicated that fixed network services are not sufficiently substitutable to be in the same market as mobile telephony services. For example, the Commission has stated:[10]

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[7] Commerce Commission Decision 479 *Vodafone Mobile Ltd NZ and 900 MHz Spectrum* (1 November 2002) 13.

[8] Commerce Commission Decision 413 *Vodafone Mobile Ltd NZ and 2 GHz Spectrum* (8 December 2000) 15; Commerce Commission Decision 423 *Telecom New Zealand Limited and 2 GHz Spectrum* (15 March 2001) 9;

[9] Commerce Commission Decision 479 *Vodafone Mobile Ltd NZ and 900 MHz Spectrum* (1 November 2002) 14.

[10] Commerce Commission Decision 479 *Vodafone Mobile Ltd NZ and 900 MHz Spectrum* (1 November 2002) 10-11.

> The Commission considers that the main factor behind a customer's purchase of a mobile service is to obtain mobility of service on which a price premium is charged, particularly for calls to customers in the local area. As fixed networks do not provide mobility, most consumers do not consider fixed services close substitutes.

As noted in the Vodafone Clearance Application, convergence may result in mobile services and services provided over fixed-line networks becoming more substitutable, which would mean that at some point a broader market definition would be appropriate. Telecom's view is that convergence has not reached a point that justifies a broader market definition along these lines.

Horizontal aggregation

12.8 The acquisition will not lead to horizontal market aggregation. If the acquisition does not take place, Telecom's ability to compete and invest in the relevant markets would be hindered due to lack of flexibility and certainty in relation to future spectrum ownership, and Telecom could potentially be left with less spectrum than it needs to invest and compete effectively.

13. PRODUCT DIFFERENTIATION

13.1 The products in the retail mobile telecommunications market are differentiated - buyers make their purchases largely on the basis of product characteristics, as well as price. Product differentiation is less important in the wholesale mobile telecommunications market.

14. DIFFERENTIATED PRODUCT MARKETS

14.1 The principal characteristics of product differentiation in the retail mobile telecommunications market are as follows:

(a) additional services (eg voicemail and video downloading);

(b) branding;

(c) coverage;

(d) customer service;

(e) data products and speeds;

(f) handsets;

(g) international roaming capability; and

(h) reception quality.

14.2 The Commission has indicated that it considers that "network capabilities, handsets, and service bundles are all used as points as differentiation" in the relevant markets.[11]

15. VERTICAL INTEGRATION

15.1 The acquisition will not result in vertical integration between firms involved at different functional levels.

16. PREVIOUS ACQUISITIONS IN RELATION TO THE RELEVANT MARKETS

16.1 Telecom has not made any relevant acquisitions in the last three years.

17. COMPETITORS

Vodafone

17.1 Vodafone New Zealand Limited ("**Vodafone**") is incorporated in New Zealand and is wholly owned by Vodafone International Holdings BV, which is based in the Netherlands. Vodafone has more than 1,000 mobile phone sites in New Zealand. Its services include text and pxt messaging, voice and data roaming, caller ID, wireless internet and, more recently, home phone services.

17.2 Vodafone has spectrum in the 900MHz (15.2MHz paired once it sells 5.8MHz paired to NZ Communications), 1800MHz (15 MHz paired), and 2.1GHz (15MHz paired) ranges, all of which are relevant to mobile telecommunications. Vodafone also notes in its clearance application that:

> Vodafone has invested heavily in 900MHz equipment: the majority of the base stations operate on the 900MHz spectrum. Vodafone is also continuing to roll out more base stations that would operate in the 900MHz frequency range to service growing traffic volumes.

17.3 Further, as noted in the Vodafone Clearance Application:

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[11] Commerce Commission *A Review of Cellular Mobile Entry Issues* (10 October 2006) 3.

> Vodafone recently participated in the auction for spectrum management rights in the 2.3/2.5GHz band. This spectrum is suited for either WiMax or long-term evolution ... of 3G. The uncertainty around how these technologies will evolve and be used in the future means that it is difficult to consider whether this spectrum will be able to be used in ways similar to the ways in which spectrum in the 800/900 MHz, 1800MHz and 2100MHz ranges currently are (and will be) used.

NZ Communications Limited

17.4 NZ Communications is currently building New Zealand's third mobile network. It has stated that it plans to create a 3G mobile network with 1,340 cell sites to cover 80% of New Zealand's population, which will take several years and require hundreds of millions of dollars to be invested.[12] The combined 10.8MHz (paired) of spectrum NZ Communications will acquire from Telecom and Vodafone will assist greatly in enabling NZ Communications to build its mobile network. That said, at least 10 of NZ Communications' cell sites are scheduled to be ready by June 2008.[13]

17.5 On 16 November 2007, NZ Communications entered into a roaming agreement with Vodafone that enables NZ Communications to offer mobile telecommunications services using Vodafone's network in areas in New Zealand where NZ Communications will not initially have a network.[14] NZ Communications has also formed a joint venture with Hautaki Limited in 2001 to develop the 2.1GHz spectrum for 3G.

17.6 As NZ Communications has not yet begun offering mobile services, Telecom expects it to offer mobile services that are increasingly competitive (both in quality and geographical coverage) over time.

17.7 NZ Communications is well-funded, and has the backing of private equity firms, including GEMS NZ BV (a Dutch company) and CVP, which is based in Hong Kong and Britain. Those two firms, together with Hautaki Limited, between them invested more than $50 million in NZ Communications Limited during 2007.

17.8 Accordingly, through its association with Hautaki Limited and significant financial resources, NZ Communications will be well-placed to offer a competing mobile network.

TelstraClear

17.9 TelstraClear has recently entered into an agreement with Telecom to resell services provided using Telecom's CDMA network.

[12] *$55 pumped into bid for third network* (5 November 2007) http://www.stuff.co.nz/4261684a28.html.
[13] *Work Starts on Third Mobile Network* (17 December 2007) http://www.stuff.co.nz/4326412a28.html.

17.10 TelstraClear also has roaming agreements with Vodafone. TelstraClear is unlikely to roll out a mobile telecommunications network in the foreseeable future. However, Vodafone has indicated that it does not expect TelstraClear to roam using these agreements.[15]

17.11 TelstraClear owns management rights to 25MHz of spectrum (paired) in the 1800MHz range and 15MHz of spectrum (paired) in the 2100MHz range. Telecom is unaware of any plans by TelstraClear to use the spectrum.

17.12 Like Vodafone, we believe that it is unlikely that TelstraClear will roll out a mobile telecommunications network of its own in the foreseeable future.

Other potential competitors

17.13 Vodafone has wholesale agreements relating to its "most popular retail plans" with Compass Communications, Orcon and M2.[16] As indicated in the Vodafone Clearance Application, "[a]t least one of these operators has indicated that it is likely to launch this year".[17]

18. CONDITIONS OF EXPANSION

Telecom

18.1 As indicated above, Telecom requires the management rights to the Renewal Spectrum to continue as well as to develop its operations in the wholesale and retail mobile network markets. Spectrum in the 800/900MHz frequency range is essential to Telecom's mobile telecommunications network. Telecom has invested heavily in developing its 2G CDMA mobile telecommunications network based on services provided over the 800/900MHz range as well as in the 2.5GHz band. Further, as noted above, Telecom intends to spend at least $300 million building a WCDMA network and GSM network.

18.2 If clearance is not given for the acquisition, this would be detrimental to Telecom's ability to continue and to develop its operations in the relevant markets. Telecom could not rely on continuing to hold management rights in relation to 15MHz of 850MHz spectrum, which would presumably come up for auction upon expiry (October 2012). This would severely inhibit Telecom's ability to compete in the relevant markets and compete in

[14] *Vodafone Clearance Application* para 7.2.
[15] See *Vodafone Clearance Application.*
[16] *Vodafone Clearance Application* para 7.1.
[17] *Vodafone Clearance Application* para 15.3.

other markets. Given that Telecom is a major player in the telecommunications sector, this could have wide-ranging consequences.

18.3 Due to reduced capacity, Telecom's ability to offer co-location, roaming, and wholesale access services to other players in the market would also be reduced.

NZ Communications

18.4 As the Commission noted in its October 2006 report following its review of the mobile sector, the unavailability of spectrum in the 800/900MHz bands for new entrants is a barrier to market entry as it raises the cost of entry and can make some service options difficult or impossible.

18.5 With NZ Communications holding 10.8MHz of spectrum management rights in the 800/900MHz spectrum, it has twice the amount of spectrum that the MED considers necessary for the provision of a national mobile network. With that level of spectrum rights, combined with its roaming agreement with Vodafone and the current Mobile Co-location STD process, NZ Communications has significant certainty and flexibility in the development of its network and the manner in which it will compete.

Vodafone

18.6 Given that Vodafone has been given clearance to acquire spectrum in the 800/900MHz range, it will, as stated in the Vodafone Clearance Application:

> have sufficient spectrum in the 800/900MHz range to continue to provide existing services and meet its currently anticipated future demand. Hence, it should be able to continue to compete effectively in all relevant telecommunications markets.

19. COORDINATED MARKET POWER

19.1 Telecom agrees with the statement in the Vodafone Clearance Application that "the prospect of exercise of coordinated market power by [Vodafone] and Telecom is negligible". Telecom and Vodafone compete vigorously in the mobile telecommunications market, and will increasingly compete in other markets, for example through Vodafone's development of *Vodafone at Home.* The acquisition, by enabling Telecom to continue as well as to develop its operations in the relevant markets will allow this competitive environment to continue. Further, there will be increased competition when NZ Communications enters the relevant markets. Co-location, roaming, and wholesale access provide additional competitive constraints.

19.2 The following other factors suggest that market coordination is unlikely post-acquisition:

(a) demand is relatively price elastic - demand has increased substantially as prices have fallen;

(b) there have been no instances of coordination between telecommunications providers in New Zealand to date;

(c) the acquisition will reduce excess capacity;

(d) strong industry bodies - Telecommunications Carriers' Forum and the Telecommunications Users Association of New Zealand;

(e) New Zealand's telecommunications industry is constantly being monitored in the media and by regulators, and market participants are very alive to this.

19.3 The following factors could be considered to facilitate coordination effects post-acquisition:

(a) high seller concentration (although this concentration will be reduced if the acquisition goes ahead);

(b) product differentiation.

However Telecom considers that these factors are outweighed significantly by the factors listed in paragraph 19.2 above and are in no way enlarged by the acquisition:

20. COMPETITIVE CONSTRAINTS

20.1 There will not be any increase in concentration in any of the relevant markets as a result of Telecom acquiring the management rights. As set out above, the acquisition will result in dis-aggregation and **enhanced** competition in the relevant markets.

21. OTHER MATTERS

Timing of the acquisition

21.1 There is an issue as to when the acquisition takes place. We note that the Offer Document must be signed and returned to MED by 9 May 2008, and that clause 2.11 of the Terms and Conditions of the Offer Document provides that acceptance of the offer by the Purchaser (Telecom) forms a binding contract between the parties. As noted in the Vodafone Clearance Application, the Offer Document allows the Purchase to assign or transfer rights under the Terms and Conditions (clause 11 of the Terms and Conditions). This means that Telecom has rights under the agreement once accepted by the Purchaser. Accordingly, Telecom's view is that the acquisition occurs when the offer is accepted by the Purchaser, and not when settlement occurs.

22. CONCLUSION

22.1 Telecom considers that the proposed acquisition will enhance competition in the national wholesale and retail markets for mobile telecommunications services.

22.2 There is significant competition in the relevant markets already, primarily between Telecom and Vodafone, who are able, well-resourced, and vigorous competitors. Further, the combined 10.8MHz (paired) of spectrum NZ Communications has recently acquired from Telecom and Vodafone, its roaming agreement with Vodafone, and the current Mobile Co-location STD process, will assist greatly in enabling NZ Communications to build its competing mobile network. There is also current and potential future competition in the relevant markets from other players through mobile roaming, co-location, and wholesale access to mobile networks. The acquisition will enable Telecom to continue to vigorously compete in the relevant markets - not granting the clearance would significantly reduce Telecom's ability to compete and would therefore significantly reduce competition in the relevant markets.

22.3 Accordingly, Telecom considers that clearance should be granted under section 66 of the Commerce Act to renew management rights in relation to the Renewal Spectrum.

THIS NOTICE is given by Telecom New Zealand Limited

The company hereby confirms that:

- all information specified by the Commission has been supplied;
- all information known to the applicant which is relevant to the consideration of this application has been supplied;
- all information supplied is correct as at the date of this application/notice.

The company undertakes to advise the Commission immediately of any material change in circumstances relating to the application/notice.

Dated this 4th day of April 2008.

Mark Verbiest, Director, Telecom New Zealand Limited

I am a director/officer of the company and am duly authorised to make this application/notice.