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

16 JANUARY 2008

PUBLIC VERSION

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

16 January 2008

The Registrar
Market Structure Group
Commerce Commission
P O Box 2351
WELLINGTON

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

Summary of proposed acquisition and competition analysis

1. The proposed acquisition by Vodafone Mobile NZ Ltd is of the management rights for two blocks of radio spectrum in the 900MHz range, hereafter referred to as "**Block A**" and "**Block B**".

2. Vodafone Mobile NZ Ltd (or its predecessor) has held the above management rights for 16 years and 11 years respectively, together more recently with the management rights for "**Block C**", which expire on 24 November 2022. The management rights held by Vodafone in respect of Block A and Block B expire in 2011 and 2012 respectively.

3. Spectrum in the 900MHz range is the cornerstone of the existing and future mobile telecommunications network of Vodafone NZ Limited, the sister company of Vodafone Mobile NZ Ltd (together referred to as "**Vodafone**"). Vodafone has invested substantial sums in developing a national mobile telecommunications network based on services provided over that spectrum range and the 1800MHz and 2100MHz ranges. It is noteworthy, however, that approximately **[ ]%** of Vodafone's network traffic is carried over spectrum in the 900MHz frequency range.

4. The Crown's ownership of radio spectrum is administered by the Ministry of Economic Development ("**MED**"). In November 2007, the MED offered to Vodafone (and to Telecom) management rights to some of the 900MHz spectrum that are currently held. The MED offered renewal of these management rights for a period of approximately 20 years from when the existing rights expire.

5. The Commerce Commission (**"Commission"**) has previously expressed the view that lack of access to 800/900MHz spectrum was a barrier to entry to the New Zealand mobile telecommunications market. The Commission has also noted that an arrangement to roam on an incumbent's existing network, together with access

to spectrum in other frequency ranges, may be an alternative means of entry into the mobile telecommunications market. Vodafone notes that other telecommunications companies have access to spectrum in other ranges that would enable them to roll out networks over that spectrum and that Vodafone has provided the Commission with a roaming Undertaking[1].

6. The MED and the Minister of Communications each reflected the Commission's view in papers prepared in 2007. In pursuance of a desire expressed by Cabinet to facilitate entry into the mobile telecommunications market by a new entrant, the MED has made it a condition of its offer to Vodafone to renew the management rights for Block B that Vodafone sell at least 5MHz of the existing rights to Block C to a new entrant.

7. In March 2007, prior to the Cabinet decision referred to above, Vodafone had entered into a conditional agreement with New Zealand Communications Limited ("**NZC**") to sell to it Vodafone's management rights in respect of Block C.

8. Vodafone now seeks clearance under section 66 of the Act for the proposed acquisition of Blocks A and B of 900MHz radio spectrum.

9. For reasons outlined in the body of this application, Vodafone believes it is sufficient, for the purposes of this application, to define product markets for wholesale and retail mobile telecommunications services. It believes services provided in these markets are provided on a national basis. Since the acquisition will affect the entry into those markets by NZC over the next three to four years, the relevant time period to consider should at least cover the next three to four years. Given the rapidly changing nature of telecommunications markets, however, Vodafone believes the time dimension of the market for the purposes of this clearance application should not extend significantly beyond this period.

10. Vodafone considers that the proposed acquisition (and accompanying sale of Block C to NZC) will not substantially lessen competition in any market. In the first instance, the proposed acquisition will not result in any market aggregation. Indeed, it instead involves Vodafone reducing its holdings of management rights to spectrum in the 900MHz frequency range. Further, if the acquisition of Blocks A and B proceeds, Vodafone will continue to provide retail and wholesale services and develop new services in competition with Telecom (and other market participants) both before and after its existing management rights expire and the newly acquired rights come into being. Vodafone will also have sold Block C to

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1 http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/Investigations/mobilemarket.aspx#696

NZC by May 2008. Combined with the roaming agreement NZC has with Vodafone, this will facilitate the entry this year by NZC into the wholesale and retail markets for the supply of telecommunications services.

11. Vodafone believes there are two possible counter-factuals relevant to the proposed acquisition. On one view, if the acquisition does not proceed, Vodafone would likely seek to acquire Block A only from the MED and, if successful in that acquisition, would use Block A in conjunction with its remaining rights in respect of Block C, to provide mobile telecommunications services. The consequence of this would be that Block C would not be sold to NZC this year. Accordingly, NZC would not be able to enter the wholesale and retail markets for the supply of mobile telecommunications services to the same extent as early as would otherwise be the case. Even if NZC was successful in attaining a block of 900MHz spectrum at auction, its ability to use that block of spectrum would be delayed until 2012. In turn, this would lead to less competition in the relevant markets over the period 2008 to 2011/2012.

12. On the other view, even if Vodafone sought to obtain management rights with respect to Block A alone (to be used in conjunction with Block C), it is arguable that the Commission would deny clearance to Vodafone for that acquisition, leaving Vodafone with use of Block C only. That is, Block A and Block B would be functionally similar to Block A and Block C. Given the importance of 900MHz spectrum to Vodafone's business operations, having management rights to Block C only would limit its ability to:

(a) compete in the wholesale and retail mobile telecommunications services markets;

(b) compete with Telecom in the fixed line telecommunications market; and

(c) effectively offer roaming and wholesale services to other access seekers so that they can compete in the retail and wholesale markets for the supply of mobile telecommunications services.

13. Furthermore, Vodafone also notes that if it is unable to attain a clearance to acquire and hold two blocks of 900MHz spectrum, using the same competition analysis, it would seem likely that Telecom, and possibly NZC as well, would be prevented from holding more than one block of 800/900MHz spectrum. Such an outcome would likely further compromise the way in which services are provided by, and the extent of competition between, all three carriers likely to operate within the retail and wholesale markets for the supply of mobile telecommunications services.

14. It is Vodafone's view that the proposed acquisition of Block A and Block B (and the associated sale to NZC of Block C) is not only consistent with the expressed policy desire of Cabinet, but that it will also further enhance competition in the wholesale and retail markets for the supply of mobile telecommunications services in comparison with the present position, and in comparison with the competition effects likely to occur in the counter-factuals set out above.

15. Vodafone therefore believes that clearance should be granted under section 66 of the Act for the proposed acquisition of Blocks A and B of 900MHz radio spectrum.

PART I: TRANSACTION DETAILS

1. WHAT IS THE BUSINESS ACQUISITION FOR WHICH CLEARANCE IS BEING SOUGHT?

1.1 The acquisition for which clearance is sought is the proposed acquisition by Vodafone Mobile NZ Limited ("**Vodafone Mobile**"), or any interconnected body corporate of it, from the Crown of:

(a) the management rights for 20 years from 29 November 2011 in the radio frequency range between 899.8 to 907.4MHz, together with the corresponding natural pair management rights in the range between 944.8 to 952.4MHz ("**Block A**"); and

(b) the management rights for 19 years and 5 months from 30 June 2012 in the radio frequency range between 907.4 to 915MHz, together with the corresponding natural pair management rights in the range between 952.4 to 960MHz ("**Block B**").

1.2 The two blocks of spectrum referred to above are pairs of 7.6MHz. Management rights for a third block are also currently held by Vodafone Mobile ("**Block C**") of 5.8MHz. However, and presumably for convenience, these blocks of spectrum are often referred to (including in Crown documents) as being 7.5MHz and 6MHz respectively. Wherever possible, for precision, Vodafone refers to 7.6MHz and 5.8MHz blocks of spectrum rather than stating approximate sizes.

1.3 **Attached** at Appendix A is a copy of the offer, which is open for acceptance for six months after it was made by the Ministry of Economic Development ("**MED**") to Vodafone Mobile, for the renewal of the management rights of Block A and Block B ("**Offer Document**").

1.4 A full glossary of terms is provided at the end of this document.

2. WHO IS THE PERSON GIVING THIS NOTICE?

2.1 This notice is given by:

Vodafone Mobile NZ Limited
Level 1
20 Viaduct Harbour Avenue
AUCKLAND

Telephone: (09) 355 2000

Facsimile: (09) 355 2005

Email: david.kreider@vodafone.com

Attention: David Kreider, General Counsel

2.2 Correspondence and enquiries should in the first instance be addressed to:

Vodafone Mobile NZ Limited
Level 1
20 Viaduct Harbour Avenue
AUCKLAND

Telephone: (09) 355 2000

Facsimile: (09) 355 2006

Email: richard.york@vodafone.com

Attention: Richard York

3. CONFIDENTIALITY

3.1 Confidentiality is not claimed for the fact of the proposed acquisition.

3.2 Confidentiality is sought for that information included in square brackets in the confidential version of this application (ie **[ ]**).

3.3 Confidentiality is sought until the confidentiality request is withdrawn or until the applicant confirms in writing to the Commission that the particular information is no longer confidential.

3.4 This request is made because the information is commercially sensitive and disclosure would be likely unreasonably to prejudice the commercial position of Vodafone New Zealand Limited and its associated companies (which, hereinafter are referred to collectively as "**Vodafone**" unless it is necessary to differentiate between them). In particular, disclosure would reveal information about Vodafone's current and future revenues, costs and strategies. Those revenues, costs and strategies are commercially sensitive. Some information is also subject to obligations of confidence between Vodafone and its suppliers or customers. This request is made initially under section 100 of the Act and subsequently under section 9 of the Official Information Act 1982 ("**OIA**").

3.5 Vodafone asks that it is advised in writing of any requests made to the Commission, including under the OIA, in relation to this application, and that the Commission seeks Vodafone's view on whether the information remains confidential and commercially sensitive at the time those requests are considered.

4. WHO ARE THE PARTICIPANTS (I.E THE PARTIES INVOLVED)?

4.1 The acquirer is:

Vodafone Mobile NZ Limited
Level 1
20 Viaduct Harbour Avenue
AUCKLAND

Telephone: (09) 355 2000
Facsimile: (09) 355 2005

Attention: David Kreider, General Counsel

4.2 The owner of the asset is:

Her Majesty the Queen in right of the
Government of New Zealand
c/- Ministry of Economic Development
33 Bowden Street
(P O Box 1473)
WELLINGTON

Telephone: (04) 472 0030
Facsimile: (04) 473 4638
Attention: Brian Miller, Manager, Radio Spectrum Policy and Planning, Energy and Communications Branch

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

Acquirer

5.1 Vodafone Mobile is a member of the international Vodafone group of companies. For further details of the group please see http://www.vodafone.com/start/about_vodafone.html.

Target company group/associates

5.2 Not applicable.

6. DOES ANY PARTICIPANT OR ANY INTERCONNECTED BODY CORPORATE THEREOF ALREADY HAVE A BENEFICIAL INTEREST IN, OR IS IT BENEFICIALLY ENTITLED TO, ANY SHARES OR OTHER PECUNIARY INTEREST IN ANOTHER PARTICIPANT?

6.1 No.

7. IDENTIFY ANY LINKS, FORMAL OR INFORMAL, BETWEEN ANY PARTICIPANT/S INCLUDING INTERCONNECTED BODIES CORPORATE AND OTHER PERSONS IDENTIFIED AT PARAGRAPH 5 AND ITS/THEIR EXISTING COMPETITION IN EACH MARKET

7.1 Vodafone is a party to wholesale contracts with other persons (Compass, Orcon and M2) in the provision of mobile telecommunications services as set out below:

Company	Type of agreement	Duration	Start Date
Compass	Wholesale agreement relating to Vodafone's most popular retail plans	[ ]	[ ]
Orcon	As above	[ ]	[ ]
M2	As above	[ ]	[ ]

7.2 On 16 November 2007, Vodafone entered into a roaming agreement with NZC, enabling NZC to offer mobile telecommunications services using 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. [

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7.3 Currently, Vodafone has two roaming agreements with TelstraClear Limited ("**TelstraClear**"). However, TelstaClear has never sought to implement these agreements. TelstraClear has announced that it does not intend to proceed with building its pilot network in Tauranga. Further, TelstraClear has recently entered into an agreement with Telecom to resell services provided using Telecom's CDMA network. Vodafone's view is that TelstraClear is unlikely to roll out a mobile telecommunications network in the foreseeable future and Vodafone does not expect that TelstraClear will roam using its agreements with Vodafone.

7.4 Some other services, which involve arrangements with competitors, are regulated under the Telecommunications Act 2001. Where relevant, Vodafone has referred to these services in this application.

8. DO ANY DIRECTORS OF THE 'ACQUIRER' ALSO HOLD DIRECTORSHIPS IN ANY OTHER COMPANIES WHICH ARE INVOLVED IN THE MARKETS IN WHICH THE TARGET COMPANY/BUSINESS OPERATES?

8.1 For Vodafone's definition of the relevant markets, see section 11 below.

8.2 No directors of the 'acquirer' in New Zealand also hold directorships in any other companies that are involved in the telecommunications market in New Zealand.

8.3 Mr Simon Murray is a director of Vodafone Plc in England. Vodafone Plc is not a shareholder of any Vodafone companies in New Zealand, whose parent company is Vodafone International Holdings B.V. Mr Murray is also the Executive Chairman and a Director of General Enterprise Management Services Limited ("GEMS"), which is a private equity investor in NZC. Vodafone does not consider that Mr Murray can exert a substantial degree of influence over Vodafone Mobile or Vodafone NZ.

9. WHAT ARE THE BUSINESS ACTIVITIES OF EACH PARTICIPANT?

9.1 Vodafone Mobile's sister company, Vodafone NZ:

(a) owns and operates a mobile telecommunication network in New Zealand, and provides a range of telecommunications services using this network throughout New Zealand; and

(b) owns and operates iHug Ltd, which provides internet and fixed line telecommunications services throughout New Zealand.

9.2 Vodafone Mobile is, at present, the owner of certain radio spectrum management rights referred to in more detail at paragraph 9.10 below.

9.3 The Crown is the Crown in right of New Zealand.

9.4 In describing the business activities of the participants to the proposed acquisition, it is convenient to set out background to the nature of radio spectrum used for telecommunications, the existing management rights for that spectrum and then the renewal process for those rights in relation to spectrum in the 800/900MHz range. That background is set out in paragraphs 9.9 and 10.1 below.

Spectrum uses and frequencies

9.5 The transmission of mobile telephone signals relies either on pairs of frequencies or on a single frequency. Using a pair of frequencies to communicate is called frequency division duplex (FDD) operation. One frequency (the "down" frequency) is used by the base station to transmit and by the mobile handset to receive. The other frequency (the "up" frequency) is used by the mobile handset to transmit and by the base station to receive. If a single frequency is used, then the send and receive signals are separated along that frequency in time slots. This operation is called time division duplex (TDD). In relation to the mobile telecommunications that are relevant to this application, the paired FDD operation is the relevant technology and all references in this application to 800/900MHz spectrum are to natural pairs of spectrum.

9.6 Mobile telecommunications services use frequencies that are internationally identified for mobile telecommunications use because equipment is only developed for these approved frequencies. Bands in the 800, 900, 1800 and 2100MHz frequency ranges are already used for the abovementioned services. In the future, bands in the 700, 2300, 2500 and 3400MHz frequency ranges are likely to be used for these services. (It should be noted that, apart from the 700MHz band, which is allocated for broadcasting, all the other bands are available for these services in New Zealand.)

9.7 Spectrum in the 800MHz and 900MHz ranges has greater propagation reach than spectrum in the 1800MHz and 2100MHz ranges. Under the same conditions, signals transmitted over 800/900MHz spectrum will travel further than signals transmitted over 1800/2100MHz spectrum. While all of these frequency bands are suitable for providing services in urban areas, 800/900MHz is preferred for servicing rural areas, due to its propagation properties. The Commission noted in Decision 479 in 2002 that 900MHz spectrum was not suitable for 3G applications. However, since then, manufacturers have started producing 3G equipment that works in the 800/900MHz spectrum ranges.

9.8 That said, Vodafone does not believe it is imperative for a network operator to have spectrum in the 800/900MHz range in order to provide nationwide mobile services to consumers in New Zealand. That is, a network operator can choose either to provide services on a nationwide basis by acquiring spectrum in a number of frequency ranges (including the 800/900MHz frequency range); or it can purchase spectrum in only a limited set of frequency ranges (such as the 1800 or 2100MHz frequency ranges) and roam onto the networks of other network operators in those areas where use of spectrum in the 800/900MHz frequency range is more appropriate. It should be noted that in a number of European countries, operators have rolled out nationwide networks only on 1800MHz spectrum (e.g. Orange in the UK and E-Plus in Germany). In this regard, the Commission has previously intimated that entry on other bands coupled with roaming on the 800/900MHz networks of incumbents may be substitutable for management rights in respect of 800/900MHz spectrum[2]. In that sense, 800/900MHz spectrum and other spectrum coupled with roaming are alternative (or substitutable) ways of providing retail mobile telecommunications services to consumers.

Mobile Spectrum Management Right Holdings

9.9 The Crown has ownership of radio spectrum. Under the Radiocommunications Act 1989 ("**RCA**"), the Crown, through the MED, is empowered to grant management rights for a period of up to 20 years over bands of spectrum, enabling the licensee to transmit and receive radio signals. At the expiry of the period of the management rights, the rights revert to the Crown and the RCA is silent as to how they should then be reallocated.

9.10 Rights in the 900MHz spectrum currently held by Vodafone are as follows:

(a) "Block A" - 2 x 7.6MHz in the 899.8 to 907.4MHz range and the corresponding natural pair in the 944.8 to 952.4MHz range, which expires on 28 November 2011;

(b) "Block B" - 2 x 7.6MHz in the 907.4 to 915MHz range and the corresponding natural pair in the 952.4 to 960MHz range, which expires on 29 June 2012; and

(c) "Block C" - 2 x 5.8MHz in the 890 to 899.8MHz range and the corresponding pair in the 939.0 to 944.8MHz range, which expires on 24 November 2022.

2 See eg Decision 479 para 146 and October 2006 Report at para 61

(While it can be seen that the lower range acquired is a block of 9.8MHz, only 5.8MHz was made available in the (natural pair) range 939.0 to 944.8MHz, precluding use of spectrum in the range 890-894MHz. The MED withheld the spectrum in order to avoid the potential for interference with spectrum immediately below 890MHz.) Vodafone acquired the management rights to Block C in the 2002 spectrum auction. It was the only person to bid for the spectrum at that auction.

9.11 On 31 March 2007, Vodafone Mobile entered into a conditional sale and purchase agreement with NZC to sell to NZC Vodafone's management rights to Block C ("**NZC Agreement**"). The NZC Agreement (which is confidential) is **attached** at Appendix B.[3] **[**

] Vodafone and NZC have amended the NZC Agreement, including to vary the condition date. A copy of that variation (which is confidential) is **attached** at Appendix C. It is Vodafone's intention to complete the sale of this spectrum so that it can renew its management rights in relation to Block A and Block B.

9.12 Telecom Mobile Limited owns management rights to 20MHz of spectrum in the 800MHz band, which it uses to provide its 2G CDMA services. (800MHz spectrum is functionally equivalent to 900MHz spectrum.) (Unless it is necessary to differentiate between Telecom Mobile Limited and Telecom New Zealand Limited, hereinafter, the term "**Telecom**" will be used to describe those companies collectively). Vodafone understands that all of Telecom's rights to 800MHz spectrum expire in 2011 or 2012. The MED has not offered Telecom renewal of all of its rights to its entire existing 800MHz spectrum. Vodafone understands from public statements made by NZC that Telecom has agreed to sell 2x5MHz of 800MHz spectrum to NZC. Vodafone does not know the details of this agreement. Telecom owns management rights to 2 x 25MHz of 1800MHz spectrum. Vodafone understands that this band is currently not used. Telecom owns management rights to 2x15MHz of 2100MHz spectrum. Vodafone understands that this band is currently not used by Telecom, but that it plans to roll out a 3G network in this band in the future.

9.13 CallPlus owns 5MHz of 3G TDD spectrum in the 2100MHz range. However this spectrum is not currently in use.

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[3] This is a counterpart.

9.14 NZC owns 2 x 10MHz of 1800MHz spectrum. In conjunction with the Hautaki Trust, NZC also has an option to acquire 2 x 15MHz of 2100MHz band which is currently owned by the Crown. If completed, NZC's purchase of 800/900MHz spectrum from Telecom and Vodafone will give NZC 2 x 10.8MHz of 800/900MHz spectrum. (In comparison, if both Vodafone and Telecom renew their remaining blocks of 800/900MHz spectrum, Vodafone will have 2 x 15.2MHz of 900MHz spectrum and Telecom will have 2 x 15MHz of 800MHz spectrum.)

9.15 TelstraClear owns 2 x 25MHz of 1800MHz spectrum and 2 x 15MHz of 2100MHz spectrum. It is unclear to Vodafone to what use, if any, TelstraClear plans to put the spectrum. However, as indicated above, Vodafone believes that it is unlikely that TelstraClear will roll out a mobile telecommunications network in the foreseeable future.

9.16 For ease of reference, the following table indicates the various blocks of radio spectrum held by various private parties referred to above:

Band	**Current Owner(s)**	**Use**
800MHz	Telecom (2 x 20MHz) *[After renewal, Telecom (2 x 15MHz) and NZC (2 x 5MHz)]*	Currently used by Telecom for servicing all customers using the CDMA2000/EVDO technology.
900MHz	Vodafone 2x21MHz *[After renewal, Vodafone (2 x 15.2MHz) and NZC (2 x 5.8MHz)].*	Currently Vodafone uses the GSM/GPRS technology to service its 2G customers. Vodafone plans to roll out a 3G network this year and provide services on this network using this spectrum band.
1800MHz	Vodafone (2 x 15MHz) NZC (2 x 10MHz) TelstraClear (2 x 25MHz) Telecom (2 x 25MHz)	Vodafone uses GSM/GPRS network functionality to service its customers using this spectrum. NZC could potentially use this spectrum for its network to deliver services using GSM/GPRS network functionality. Vodafone understands that neither Telecom nor TelstraClear is currently

		using this spectrum and is unlikely to use it in the near future.
2100MHz (3G FDD)	Vodafone (2 x 15MHz) TelstraClear (2 x 15MHz) Telecom (2 x 15MHz) Hautaki Trust (2 x 15MHz)	Vodafone is currently using this spectrum to provide services using 3G network functionality. Telecom will use this band to roll out its 3G network in the future. TelstraClear is not currently using this spectrum. NZC has an option to use the Hautaki Trust spectrum.
3G TDD	Vodafone (5MHz) CallPlus (5MHz) TelstraClear (5MHz)	Currently not used by any parties. TDD version of 3G has not developed as expected. Therefore, it is not clear what this will be used for in the near future.
2.3/2.5GHz	Kordia (35MHz) Woosh (35MHz) Craig Wireless (2 x 20MHz) Telecom (2 x 20MHz) Vodafone (35MHz) CallPlus (30MHz)	This spectrum is likely to be used to provide WiMax services primarily. It can also be used for long-term evolution ("**LTE**") of 3G. Most of the parties have announced that they will roll out WiMax networks. The LTE technologies are not likely to be available until 2012.
3.5GHz	TelstraClear (2 x 21MHz) Vodafone (2 x 7MHz) Telecom (2 x 7MHz) Compass (2 x 7MHz) Kordia (2 x 21MHz) Plus a number of other parties with regional licences.	Some parties have rolled out regional networks. This spectrum is primarily used for a fixed "WiMax network". However, there is no widespread roll out of WiMax networks. Vodafone is not using this spectrum and **[ ]**

25GHz (LMDS)	Vodafone (2 x 256MHz) Kordia (2 x 128MHz) TelstraClear (2 x 256MHz)	Currently not widely used. Vodafone is using this spectrum for backhaul applications ie. to link cell sites to switches.
26GHz	TelstraClear (1950MHz)	Not widely used.

9.17 For ease of reference, the following table summarises the anticipated spectrum management rights relevant to mobile telecommunications that will be held by Vodafone, Telecom, TelstraClear and NZC in the 800/900, 1800 and 2100MHz frequency ranges if the renewal offers are accepted:

	800/900MHz	1800MHz	2100MHz
Vodafone	2x15.2	2x15	2x15
Telecom	2x15	2x25	2x15
TelstraClear		2x25	2x15
NZC	2x10.8	2x10	2x15*

* In this band, NZC has an option to use spectrum that the Hautaki Trust has management rights to.

9.18 As noted above, 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 (LTE) 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.

Background to 800/900 MHz spectrum renewal process

9.19 In April 2003, Cabinet determined a policy [POL Min (3) 9/1] that, subject to a case-by-case review, commercial radio spectrum rights would be offered for renewal to existing right holders five years prior to their expiry at a price calculated using a price setting formula that estimated the market value of the rights. This policy was adopted to ensure consistency with international radio practice and the general objective of maximising the value of the spectrum to society as a whole[4]. This policy was expressed to be a reflection of the need to avoid, as far as possible, the spectre of incumbents being left with stranded investment in their networks through failure to secure continued access on economic terms to the spectrum needed to

[4] See "Radio Spectrum: Rights at Expiry", Cabinet Policy Committee paras 3 and 27

provide, as relevant, mobile telecommunications services[5]. If the renewal offer was not accepted, Cabinet's stated policy was that the rights will be auctioned and, if not sold, held by the Crown.

9.20 In its October 2006 mobile market review paper – *A review of cellular mobile network entry issues* ("**October 2006 Report**"), the Commission expressed the view that, amongst other things, the unavailability of spectrum in the 800/900MHz range for new entrants may be hindering entry into the mobile market. The Commission invited the MED to give weight to the benefits of new entry in its review of cellular spectrum renewal[6]. It is noted that, the Commission said that[7], while lack of spectrum in the 800/900MHz range may increase costs for a new entrant into the mobile market, the significance of that absence of spectrum may diminish in the presence of effective regulation of roaming and co-location. Vodafone further notes that agreements can be (and in some cases have been) reached between the parties that enable roaming and co-location, such as the roaming agreement that Vodafone has entered into with NZC as referred to in paragraph 7.2 above.

9.21 The MED engaged Network Strategies Limited ("**NSL**") to assess the spectrum usage of Vodafone and Telecom. Even though NSL found that Vodafone uses all of its spectrum in the 900MHz band, it highlighted factors in its November 2006 report (**attached** at Appendix D) which it believed could influence the amount of spectrum being substantially used and concluded that, in combination with its other spectrum in the 1800MHz and 2100MHz bands, Vodafone could be substantially using 14-16MHz of the 900MHz band[8]. Vodafone notes that, if it acquires the rights to Block A and Block B, it will have only 15.2MHz – around the mid-point of the amount of 900MHz spectrum that NSL considered that it then substantially used.

9.22 The Commission expressed the view in the October 2006 Report that new entry was possible by NZC (or its predecessor Econet) or TelstraClear. As addressed in more detail in section 16 below, NZC has said that it will deploy a mobile telecommunications network in 2008 that will enable it to provide retail and wholesale mobile services using its own network. However, it does not appear likely to Vodafone that TelstraClear will enter as a facilities-based operator in the foreseeable future. Vodafone notes that, unlike NZC, TelstraClear has not sought to purchase 900MHz spectrum from it. Vodafone is not aware of any other likely facilities based entrants and it questions whether it would be economic for a fourth

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[5] See Paper to Cabinet "Arrangements for the Renewal of Radio Spectrum Management Rights use for Cellular services", from the Minister of Communications, March 2007, paragraph 20

[6] See 10 October 2006 Report, paragraph 13 p6 and paragraph 206 p39

[7] See at paragraph 53 on p14 of the October 2006 Report

[8] See p26-28 of the NSL report

national mobile telecommunications network operator to commence network roll-out in the rural regions of New Zealand where spectrum in the 900MHz frequency range would be most valuable. Vodafone's view that NZC is the only person likely to purchase 800/900MHz spectrum and the only likely new entrant as a network operator using the 900MHz frequency range is reflected in the balance of this clearance application.

9.23 In March 2007, the Minister of Communications submitted a paper to Cabinet on arrangements for renewal of radio spectrum management rights used for cellular services (**attached** at Appendix E). The Minister noted that the desired policy outcome of the renewal process was a package that supports competition, minimises the risk of stranded investment, avoids undue disruption, facilitates migration to new technologies and maximises the opportunity for new investment in spectrum[9]. Auctioning all of the rights to be renewed in 2011 and 2012 was noted in the paper to increase the risk of stranding investment, through incumbents losing their spectrum at auction and presenting the risk of disruption to services[10]. The Minister noted that it was considered appropriate that incumbents retain that part of their existing spectrum rights that is reasonably required to operate their networks and avoid unreasonably stranding their investments[11]. The remainder of the spectrum could be auctioned, providing opportunities for entry of competition[12]. The paper considered that it was important that, subject to considerations under the Act, the incumbents be permitted to bid at the auctions of spectrum not offered for renewal[13].

9.24 Based on the reviews undertaken by the Commission and the MED, and consistent with the paper to Cabinet referred to above, Cabinet decided not to offer all existing 800/900MHz spectrum for renewal on expiry in 2011/2012. This decision was expressed to be to ensure that some 800/900MHz spectrum could be made available to possible new entrants into the market. The decision applies both to Vodafone and to Telecom. In respect of the spectrum held by Vodafone, Cabinet resolved that:

(a) One of the two blocks of 7.6MHz of spectrum management rights in the 900MHz range which expire in 2011 or 2012 should not be offered for renewal (although the remainder of the existing spectrum expiring then will be

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[9] See paragraph 20 of the Cabinet paper

[10] See paragraph 27 of the Cabinet paper

[11] See paragraph 28 of the Cabinet paper

[12] See paragraph 28 of the Cabinet paper

[13] See paragraphs 28 – 29 and 42 of the Cabinet paper

offered to Vodafone) and will be auctioned or, if not sold, held by the Crown; but

(b) if, within six months of being offered renewal of one block of 7.6MHz, Vodafone offers at least 5MHz of the 900MHz spectrum to a third party who does not presently hold 800MHz or 900MHz spectrum, Vodafone will be offered renewal of the second block of 7.6MHz of the 900MHz spectrum.

9.25 As indicated above, the NZC Agreement was entered into on 31 March 2007. It is noted that, while the Cabinet paper and the condition in the Offer Document require Vodafone to sell only 2 x 5MHz of spectrum, 2 x 5.8MHz of spectrum would be sold under the NZC Agreement.

9.26 The MED conveyed its understanding of the Cabinet decision referred to in paragraph 9.24 above to Vodafone by letter dated 15 June 2007 (**attached** at Appendix F). By letter dated 20 September 2007, the MED provided guidance to Vodafone in respect of the sale of at least 5MHz of spectrum on the secondary market (**attached** at Appendix G). By then, the NZC Agreement had been entered into and Vodafone understands, from the MED letter of 20 September 2007, and discussions that it has had with the MED, that the NZC Agreement would be in accordance with the intention of Cabinet and the MED with respect to the renewal of spectrum.

9.27 On 9 November 2007, the MED made an offer to Vodafone for the renewal of Block A and Block B. The offer is open for acceptance by Vodafone prior to 9 May 2008. The offer is divided into two parts:

(a) An offer to grant management rights in respect of Block A from 29 November 2011 to 28 November 2031, for $28,864,164 (plus GST).

(b) An offer to grant management rights in respect of Block B from 30 June 2012 to 28 November 2031, for $28,022,100 (plus GST). Renewal of Block B is conditional on Vodafone completing, prior to acceptance of the offer, an unconditional sale of Block C to a New Entrant (as defined in the offer) on terms set out in the offer. **[**

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Timing of the Acquisition

9.28 Pursuant to clause 2.11 of the Offer Document, acceptance of the offer by Vodafone forms a binding contract between the parties. That clause then provides that Vodafone will then have no legal or equitable interest in the Management Rights in respect of those blocks of spectrum until it is registered as the manager of such, which will be after settlement. [

] In this respect, settlement must occur before 29 May 2011 for Block A and 30 December 2011 for Block B. On acceptance of the offer, there is a binding contract that allocates spectrum management rights in the future. The Offer Document recognises that (with the consent of the MED) Vodafone can assign or transfer the rights under it. Further, while under clause 7, the MED can propose to amend the lots to be acquired, the amount of usable spectrum must not be affected. Both of these reflect that Vodafone has some form of rights under the binding contract from when it is accepted. The legal position between Vodafone and the MED is therefore more certain than, for instance, under an option to purchase, or a franchise or other contractual rights that the Commission has stated in its Merger and Acquisition Guidelines will likely be treated as an acquisition[14]. Accordingly, it would seem that the relevant proposed acquisition occurs on acceptance of the offer rather than when settlement under the contract occurs.

9.29 Even if, however, the acquisition occurs at the time of settlement, the competition analysis set out in section 16 below is not altered, for the reasons referred to in paragraph 11.13 below. Further, Vodafone has a right under clause 4.2 of the Offer Document to settle before 29 May 2011 in respect of Block A and before 30 December 2011 in respect of Block B. This ability to settle early could mean that even that form of acquisition could occur during the time that the clearance operated.

9.30 The offer in respect of Block A and Block B comprises the proposed acquisition for which clearance is sought.

10. WHAT ARE THE REASONS FOR THE PROPOSAL AND THE INTENTIONS IN RESPECT OF THE ACQUIRED OR MERGED BUSINESS?

10.1 Pursuant to section 138(1) of the RCA, the grant of any management right for radio spectrum is deemed to be the acquisition of assets of a business and is subject to section 47 of the Act. Clause 5.1 of the Offer Document requires that, prior to settlement, Vodafone Mobile provides to the Chief Executive of the MED a statutory declaration specifying that either:

(a) the acquisition of the Lot (or Lots) does not involve a breach of section 47 of the Act; or

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14 See paragraph 2.3 at p10 of the Guidelines

(b) a clearance or authorisation has been obtained under section 66 or section 67 of the Act for the acquisition of the Lot (or Lots).

10.2 Vodafone considers that the acquisition of management rights in respect of Blocks A and B of 900 MHz radio spectrum (with the associated sale of the rights in respect of Block C to NZC) will not infringe section 47 of the Act. However, given the interaction of the Offer Document with its agreement to sell Block C to NZC, and for there to be complete certainty in the renewal process of spectrum over which it carries approximately [ ]% of its traffic, Vodafone has elected to seek a clearance for the acquisition of the management rights relating to Blocks A and B rather than simply provide the statutory declaration referred to in paragraph 10.1.

10.3 Vodafone Mobile is interested in acquiring the management rights for Block A and Block B for the following reasons:

(a) Vodafone relies heavily on the 900MHz band to carry its network traffic[15] - approximately [ ]% of Vodafone's network traffic is carried over the 900MHz range. Further, Vodafone's past investment decisions in this spectrum range arguably make having sufficient 900MHz spectrum available more important to it than to a new entrant who is yet to make those investment decisions. With the launch of products such as Vodafone at Home and its evolution in the future, and Vodafone's intention to use the 900MHz spectrum for 3G services in the future, the proportion of traffic carried over the 900MHz range and the importance to it of this spectrum range is likely to remain very high. Lack of sufficient spectrum in this range would be so critical to Vodafone that it would likely significantly affect its future strategic decisions and require it to undertake a review of all of its present business plans.

(b) Absence of sufficient 900MHz spectrum will have a significant impact on how efficiently and effectively Vodafone can compete to provide mobile and wider telecommunications services.

(c) Even if Vodafone incurs significant capital expenditure to reconfigure the network to provide capacity in the 1800MHz range, this exercise is likely to cause disruption to the services Vodafone provides to its retail customers. It would also likely divert those funds away from developing other new products and services.

[15] This was noted by the MED in the Renewal of Management Rights for Cellular Services, Discussion Paper, July 2006.

(d) Not being able to accept the MED's renewal offer may affect Vodafone's resale agreements with Compass, M2 and Orcon and may affect its ability to offer roaming on its network to NZC.

(e) 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. If Vodafone does not have two blocks of 900MHz spectrum, it will not be able to use a large part of this equipment and there will be stranded investment in that equipment, which Cabinet expressed a desire to avoid.

(f) [

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PART II: IDENTIFICATION OF MARKETS AFFECTED

Horizontal Aggregation

11. ARE THERE ANY MARKETS IN WHICH THERE WOULD BE AN AGGREGATION OF BUSINESS ACTIVITIES AS A RESULT OF THE PROPOSED ACQUISITION?

11.1 The proposed acquisition will not lead to aggregation of business activities in any markets. In its previous discussions regarding acquisition of radio spectrum management rights[16], the Commission indicated that, since a proposed acquisition of spectrum does not result in aggregation in the market, the issue to be considered is whether the proposed acquisition would result in the removal of a vehicle by which entry into a market could be facilitated[17].

11.2 The precise definition of various markets relevant to the provision of mobile telecommunications services has been the subject of consideration in a number of regulatory forums in recent years, particularly following the Telecommunications Act 2001 coming into force.

11.3 Vodafone notes that the Commission adopted the following market definitions for the purposes of its November 2002 Decision 479 (clearance for Vodafone to acquire Block C):

(a) the relevant product and geographic market is the provision of mobile telecommunications services on a national basis; and

(b) the relevant functional markets are the wholesale supply of those services and the retail supply of those services.

11.4 Vodafone also notes that the Commission has previously stated that the markets for mobile telecommunications services and fixed network telecommunications services are still separate and that previously proposed acquisitions of spectrum have been assessed by reference only to the narrower mobile telecommunications services market. Vodafone believes that convergence may mean that services provided over mobile and fixed-line networks are becoming increasingly substitutable for each other, and that carriers are starting to bundle services provided over these networks together such that these services are increasingly being provided in the same market and a broader market definition may be appropriate in the future. However, because Vodafone considers that the proposed acquisition would not substantially lessen competition in a narrowly defined market, the mobile telecommunications

[16] Decisions 413, 423, 447, and 479

[17] See eg paragraph 108 of Decision 479

market, let alone in any wider markets, it intends largely to adopt the market definition previously specified by the Commission in Decision 479 for the purposes of this application.

11.5 Further, Vodafone considers that, in this application, absolute precision in determining markets may not be necessary since the proposed acquisition of spectrum does not lead to market concentration or foreclosure of entry. In fact, the converse is true in that NZC will acquire access to 900MHz spectrum (in addition to 800MHz spectrum) sooner than if the proposed acquisition does not proceed. The acquisition, therefore, could not be said to "substantially lessen competition" whatever the relevant market was determined to be. Vodafone's reasons for reaching this view are outlined in greater detail in section 16 below.

11.6 For the purposes of this application, Vodafone's proposed identification of markets is set out above. For completeness, however, Vodafone addresses the market identity in more detail below.

Markets - products

11.7 As noted above, for the purposes of this clearance application, Vodafone adopts the Commission's previously stated view that the relevant markets for the purposes of this clearance application are the wholesale and retail markets for mobile telecommunications services. In this regard, Vodafone notes there has been some suggestion in the past that there may be separate mobile telecommunications markets for 2G and 3G services. In paragraph 68 of Decision 413, and in Decision 423, both of which related to acquisition of spectrum in the 2GHz range which is used for 3G services, the Commission referred to two mobile markets: mobile telecommunications services and third generation mobile telecommunications services. However, in its October 2006 Report, the Commission appeared to consider there to be one market for mobile telecommunications services that comprises both 2G and 3G services. Vodafone believes that 2G and 3G mobile services are provided in the same mobile telecommunications market. Even if the narrow view that there is a separate market in respect of 3G mobile services was adopted, the development of technology enabling 3G services to be provided on spectrum in 800/900MHz range would mean that the proposed acquisition would have the same effect in both markets and it is unnecessary to consider them separately.

11.8 Vodafone notes that, in the October 2006 Report and in the Telecommunications Act 2001 Schedule 3 investigation into amending roaming and co-location services draft report 3 August 2007, the Commission referred to emerging technologies, such as Wifi and Wimax, as possibly being relevant in the future. Vodafone is of the view that such technologies may possibly become closer substitutes for mobile telecommunications services in the future, if these technologies are successful in becoming mass-market technologies. Currently, there are diverging views on whether these technologies will be successful. In this context, considering the impact of these technologies in the mobile telecommunications market may lead to overly speculative analysis. Vodafone believes that it is appropriate to adopt the more restrictive view that these technologies should not be considered to be in the same market as mobile telecommunications services at this point in time. That said, the continual development of new technologies, including the prospective development of new network types, and of 4G services, does make it harder to conduct an authoritative analysis of market boundaries significantly beyond 2011/2012 (i.e. the period in which Vodafone would own management rights for blocks A and B of the 900MHz spectrum). This impacts on the time dimension of the market, and is discussed in more detail below.

Markets – functional level

11.9 The proposed acquisition of spectrum allows a telecommunications provider to provide mobile telecommunications services at the retail level and at the wholesale level and Vodafone considers that these are the appropriate functional levels to consider.

Markets - geographical

11.10 Vodafone considers that mobile services are provided on a national basis by it and by Telecom. In respect of new entrants, the Commission has identified in the October 2006 Report that entry on a national basis, even if by way of roaming, is important. The market should therefore be considered a national one.

Markets – time frame

11.11 Vodafone notes that the relevant time frame usually considered by the Commission is 2-3 years. In Decision 479, the Commission considered a period between 2003 and 2011. The Commission noted in that decision at paragraph 96 that:

> ... the rapid development in technology makes any assessment of market conditions beyond 2011 very problematic. The rate of development would suggest, however, that a range of new technology and entry options might be available at that time.

11.12 Vodafone considers that the nature of the telecommunications industry means that network developments and advancements mean a relatively short time horizon should be considered when conducting competition analysis in telecommunications markets. Accordingly, Vodafone believes the Commission's competition analysis should not extend significantly beyond the 2011/2012 time period, when Vodafone would renew management rights to Blocks A and B.

11.13 Irrespective of whether the Commission believes that the acquisition for the purposes of this clearance application occurs at the time when Vodafone accepts the MED offer or the time at which Vodafone settles its purchase of the relevant management rights, Vodafone considers that the appropriate time frame in which to consider the proposed acquisition should include the period up to about the time of the expiry of its current rights with respect to Blocks A and B. This is because if Vodafone accepts the offer from the MED, Vodafone will be required to have sold its management rights in respect of Block C to a new entrant. That is, the nature of the MED offer means that the acquisition cannot occur unless Vodafone sells its management rights to Block C to a new entrant prior to accepting the offer. Vodafone will likely not sell its management rights to Block C if it does not acquire Blocks A and B. Hence, the nature of the MED offer means that the acquisition – irrespective of when it is said to occur – will generate changes in the mobile telecommunications market from May 2008 onwards on account of it assisting the likely facilities-based entry of a new entrant into the mobile telecommunications market.

Conclusion on markets

11.14 Vodafone considers that the positive competition effects of its proposed acquisition mean that the precise definition of markets is not of critical importance in this application. It considers that, for the purpose of this application only, it is sufficient for the market to be defined narrowly as the national market for the supply of mobile telecommunications services for the period at least covering the next three years (but likely not much further beyond this period), consistent with the previous approach of the Commission in this area.

12. PLEASE INDICATE WHETHER THE PRODUCTS IN EACH MARKET IDENTIFIED IN QUESTION 11 ARE STANDARDISED (BUYERS MAKE THEIR PURCHASES LARGELY ON THE BASIS OF PRICE) OR DIFFERENTIATED (BUYERS MAKE THEIR PURCHASES LARGELY ON THE BASIS OF PRODUCT CHARACTERISTICS AS WELL AS PRICE)

12.1 Vodafone considers that the retail and wholesale markets involve differentiated products. While the basic voice and data content are essentially the same, a number of other factors (such as services and bundles) are differentiated and influence customers' choice of service provider.

13. FOR DIFFERENTIATED PRODUCT MARKETS:

Please indicate the principal characteristics of products that cause them to be differentiated one from another.

13.1 Vodafone notes that the Commission formed a view in the October 2006 Report at paragraph (iv) that:

> Telecom and Vodafone compete for market and revenue share. Network capabilities, handsets, and service bundles are all used as points of differentiation.

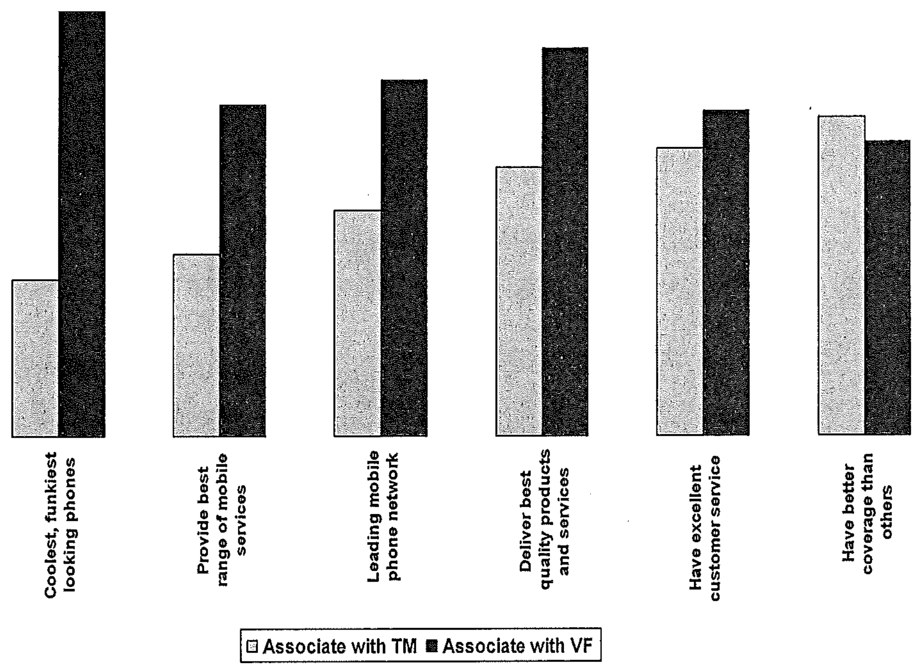
13.2 Vodafone is of the view that a number of factors influence a customer's choice of which mobile telecommunications service provider to use, such as handsets; functionality; service quality (particularly coverage); customer service; and brand image. These factors are differentiated in the market and have a significant influence on competition. In addition to price competition there is, therefore, competition in other aspects of the product. For example:

(a) The data products offered by Vodafone and Telecom are highly differentiated. Telecom has greater 3G coverage compared to Vodafone, while the peak speeds offered by Vodafone are faster than those offered by Telecom.

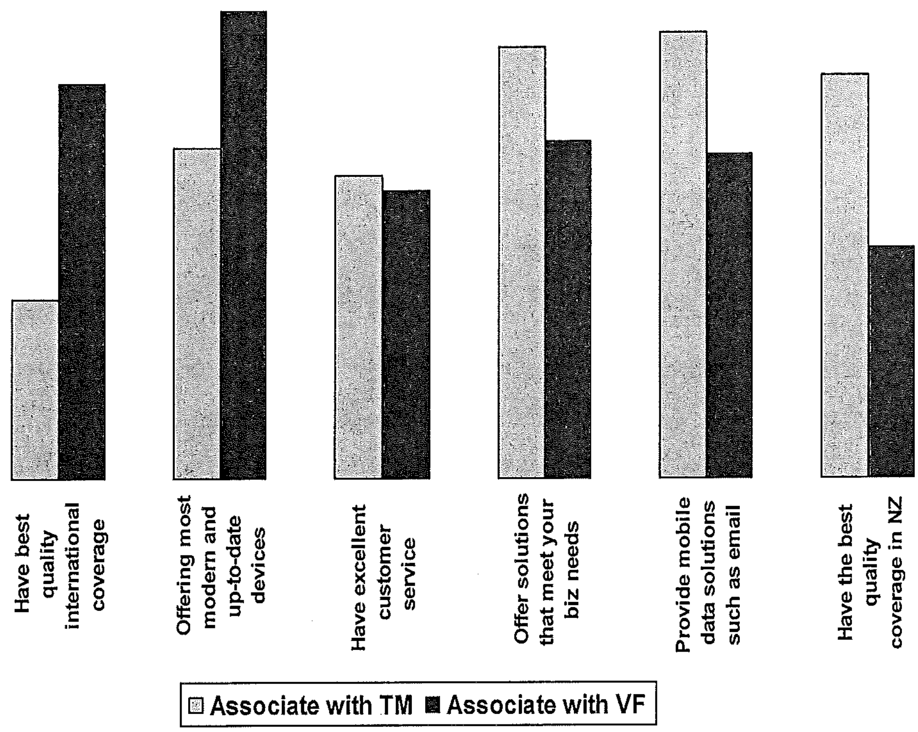
(b) Value added services such as voice mail, music downloads, video calling etc are highly differentiated between Vodafone and Telecom.

(c) International roaming. Vodafone customers are able to use the same mobile handset when they roam to almost all countries. Unless Telecom customers have a "World Phone", those customers need to change their mobile handset to roam in most countries. In addition, Vodafone customers are able to use short codes (such as 707 for voice mail and 777 for customer service) in a number of countries. Telecom, however, does not offer this same service

Further, Vodafone regularly conducts surveys in relation to Vodafone and Telecom customers' perceptions in relation to various aspects of the service provided by those companies. Each month, these surveys interview 300 consumer and 300 business Vodafone and Telecom customers. Results for the period from May until October 2007 are given below. The results show that there are a number of features that customers perceive to be differentiated between Vodafone and Telecom. In particular, the following figure shows how consumers view different aspects of the products of Vodafone and Telecom.



The following figure shows how business customers view different aspects of the products of Vodafone and Telecom.



Both figures show that, in most cases, customers see one of the companies as having an advantage over the other with respect to the various aspects of the products offered by Vodafone and Telecom.

13.3 Similarly, the wholesale market also consists of differentiated products. This is because of the nature of the wholesaling agreements that are in existence and that are likely to come into existence in the future. [

]. Both Vodafone and Telecom have in place wholesale agreements with other carriers.

WILL THE PROPOSAL RESULT IN VERTICAL INTEGRATION BETWEEN FIRMS INVOLVED AT DIFFERENT FUNCTIONAL LEVELS?

Not applicable.

14. IN RESPECT OF EACH MARKET IDENTIFIED IN QUESTIONS 11 AND/OR 12 IDENTIFY BRIEFLY:

- **ALL PROPOSED ACQUISITIONS OF ASSETS OF A BUSINESS OR SHARES INVOLVING EITHER PARTICIPANT (OR ANY INTERCONNECTED BODY CORPORATE THEREOF) NOTIFIED TO THE COMMISSION IN THE LAST THREE YEARS AND, IN EACH CASE:**
- **THE OUTCOME OF THE NOTIFICATION (E.G CLEARED, AUTHORISED, DECLINED, WITHDRAWN)**
- **WHETHER THE PROPOSED ACQUISITION HAS OCCURRED.**
- **ANY OTHER ACQUISITION OF ASSETS OF A BUSINESS OR SHARES WHICH EITHER PARTICIPANT (OR ANY INTERCONNECTED BODY CORPORATE) HAS UNDERTAKEN IN THE LAST THREE YEARS.**

14.1 There have been no acquisitions of spectrum rights in the last three years by Vodafone apart from the recent auction of 2.5MHz spectrum, which has not yet been completed and has not been notified to the Commission.

PART III: CONSTRAINTS ON MARKET POWER BY EXISTING COMPETITION

15. IN THE MARKET OR MARKETS, WHO ARE THE SUPPLIERS OF COMPETING PRODUCTS, INCLUDING IMPORTS?

15.1 Currently, Telecom is the only competing network operator in the provision of mobile telecommunication services at the retail and wholesale level. As noted above, Telecom uses spectrum in the 825–845MHz and 870-890MHz range to provide mobile telecommunications services using its CDMA2000 network. Telecom also holds 2 x 25MHz in the 1800MHz band and 2 x 15MHz in the 2100MHz band. Telecom has also announced plans to roll out a UMTS/GSM network on its 2100/800MHz spectrum in the next two years, which will eventually replace its CDMA-based network. Telecom's change to use the same UMTS/GSM technology as Vodafone could be expected to increase the ease with which customers can switch between networks and therefore further increase competitive pressure in the market for mobile telecommunications services.

15.2 Market share by customer numbers as at March 2007 are estimated as follows, based on published results[18]:

	Existing % of Market Share
Telecom	47.3%
Vodafone	52.7%

15.3 Vodafone recently ended its agency agreement with TelstraClear, which has announced that it will wholesale Telecom's CDMA network. Vodafone has three wholesale agreements with Compass, Orcon and M2. At least one of these operators has indicated that it is likely to launch this year. [

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[18] See, for instance, Vodafone media release, "Vodafone customers the winners as prices come down", 20 July 2007 at http://www.vodafone.co.nz/personal/about/media-centre/2007-media-releases/vodafone-releases-q1-results.jsp

15.4 The Commission indicated that, since TelstraClear's mobile services were provided via an agency agreement with Vodafone, TelstraClear was not considered to provide effective competition to Vodafone[19]. However, now that TelstraClear's services are provided through Telecom, TelstraClear should be regarded as providing at least some level of competition to Vodafone (by or through the Telecom network) at the retail level. Further, while other resale service providers – and indeed TelstraClear through its wholesale agreement with Telecom – will be unable to provide full network–based competition to Vodafone, all of these service providers will provide some competitive pressure on Vodafone and Telecom in the retailing aspects of providing telecommunications services[20]. Such competition is consistent with that envisaged by other aspects of the telecommunications access regime enforced by the Commission – especially with regard to a number of fixed-line telecommunications services – and should, therefore, be regarded as providing at least some level of competitive discipline on Vodafone at the retail level.

15.5 Additionally, there is the important potential for already signalled new entry (by NZC) to be facilitated earlier by Vodafone's acquisition of Blocks A and B (and sale of management rights in relation to Block C to a new entrant) if the proposed acquisition proceeds. Vodafone believes this would have the effect of further enhancing the state of competition in the mobile telecommunications market between now and 2011/2012. In this regard, Vodafone notes that information published in the media suggests that NZC is likely to enter the New Zealand market as an infrastructure based service provider by the end of this year [http://www.gsmmobile.co.nz/News/article/sid=1648.html]. NZC is likely to roll out a GSM/GPRS/UMTS network in order to provide mobile telecommunications services.

15.6 The ability of NZC to enter the market is supported by the existence of two regulated services – domestic roaming and co-location. While Vodafone has not always agreed with the extent of regulation of these services proposed by the Commission, the Commission *itself* should be satisfied with the level of regulation it will recommend for these services at the time of completing its inquiries into these services. In this regard, Vodafone notes that the Commission's recommendations with respect to the appropriate level of regulation of co-location services was accepted by the Minister of Communications on 14 December 2007[21], and that the Commission has deferred its final recommendations on the regulation of roaming services until February 2008. By virtue of its investigations into the extent to which these services should be regulated since the October 2006 Report, the Commission

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[19] See Decision 479, paragraph 115

[20] The Commission noted this form of competition in its October 2006 Report at paragraph 193 on p37.

[21] Commerce Commission "Telecommunications Act 2001: Schedule 3 Investigation into amending the co-location service on cellular mobile telephone transmission sites", Final Report, 14 December 2006

should itself be confident that it has put in place the appropriate regulatory settings (which have been supplemented by commercial arrangements) to best ensure a new entrant is able to enter the mobile telecommunications market in the present circumstances.

15.7 The capacity for NZC to enter the market effectively within the context of these regulatory settings will be enhanced, however, if it is able to acquire spectrum from Vodafone in the 900MHz range. In that sense, the combination of the potential for this acquisition to facilitate new entry into the market and the regulatory reviews conducted by the Commission since October 2006 should leave it confident that the mobile telecommunications market will be substantially *more* competitive if the proposed acquisition occurs. The importance of the proposed acquisition to the state of competition in the market is considered in more detail in section 16 below.

15.8 Importantly, Vodafone remains of the view that the mobile telecommunications market is showing signs of becoming even more competitive over time. It notes the Commission formed a view in the October 2006 Report at paragraphs (iv) to (vii) that:

> Telecom and Vodafone compete for market and revenue share. Network capabilities, handsets, and service bundles are all used as points of differentiation. Levels of customer churn appear to be at least as high as in other countries and may spike following the introduction of cellular number portability in early 2007.
>
> Notwithstanding these indicators of competition ... there are features of the mobile market that suggest that competition in this market is limited. While there is some dispute as to competitive pricing data, retail prices for mobile voice calls remain significantly above the midpoint of other OECD countries across all user types.
>
> In a competitive market, a scenario of low usage and high prices, along with high fixed costs and low variable costs, would be self-correcting. Competitors would reduce prices toward marginal cost to drive utilization of their networks and thereby spread fixed costs over the higher volume of traffic.
>
> The fact that this has not occurred suggests that there is room for enhancing competition through new entry. Yet new entry has not occurred to any material extent.

15.9 Vodafone notes a number of outcomes in the time since the Commission reached its views in the October 2006 Report which suggest the retail market for mobile telecommunications services is becoming even more competitive than when the Commission reached these views.

15.10 In this regard, Vodafone notes that competition has resulted in the following market outcomes in the last two years:

(a) Current voice prices are 28% lower than last year's prices. Vodafone's outgoing voice revenue per minute (including monthly fee revenue) fell from [ ] cents per minute in April 2006 to [ ] cents per minute in July 2007.

(b) From August 2004 to August 2006, there has been a 28% increase in usage. Further, between August 2006 and August 2007 there was a 37% increase in usage. This suggests that the usage is increasing in response to decreases in price.

(c) Mobile broadband plans introduced by Vodafone are among the cheapest available in the Vodafone Group of operating companies. Currently Vodafone offers 1GB of data per month for $49.95 and 6GB of data per month for $79.95.

(d) Customer Churn Rates are around [ ] for both Vodafone and Telecom. This suggests that there is significant competition in the market and customers switch networks.

(e) In the last three years, New Zealand prices, as a percentage of the OECD mean, have almost halved. These are at 89%, 89% and 93% of the OECD average of cheapest plans for low, medium and high users respectively, and are all Vodafone plans.[22] Vodafone also notes that the OECD average has decreased over the past three years by 2%, 31% and 32% for low, medium and high users respectively. During a period of aggressive price decreases worldwide, Vodafone New Zealand's decreases have significantly outpaced the OECD.

(f) In terms of OECD rankings, New Zealand has achieved the following in the mobile sector: 14th of 30 for Low Users, 12th for Medium Users and 16th for High Users. This is part of a trend of sustained improvement and compares favourably with rankings of 20th, 24th and 21st, respectively, as reported by the Commission in October 2006[23].

15.11 Vodafone is of the view that the telecommunications market is competitive. A detailed discussion of Vodafone's views on the state of competition in the retail telecommunications market can be found in its submission to the Commission's

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[22] August 2007 rankings - http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/MonitoringandReporting/DecisionsList.aspx

[23] Commerce Commission, *A review of Cellular Mobile Market Entry Issues,* October 2006, p.10.

Section 3 Investigation into amending the roaming and co-location services draft report[24]. While the Commission may have some concerns about some of these indicators of the state of competition in the retail mobile telecommunications market[25], it seems obvious that the level of competition in the retail mobile services market has intensified in recent years. Further, the structural changes to the market since October 2006 – coupled with the divestiture of Block C to NZC – should leave the Commission confident that the retail (and indeed the wholesale) mobile telecommunications market will become even more competitive if the proposed acquisition proceeds.

16. CONDITIONS OF EXPANSION

16.1 As noted above, it is Vodafone's intention to continue to provide telecommunications services using spectrum in the 900MHz frequency range. It also intends to expand the range of telecommunications services it provides using spectrum in this range. Vodafone believes that the availability of necessary spectrum is not only a condition of expansion of its operations, but also a condition of its continued efficient operation and competition. Vodafone understands that NZC will also commence operations as a facilities-based service provider during 2008. Hence, acceptance of the offer and the requisite sale of Block C to NZC should enable both Vodafone and NZC to expand the number and range of services they can provide to consumers. In turn, this will promote competition in both the wholesale and retail mobile telecommunications markets.

16.2 If the proposed acquisition of Blocks A and B pursuant to the MED Offer Document does not occur, Vodafone believes that the following sequence of outcomes is likely:

(a) All of the 900MHz spectrum presently held by Vodafone will remain with it until 2011/2012 when its management rights of Blocks A and B expire. After 2012, Vodafone would continue to hold Block C. New entry, based on the acquisition of 900MHz spectrum at auction, will not be possible to the same extent as it would if NZC was able to acquire Block C from Vodafone in May 2008. This is because NZC would not gain access to 900MHz spectrum until 2011/2012, and only then if it was successful in acquiring this spectrum at auction.

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[24] See *Vodafone New Zealand Limited Submission to the Commerce Commission: Schedule 3 investigation into amending the roaming and co-location services, draft report,* 31 August 2007, at pp. 48 – 56 (paragraphs 201 – 233).

[25] See, for instance, Commerce Commission, *Telecommunications Key Statistics – September Quarterly 2007,* 5 December 2007, at paragraph 14.

(b) If, for some reason, Vodafone was not permitted to acquire or hold two blocks of spectrum in the 800/900MHz range beyond 2011/2012, at least one of the blocks not renewed would most likely lapse into Crown ownership again. Vodafone believes there is no credible evidence to suggest there is a fourth party willing to deploy a mobile telecommunications network that would require access to spectrum in the 900MHz range. It is also questionable whether it would be economic for a fourth network operator to provide mobile services in rural areas such that a fourth operator would be prepared to deploy a network that used spectrum in the 800/900MHz range.

(c) If Vodafone does not attain a clearance to hold the two blocks of spectrum that are the subject of this clearance application (ie Blocks A and B), it is arguable that the Commission would not grant it a clearance to hold an alternative set of two blocks of 900MHz spectrum (i.e. Blocks A and C) if it were to attain a second block at auction.[26] In these circumstances, there would seem no reason why similar considerations would not apply to Telecom too, and possibly any other party, including NZC, preventing them from acquiring or holding more than one block of this spectrum. If so, Vodafone believes that approximately half of the spectrum available in the 800/900MHz range would likely revert back to the Crown if, for some reason, parties are not permitted to each acquire/hold two blocks of spectrum in the 800/900MHz range. This is because Vodafone believes there is no credible evidence of a fourth network operator seeking to build a network in rural areas where spectrum in the 800/900MHz range would be most appropriate.

16.3 The consequences of such reduced holdings in 800/900MHz spectrum by all network operators would be dramatic, and could include the following:

(a) Vodafone and Telecom would be significantly impaired in their ability to provide mobile telecommunications services to consumers as a result of network capacity beyond 2011/2012 being reduced to below the levels recommended in the NSL Report and contemplated by Cabinet and the MED. Vodafone does not know in what ways a reduced holding of 800/900MHz spectrum could affect Telecom's stated intention to develop a UMTS/GSM network.

(b) The ability of NZC to enter the market would likely be seriously hampered. Prior to 2011/2012, it would have less spectrum available to it to provide services in rural areas. Secondly, the ability for it to roam onto Vodafone's

[26] That is, the MED would likely seek to auction Blocks A and B if Vodafone was unable to complete its acceptance of the offer on account of it not attaining a clearance from the Commission.

network may be severely constrained as, after 2011/2012, Vodafone will be unlikely to have any spare capacity on its network to enable it to provide roaming using this spectrum and, before that time, Vodafone will be operationally preparing for a reduction in its spectrum holding. Vodafone does not know what effect there would be in relation to the sale by Telecom to NZC of 800MHz spectrum.

(c) The ability of network operators to fulfil or offer new wholesale agreements would likely be similarly compromised if its own mobile telecommunications service offerings are constrained by its lack of access to sufficient 900MHz spectrum.

(d) Vodafone would face significant disincentives with respect to the extent of future investment in telecommunications infrastructure given it would lose confidence in its ability to retain management rights of other existing (or future acquisitions of) blocks of spectrum, and the consequence of stranded asset investment. This could be expected to significantly reduce the quality and range of mobile telecommunications services available to consumers.

(e) Vodafone is the only telecommunications provider that has a nationwide network and that offers a full alternative to the mobile and fixed networks of Telecom. Vodafone is developing products and services that are provided over its mobile network and that will compete with services offered by Telecom over its fixed-line network, for instance the recently announced Vodafone at Home product. The ability of Vodafone to compete effectively in the fixed-line space would likely be compromised if its mobile telecommunications service offerings are constrained by its lack of access to spectrum over which to provide those services.

(f) A substantial amount of equipment used on the 800/900MHZ bands owned by the incumbents would become redundant.

(g) The expressed policy of Cabinet referred to at paragraph 9.19 above would not be fulfilled.

16.4 In contrast, if Vodafone acquires Blocks A and B, it should 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. Importantly, as stated, if the acquisition proceeds, NZC will gain access to an additional block of 900MHz spectrum before May 2008 so that it is able to commence operations using this spectrum to compete with Vodafone and Telecom in the mobile telecommunications market earlier. This should further increase the extent of competition in relevant markets.

16.5 In Vodafone's view, the level of competition in all relevant telecommunications markets is likely to be greater in the future if the proposed acquisition occurs. Entry of NZC and wholesale operators is expected to also increase the level of competition over the provision of these services. However, having access to two blocks of 900MHz spectrum is critical to Vodafone. If Vodafone is reduced to owning one block of 900MHz spectrum, this will reduce Vodafone's ability to compete in the retail and wholesale mobile telecommunications markets, and will also likely impact on its ability to compete over the provision of fixed line telecommunications services.

17. CO-ORDINATED MARKET POWER

17.1 Vodafone considers that the prospect of exercise of co-ordinated market power by it and Telecom is negligible. There is significant competition in the market for each other's customers, as demonstrated by the high churn rate experienced by both networks. In addition, now that the mobile market is saturated (with over 100% penetration), Vodafone is increasingly targeting Telecom's heretofore exclusive revenue pools, for instance by developing Vodafone at Home.

17.2 In any event, NZC having 800/900MHz spectrum and being in a position to enter the market would further impede any co-ordination effects.

17.3 Other reasons why the proposed transaction will not increase the risk of co-ordinated behaviour include:

Factors Conducive to Collusion	**Presence of Factors in the Market**
High Seller Concentration	Yes
Differentiated product/service	Products are differentiated (see paragraph 12.1).
New entry	New entry is expected. Barriers to new entry are lower than in 2002: – 800/900MHz spectrum availability, better roaming terms, other regulation such as mobile termination rates
Lack of fringe competitors	No. TelstraClear is still a fringe competitor. Warehouse Gold has left the market, however **[** **]**
Price inelastic demand curve	No. There has been significant growth in

	usage as prices have been cut.
Industry's poor competition record	No instances of collusive behaviour between telecommunications service providers.
Presence of excess capacity	The existence of excess capacity (if any) is likely to be less in the future if the proposed acquisition proceeds.
Presence of industry associations	TCF, TUANZ is vocal.

18. PART IV: CONTRAINTS ON MARKET POWER BY POTENTIAL COMPETITION

18.1 Vodafone considers that the constraints imposed by Telecom are significant, and more than sufficient to ensure that the acquisition would not have the effect or likely effect of substantially lessening competition in a market.

18.2 Vodafone will also be further constrained in its competitive activities by the ability of a new entrant, NZC, to enter the market (using its own spectrum and roaming rights) earlier than if NZC acquires spectrum management rights at auction.

19. CONCLUSION

19.1 Vodafone does not believe that the proposed acquisition will substantially lessen competition in any market. In the first instance, the proposed acquisition does not result in any market aggregation. Indeed, the proposed acquisition involves Vodafone lessening its holdings of management rights with respect to spectrum in the 900MHz range. In this regard, the proposed acquisition has the effect of promoting competition in wholesale and retail markets for mobile telecommunications services by facilitating the early entry of NZC into these markets in 2008.

19.2 In contrast, if the proposed acquisition does not occur, NZC will be unable to enter these markets to the same extent until 2011/12, even if it is able to win the management rights to blocks of spectrum in the 900MHz range at auction. Further, the likely reductions to Vodafone's holdings of spectrum in the 900MHz range will limit its ability to:

(a) compete in the wholesale and retail mobile telecommunications services markets;

(b) compete with Telecom in the fixed line telecommunications market; and

(c) effectively offer roaming and wholesale services to other access seekers so that they can compete in the retail and wholesale mobile services markets.

19.3 Overall, therefore, the proposed acquisition will substantially promote competition rather than lessen competition in any relevant market.

THIS NOTICE is given by David Laurence Kreider of Vodafone Mobile NZ Limited. We hereby confirm that:

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

Vodafone NZ Limited undertakes to advise the Commission immediately of any material change in circumstances relating to the application/notice.

Dated this 16th day of January 2008

Signed by David Laurence Kreider

General Counsel

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

GLOSSARY OF TERMS

2G: 2nd generation (mobile technologies). This is characterised by digital transmission rather than analogue (the latter being used by first generation mobile technologies). 2nd generation mobile technologies include GSM, and the early versions of cdma2000.

2.5G: 2.5 generation (mobile technologies). This term is used to primarily describe data technologies that evolved from 2nd Generation technologies. This includes GPRS and cdma2000 1xRTT.

3G: 3rd Generation mobile technologies. This is based on the IMT 2000 set of radio technology standards as recognised by the ITU and is an enhancement to 2 and 2.5G, such as faster data rates. This includes WCDMA and cdma2000 EVDO.

CDMA: Code Division Multiple Access. A multiple access scheme used by mobile technologies to use spectrum efficiently.

cdma2000: An umbrella name used to describe the mobile technology developed by Qualcomm and used by Telecom. It includes 1xRTT and EVDO.

EVDO: Evolution Data Only. This is an evolution of cdma2000 which provides high speed data.

FDD: Frequency Division Duplex. This term is used to describe two way communication which is carried out by each party (transmitting and receiving) using different frequency to transmit.

GSM: Global System for Mobile communication. This is one of the 2G technologies.

GPRS: General Packet Radio System. This is an upgrade to GSM which provides packet data services.

HSPA: High Speed Packet Access. This is a general term used to describe the high-speed bearers offered by WCDMA 3G technology.

IMT 2000: International Mobile Telecommunications 2000. This is a generic name used by the ITU to describe all the 3G mobile technologies.

ITU: – The International Telecommunications Union, which is an arm of United Nations.

LMDS: Local Multiple Distribution Systems. These systems normally operate in the 25/26GHz range.

LTE: Long Term Evolution of 3G/HSPA. This is also considered as 4G which is expected to operate between 2010 and 2012.

TDD: Time Division Duplex. This is two way communication which is carried out by both parties (transmitting and receiving) using the same channel at different times.

WiMax: Worldwide Interoperability for Microwave Access. This is a telecommunications technology aimed at providing wireless data, from point-to-point links to full mobile cellular type access.

Appendices

A. 800/900MHz management rights offer document to Vodafone New Zealand Limited, November 2007 ("**Offer Document**");

Available at http://www.med.govt.nz/templates/MultipageDocumentTOC 32547.aspx

B. **[CONFIDENTIAL]**;

C. **[CONFIDENTIAL]**;

D. Report for the Ministry for Economic Development "Renewal of Management Rights for Cellular Services (800/900MHz). The optimal spectrum quantity and current utilisation", Network Strategies, 24 November 2006;

Available at http://www.med.govt.nz/templates/MultipageDocumentTOC 26362.aspx

E "Arrangements for the renewal of radio spectrum management rights used for cellular services", letter to Cabinet Economic Development Committee from Minister of Communications, March 2007;

Available at http://www.med.govt.nz/templates/MultipageDocumentTOC 26333.aspx

E. MED letter to Vodafone dated 15 June 2007;

F. MED letter to Vodafone dated 20 September 2007;

Economic Development

File No: POL/1/24/21/5

15 June 2007

A Sathyendran
Vodafone New Zealand Limited
Private Bag 92161
AUCKLAND

Dear Sathy

RENEWAL OF RADIO SPECTRUM MANAGEMENT RIGHTS USED FOR CELLULAR SERVICES

Thank you for your email dated 21 May 2007 and a marked up version of the UHF offer terms and conditions which you suggested might form a basis for discussion on structuring the 900 MHz renewal offer.

As discussed in our telephone conversation on 8 June 2007, the Ministry will not be in a position to make cellular renewal offers until later this year (likely to be September 2007) as we have not yet identified the spectrum that will be offered for renewal or determined the offer prices. We will develop terms and conditions closer to the offer date, and we will consider your suggestions then. They look helpful.

However, we would like to take this opportunity to set out the Ministry's understanding of the effect of the Cabinet decisions regarding the renewal of Radio Spectrum Management Rights used for Cellular Services, with particular reference to the sale and purchase agreement between Vodafone and New Zealand Communications Limited (NZCL).

Cabinet agreed that 7.5 MHz (paired) of the spectrum that expires in 2011 or 2012 in each band should not be offered for renewal but that renewal offers will be made to existing right holders for their remaining spectrum and 7.5 MHz (paired) would be offered by auction.

Cabinet also agreed that if Telecom or Vodafone sell at least 5 MHz (paired) of 800 or 900 MHz 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, then:

- if the rights sold expire after 2012, (Vodafone has some rights expiring in 2022) then the seller (Vodafone) will be offered the 7.5 MHz (paired) otherwise intended for auction;

- if the rights sold expire in 2011 or 2012, the purchaser would be offered corresponding renewed management rights at the price and substantially on the same terms offered to Telecom or Vodafone, and Telecom or Vodafone (as the case may be) will be able to purchase renewed management rights over the remaining part of the 7.5 MHz (paired) otherwise intended for auction.

The Ministry is required to implement these Cabinet decisions. On this basis it is clear that if the sale and purchase between Vodafone and NZCL for more than 5 MHz of 900 MHz spectrum (paired) is completed before a date six months after the renewal offers being made then Vodafone will receive a renewal offer for the 7.5 MHz (paired) that was otherwise intended for auction.

I encourage you to continue your discussions with New Zealand Communications Limited to see if your sale and purchase agreement can be modified to expedite the timing of the transaction within the context of these cabinet decisions.

Yours sincerely

Brian Miller
Manager, Radio Spectrum Policy and Planning
Energy and Communications Branch

Ministry of Economic Development
Manatū Ōhanga

File No: P/028/PR009/006

20 September 2007

A Sathyendran
Manager, Spectrum Strategy
Vodafone New Zealand
Private Bag 92161
AUCKLAND 1030

Dear Sathy

PROCESS FOR SPECTRUM SALE ON THE SECONDARY MARKET

The Ministry of Economic Development (MED) has received a request from Telecom New Zealand for guidance in respect of the sale of at least of 5 MHz spectrum on the secondary market in order to meet the Government's objectives in providing for such a sale. I have provided the following guidance to Telecom and indicated that I would also provide the same to Vodafone.

The Government's objective in providing incumbent right holders (Telecom and Vodafone) with the opportunity to sell at least 5 MHz (paired) of 800 or 900 MHz spectrum on the secondary market to a person who does not currently hold spectrum in these bands, within six months of renewal offers being made, is to *allow immediate deployment by a new entrant to the market.* The Government expects this to be evidenced by:

- purchase of the spectrum by a person unconnected and unassociated with the seller;
- sale to a person who is interested in building competitive infrastructure and who is or becomes a network operator under the Telecommunications Act 2001;
- sale on the basis of the highest price;
- an unconditional transaction involving a change of right holder recorded in the Record of Management Rights; and
- the seller retaining no interest in the spectrum, subject only to the remaining management rights that expire in 2011 and 2012 being offered for renewal.

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It is recommended that this clarification be reflected in the sale process in order to ensure any sale is consistent with the Government's objectives.

I am happy to discuss and/or provide further elaboration of this guidance should you require it.

Yours sincerely

Brian Miller
Manager, Radio Spectrum Policy & Planning
Radio Spectrum Policy