Better together.

Trustpower Limited
Head Office
108 Durham Street
Tauranga
Postal Address:
Private Bag 12023
Tauranga Mail Centre
Tauranga 3143
F 0800 32 93 02
Offices in
Auckland
Wellington
Christchurch
Oamaru
Freephone
0800 87 87 87
trustpower.co.nz

19 July 2019

Dr Stephen Gale
Telecommunications Commissioner
Commerce Commission
WELLINGTON

By email: TelcoFibre@comcom.govt.nz

TRUSTPOWER CROSS SUBMISSION: MOBILE MARKET STUDY PRELIMINARY FINDINGS

1. Introduction

The Commerce Commission (**the Commission**) has been considering the current state of competition for mobile services, likely future developments and potential impacts on competition and consumers as part of its mobile market study.

Following the receipt of submissions from interested parties on the Commission's *Mobile Market Study - Preliminary Findings* (**preliminary findings report**), the Commission has now issued a request for cross-submissions.

Trustpower welcomes the opportunity to provide this cross-submission on the matters raised in other party's submissions.

2. Trustpower's perspective

In our submission on the Commission's preliminary findings report, we outlined our view that:

- commercially agreed solutions for Mobile Virtual Network Operator (**MVNO**) access arrangements are the best solution as they can provide access seekers and providers with the opportunity to tailor the access arrangement to best suit their needs;
- successful commercial negotiations rely on an access provider having adequate incentives to genuinely negotiate with an access seeker – in the absence of strong wholesale competition, a regulatory backstop is the best approach for providing these incentives and supporting commercial negotiations; and
- in the absence of a regulatory backstop, ongoing monitoring of market outcomes will be important, with the Commission acting promptly if it finds that its expectations for development of the wholesale market are not met.

Our review of other party's submissions has reinforced these views, and lead to a further refinement of what we consider would be required for a monitoring regime to be effective. The following sections expand further on these matters.

2.1 Uncertain that three MNOs will be sufficient to promote competitive outcomes into the future

We remain unconvinced that the New Zealand market is primed for greater wholesale competition between the three Mobile Network Operators (**MNO**s), thereby ensuring market conditions are sufficient to support the entry of MVNOs going forward.

The Commission's tenth preliminary finding (PF10) was contentious amongst submitters:

> *"PF10. With three national mobile networks, sufficient competitive conditions at the wholesale level exist and we expect MVNOs should emerge if they are commercially viable. However, spectrum allocation decisions will be critical to support this competition"*

Our review of others submissions has reinforced our concerns that the Commission's preliminary finding is based on a number of precarious and uncertain assumptions. These assumptions are explored in the remainder of this section.

Assumption 1: The presence of three MNOs will establish sufficient competitive conditions in the wholesale market.

Assumption 1 has been challenged in a number of submissions which note that a competitive wholesale market has yet to emerge, and question the position taken by the Commission in PF11 that "*recent increased wholesale activity from 2Degrees has prompted a response from Spark and Vodafone*".

Submitters suggest that the regulatory oversight of this study is most likely what has prompted recent activity, indicating that the presence of three MNOs is not enough to establish sufficient competitive conditions. Absent a regulatory backstop, the Commission needs to remain vigilant and be in a position to act in the event evidence emerges the anticipated competitive conditions have not eventuated.

We reiterate that no other country has found that three MNOs provide sufficient competition – as evidenced in the Analysys Mason report we provided in response to the Commission's Issues Paper. In fact, Analysys Mason provided examples of regulators establishing conditions to enable MVNO entry when faced with mergers that would reduce the number of MNOs from four to three. These conditions to enable MVNO entry were deemed necessary to ensure the mobile market remained competitive. We question why New Zealand is any different, and why the Commission has formed the view that three participants in the mobile market is adequate to ensure sustainable competition, when no other country has formed that view.

Assumption 2: That MVNOs are expected to emerge if they are commercially viable.

We previously submitted that the success of MVNOs is largely determined by the nature of their wholesale agreement with the MNO. This view was supported by Vocus in its recent submission. Further, Internet NZ reiterated that the market share of MVNO's in New Zealand is under 1%, indicating that the historical presence of three MNOs has not delivered the outcomes that the Commission would have expected based on PF10.

We do not accept NERA's point that:

> *"… a lack of MVNOs in New Zealand may simply reflect that they are not able to offer a compelling competitive value proposition to the MNOs and to customers."*[1]

If MVNOs have not delivered a compelling value proposition to date, the likely explanation is they have not been able to due to the wholesale terms on offer.

This situation is not unique to New Zealand. We refer to the European Commission's 2016 decision on the H3G/Wind merger in Italy, when they observed[2]:

> *"The Commission considers that the reason for the MVNOs' relatively small share of the retail market is a result of their lack of ability, rather than lack of incentive, to compete.*
>
> *MVNOs' ability to compete is constrained by the wholesale access conditions granted by their respective host MNOs, which limit the range of services that they can offer, the customer segment they can address, and the prices they can offer. Therefore, MVNOs cannot exert the same competitive pressure as an MNO in a significant and sustained way".*

Although New Zealand is a smaller market, we believe similar issues exist.

Trustpower does not believe the Commission has provided adequate evidence to support the premise that the current low MVNO market share is solely a result of a lack of commercially viable MVNOs.

Assumption 3: The outcome of future spectrum allocation activities will be crucial to support competition

The preliminary finding that there are asymmetries in the current spectrum holdings and that these should be fixed in future spectrum allocations has been a particularly contentious topic in submissions, particularly amongst the MNOs.

2Degrees agreed with the Commission that sustained competition will require the upcoming spectrum allocations to support future competition. However, Vodafone and Spark contested this view. We note that there is significant uncertainty relating to this assumption, including that it largely sits outside of the Commission's control. Accordingly, we question whether the Commission's anticipated wholesale settings will transpire.

Trustpower remains sceptical that resolution of the spectrum allocation issue will result in an effective wholesale market emerging in New Zealand. However, given the Commission's reliance on this fact, the Commission must closely monitor the spectrum allocation issue and, if necessary, be ready to quickly revise its views if spectrum asymmetries persist[3].

2.2 The size of the New Zealand market does not explain the lack of meaningful MVNO entry

In its submission on the Commission's preliminary findings report, Chorus observed that MVNO market share is very low in New Zealand. Chorus then contrasts the number of MVNOs in the market with the number of fixed-line retail service providers:

[1] NERA report for Spark on the Commission's preliminary findings report, page 5.
[2] Case M.7758-Hutchison 3G Italy/Wind/JV, paragraphs 865-866
[3] See also PF7

> *"… despite Vocus operating as an MVNO for over a decade, the total MVNO market share remains at around 1%, while 99% is captured by the 3 dominant MNOs. Further, a comparison of the mobile and fixed wholesale access arrangements shows a startling figure with over 90 retail fixed-broadband providers versus 6 MVNO providers."*[4]

Similarly, Sky asked:

> *"… what makes New Zealand different to the rest of the world?"*[5]

We previously presented evidence to the Commission that the MVNO market share is very low in New Zealand compared to other similar markets, and that this was likely to result in poor outcomes for consumers**.**

The Commission has, however, presented evidence that there is relatively active retail competition in the mobile market, despite the low MVNO market share. This suggests that there are current impediments and limited incentives within the wholesale market that result in weak wholesale competition at the same time as relatively active retail competition. We consider that promoting strong wholesale market competition has a direct effect in further enhancing retail market competition, above and beyond that currently observed by the Commission. In our view, infrastructure-based competition, which has been somewhat positive for retail mobile markets, appears to have been far less beneficial in wholesale mobile markets. This warrants the Commission's attention, particularly given the uncertainties around whether a more competitive wholesale will continue to emerge.

We do not agree with the views of Vodafone when, in response to Red Dawn Consulting's (**RDC**) advice to the Commission that regulatory intervention is warranted to increase MVNO participation in the New Zealand mobile market, they stated:

> *"… there are few opportunities for MVNOs in New Zealand given our scale. Where opportunities do exist, the market conditions are sufficient to allow entry."*[6]

The Analysys Mason report, prepared previously for Trustpower, included an assessment of mobile market outcomes in comparable countries to New Zealand and found that:

> *"In the comparison countries, independent MVNOs have gained around 5% to 15% of the market, and a total of 10% to 35% of the market is served by alternative brands (i.e. not the main MNO brands). The comparison countries also have a larger number of MVNOs, providing a diverse choice for consumers.* ***Denmark, Austria, Norway and Ireland – all countries with a similar population to New Zealand – each have between 7 and 58 MVNO brands"****.*[7] *(emphasis added)*

We are uncertain why there is a persistent view among the MNOs that the New Zealand market is too small to support meaningful MVNO entry. We repeat the point made in our earlier submissions that access seekers of scale, particularly those with existing infrastructure or with a sizeable customer base in other retail markets, are quite likely to be interested in MVNO arrangements.

[4] Chorus submission on the Commission's preliminary findings report, page 8.
[5] Sky submission on the Commission's preliminary findings report, page 3.
[6] Vodafone submission on the Commission's preliminary findings report, page X.
[7] Analysys Mason, *MVNO aspects of the Commission's mobile market review* (25 October 2018), page 1.

2.3 The key to a stronger mobile retail market is effective wholesale access

Nova's submission raises the importance of a MVNO being able to obtain wholesale access on reasonable terms[8]:

> *" the ability of non-MNOs to compete in retail markets is constrained unless they are able to obtain wholesale access to mobile services on reasonable terms (both price and non-price)".*

We agree that wholesale access on reasonable terms is paramount for enabling retail competition to flourish. Our view continues to be that, for a truly vibrant competitive retail market to emerge and be sustained, then MVNO entry is required – and that this needs to be at the "heavy" or "thick" end of the spectrum.

A "heavy" or "thick" access arrangement enables MVNOs' to influence competition across a range of facets and bring about the best outcomes for consumers by enabling service offerings (including bundling) and pricing constructs to develop in a way that brings real value to the market. This was supported by Analysys Mason who explain:

> *"Typically, heavy MVNOs are able to offer a wider range of service offerings, because they must own a suite of retail service platforms"* [9]

We consider that the positive consumer outcomes associated with MVNOs have been well established during the initial rounds of consultation on the mobile market study[10]. These positive outcomes are, however, unlikely to emerge in an environment where MVNOs are essentially reselling an MNO's services under constrained terms and slender margins, as would be the case under a "thin" or "light" access arrangement.

We encourage the Commission to investigate in greater detail the impacts that "thick" or "heavy" MVNO wholesale access models can have in the market, before concurring with the MNOs that MVNO's can offer limited consumer benefit in New Zealand.

We and others have made the point that, in markets where consolidation of MNOs has occurred, a key remedy imposed by competition authorities has been the introduction of thick MVNOs[11]. The conclusion has been that the reduction in competition at the wholesale level caused by the consolidation requires either a more robust MVNO model or a new market entrant.

We are in a different market and we are not facing consolidation; and a new market entrant may not be a realistic possibility. However, like those markets where a thick MVNO has been seen as an appropriate merger remedy, we believe this model warrants serious consideration by the Commission as a regulatory backstop.

2.4 Effective monitoring arrangements required to ensure competition continues to evolve

The submissions of both Nova and Vocus suggested steps that the Commission should take if its final decision is to not provide a regulatory backstop.

---

[8] Nova submission on the Commission's preliminary findings report, page 2.
[9] Analysys Mason, *MVNO aspects of the Commission's mobile market review* (25 October 2018), page 4.
[10] Refer to Analysys Mason (25 October 2018), page 7: "*An increased presence of competitive challenger MVNOs in the New Zealand market is likely to contribute to improved price and volume competition in voice and data services, innovation across prepaid and postpaid packages, and wider choice of standalone mobile and fixed–mobile service bundles*."
[11] For example Germany 2014, Ireland 2014, Austria 2012

We generally agree with their suggestions, which include:

- Developing a roadmap of target metrics of MVNO market share to demonstrate we have "turned a corner" (Vocus); and
- Reference material on various key issues, consistent with RDC's earlier suggestions, such as Commission guidance on various issues (Vocus and Nova).

Other useful metrics could include:

- Instances where MNO's approach MVNOs offering wholesale contracts (rather than the other way around);
- Terms that limit the MVNO's ability to differentiate on price (including whether only pay-as-you-go terms are available, or capacity deals; whether terms effectively discourage MVNOs from competing on price), quality and other terms; and
- Whether thick MVNOs are on offer by MNOs in the market, or only thin MVNOs.

Given the importance of an effective monitoring regime absent a regulatory backstop, the Commission should consider the value of implementing some form of Information Disclosure regime for MNOs and MVNOs. This would provide the Commission with raw information that they can then explore and analyse, and ensure the expected market outcomes are in fact occurring.

We also suggest the Commission monitors analyst reports to see whether they discuss the impact of MVNOs on the market when they are covering MNOs. These analysts are experts in their industry sectors and cover the market closely.

Coupled with this, we believe it will be vital that the Commission makes it clear to MNO's that it intends to act promptly in the event that it's monitoring activities identify ongoing wholesale market failures.

While we consider that commercially negotiated outcomes will always be superior to regulated solutions, we still consider that a regulatory backstop may be required to ensure adequate incentives exist for access providers to provide reasonable terms and conditions to credible access seekers.

For any questions relating to the material in this submission, please contact me directly via email: Paul.Bacon@trustpower.co.nz.

Regards,

Paul Bacon

Paul Bacon
Head of Retail Markets