

Determination for the designated multinetwork services of ‘local telephone number portability service’ and ‘cellular telephone number portability service’

Final determination under section 39 of the Telecommunications Act 2001 (‘the Act’)

[2016] NZCC 32

The Commission: Dr Stephen Gale
Elisabeth Welson
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Date of determination: 19 December 2016

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List of terms and abbreviations¹

Access Provider	means every person who operates- (a) a PSTN to which numbers have been allocated; and (b) a telephone service that relates to the LMNP Services.
Access Seeker	means any person who- (a) operates a PSTN to which numbers have been allocated; and (b) operates a telephone service that relates to the LMNP Services; and (c) seeks access to the LMNP Services.
Act	means the Telecommunications Act 2001
Commission	means the Commerce Commission.
Draft Determination	Draft determination under section 36 of the Telecommunications Act 2001 ('the Act'), 3 November 2016
Decision 554	means the Final Determination for Local and Cellular Number Portability Services, 31 August 2005.
Decision 705	means the Final Determination for Local and Cellular Number Portability Services, 15 December 2010.
Enforcement Agency	means the agency responsible for enforcement action either under Decision 554, Decision 705, or this determination as the context requires.
GSP	means the Gaining Service Provider, which is the service provider to which the number is moving or has already moved, in a port.
IPMS	means Industry Portability Management System, which is the software, hardware and other shared facilities used to provide the LMNP Services.
LMNP Services	means the designated multinetwork services of "local telephone number portability" and/or "cellular telephone number portability" services that are listed under subpart 2 of Part 2 of Schedule 1 of the Act.

¹ Where a term or abbreviation is defined in the Telecommunications Act, the statutory definition is adopted for the purposes of this list.

LMNP Terms	means the terms that outline the process that enables end-users to port their numbers and sets out the rights and obligations of parties to the terms set out in attachment D to this determination, the proposed draft attachment D to the Draft Determination and/or Appendix 3 to Decision 705, as the context requires.
Network Terms	means the terms that set out what is required of parties to the terms in the development of their own network solutions and that specify the optional and mandatory requirements necessary between networks to enable LMNP Services in attachment D to this determination, the proposed draft attachment D and/or Appendix 3 to Decision 705 as the context requires.
NAD	Means the organisation established under the Numbering Administration Deed dated 20 December 1998, or any such successor organisation or agreement that may be formed.
PSTN	has the definition as set out in section 5 of the Act.
SOH	means standard operating hours.
TCF	means the New Zealand Telecommunications Forum Inc.

Executive Summary

- (i) This determination sets out our decision to issue a new determination for the LMNP Services, which are the two designated multinet network services listed in Schedule 1 of the Act.
- (ii) The LMNP Services allow end-users to keep their local and mobile phone numbers when they switch service providers.
- (iii) The current determination in respect of the LMNP Services, Decision 705, will expire on 19 December 2016. Decision 705 consists of the determination itself, as well as the current versions of the LMNP Terms and Network Terms. Together these documents make up the requirements of a determination for a designated multinet network service, as required by section 40 of the Act.
- (iv) We consider that the continued regulation of the LMNP Services through a determination will best give effect to the promotion “of competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand”, consistent with section 18 of the Telecommunications Act 2001. Regulation of the LMNP Services promotes competition by enabling end-users to switch service providers, which removes a barrier to competition.
- (v) This determination will continue the regulation of the LMNP Services for five years beginning on 20 December 2016 which is the day after the expiry of Decision 705. This determination will expire on the earlier of 20 December 2021 or the date on which the services cease to be designated multinet network services under the Act.
- (vi) In our investigation, we found that overall the current regulatory framework for processes supporting the LMNP Services is working well and achieves its intended objectives. Accordingly, the Commission has based this new determination on Decision 705.
- (vii) However, we have made certain limited changes to Decision 705, in order to ensure that this new determination best gives effect to the promotion “of competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand” in section 18. These changes update Decision 705 to ensure it remains relevant to industry and end-users.
- (viii) Accordingly, we have included Saturday in the standard operating hours for the LMNP Services, increased the window for planned upgrades to the systems supporting the LMNP Services, simplified the process for adding new parties, and required the industry to publish service level performance information.
- (ix) We have also made some changes to the Decision 705 LMNP Terms and Network Terms to revise the standard to which some functions must be performed, and to ensure efficient ongoing delivery of the LMNP Services. The LMNP Terms and Network Terms are in Appendices C and D of this determination. The determination, along with the

LMNP Terms and Network Terms together make up the required contents of a determination for a designated multinet network service, as set out in section 37(c) of the Telecommunications Act 2001.

- (x) We consider that the current formula for allocating costs of delivering the LMNP Services is working and hence does not need to be revised. As such we have retained the cost allocation formula from Decision 705.
- (xi) Costs for this determination are to be shared between the parties based on market share. The bases for working out market share are set out in this determination.
- (xii) On 1 June 2016, the Commission approved exemptions under clauses 14.2.1 and 14.2.3 of the Network Terms for Spark New Zealand Limited for the period 1 January 2016 until 31 December 2020. These exemptions are for Post Dialling Delay and In Ported Services and Features. Because the exemptions are only exemptions from Decision 705, which will expire on 19 December 2016, we have provided exemptions to this determination on the same terms as the exemptions to Decision 705.
- (xiii) On 3 November 2016, in accordance with section 36(1) of the Act, we published the Draft Determination and invited submissions on it.
- (xiv) The closing date for submissions was 1 December 2016.
- (xv) We received a submission from the TCF and have published it on our website.

Introduction

Background to Number Portability

1. Subpart 2 of Schedule 1 of the Act contains two designated multinetwork services:
 - 1.1 Local Telephone Number Portability Service (Local Number Portability or LNP); and
 - 1.2 Cellular Telephone Number Portability Service (Mobile Number Portability or MNP)(together, the LMNP Services).
2. The services allow end-users to keep their local and mobile phone numbers when they switch service providers.
3. We issued the first LMNP Services determination, Decision 554, in 2005 and the services were made available to end-users from 2007 after the necessary processes were established.²
4. We issued a second determination, Decision 705, on 15 December 2010.³ Decision 705 will expire on 19 December 2016.⁴ Decision 705 consists of the following key parts:
 - 4.1 the Determination for the designated multinetwork services of ‘local telephone number portability service’ and ‘cellular telephone number portability service’;
 - 4.2 LMNP Terms; and
 - 4.3 Network Terms.
5. These parts together contain the matters that are required to be included in a designated multinetwork service determination, as set out in sections 31AA and 40 of the Act.

Background to this process

Initiating the determination process

6. On 8 August 2016, the TCF, on behalf of the majority of the parties to Decision 705, requested a clarification of Decision 705. The request sought changes that we considered too extensive to be a “clarification”.⁵

² Commerce Commission, Decision 554, 31 August 2005.

³ Commerce Commission, Decision 705, 15 December 2016.

⁴ Section 62 provides that a determination expires on the earlier of either the expiry date in the determination or the date on which the service to which the determination applies is omitted from Schedule 1.

7. The TCF confirmed that its intent was to apply to renew Decision 705 incorporating certain changes proposed by the TCF.⁶ We considered that the changes sought by the TCF did not meet the requirements for a reconsideration of Decision 705.⁷ In any event, we have considered the TCF's suggested changes to Decision 705 as part of our investigation. We have discussed the substantive changes sought by the TCF from paragraph 53 below.
8. Section 31AA of the Act allows us to initiate the process to issue a determination for a designated multinet network service. Subpart 3 of Part 2 of the Act specifies the process that we must follow.
9. A designated multinet network service determination must cover:⁸
 - 9.1 the functions that must be performed by a system for delivering the service and the standard to which those functions must be performed; and
 - 9.2 a formula for allocating costs between Access Seekers and Access Providers of the service.
10. We may only decide to initiate the process for making a determination if we are satisfied that there are reasonable grounds for doing so.⁹
11. We considered that there were reasonable grounds for initiating the process to issue a further determination for the LMNP Services. Those grounds were:
 - 11.1 Decision 705 has effectively enabled end-users to switch service providers, with the costs being absorbed by the service provider that gains the customer, thereby promoting competition for the long-term benefit of end-users. This removes a barrier for end-users who wish to switch service providers and enjoy the benefits of competition. This also removes a barrier to entry for firms wishing to enter the market or expand their service offering. These benefits are consistent with the section 18 purpose of the Act of promoting competition for the long-term benefit of end-users.
 - 11.2 Issuing a new determination before Decision 705 expires on 19 December 2016 will ensure continuity of the benefits of number portability, and remove uncertainty and the risk of opportunistic behaviour during an unregulated period.¹⁰

⁵ Section 58.

⁶ Email from TCF to the Commerce Commission, 7 October 2016.

⁷ Section 59.

⁸ Section 31AA(1).

⁹ Section 31AA(2).

¹⁰ Section 62 provides that a determination expires on the earlier of either the expiry date in the determination or the date on which the service to which the determination applies is omitted from Schedule 1.

- 11.3 Without a determination there may be incentives for incumbent service providers to either not provide the service or to charge Access Seekers prices significantly above cost and hence create barriers to entry and competition.
12. We therefore initiated the process for determination under section 31AA. As required by section 34(c) of the Act, on 25 August 2016 we notified in writing all persons expected to be parties to the determination and requested each to comment on the Commission's initiation of the process for a determination.¹¹
13. We received a response from the TCF on behalf of 14 parties to Decision 705.¹² The TCF expressed agreement with the decision to initiate the process for a determination and that there were reasonable grounds for doing so.
14. After considering the 14 parties' comments we decided to investigate making an LMNP Services determination.¹³ The parties to the determination were notified of this decision and public notice was given in the Gazette on 15 September 2016.

Steps taken as part of our investigation

15. Following our decision to investigate, we undertook a range of activities in order to assess whether we should continue regulation of the LMNP Services, and if so, whether and what changes we should make to Decision 705, consistent with our decision-making framework set out below. The activities we undertook were:
- 15.1 Reviewing Decision 705 and assessing whether it continues to best meet the section 18 purpose.
- 15.2 Seeking feedback from the industry body (the TCF) and reviewing its proposed changes to Decision 705's terms.
- 15.3 Seeking feedback from the Enforcement Agency that is responsible for enforcing the service performance requirements of Decision 705.
- 15.4 Seeking feedback from TUANZ, which represents major users of telecommunications services.

¹¹ Compass Communications Limited, Digital Island Ltd, Link Telecom (NZ) Ltd, Nitonet Interconnect Limited, NOW New Zealand Limited, Spark New Zealand Limited (including Skinny Mobile), Symbio Wholesale NZ Limited, Telnet Telecommunication Ltd, Total Consumer Service Limited (ta Megatel), Two Degrees New Zealand, Vibe Communications Limited, Vocus New Zealand Ltd (including 2Talk, CallPlus, Orcon and M2), Vodafone New Zealand Ltd (including TelstraClear, ihug and Vodafone Next Generation Services), Voxbone SA, Voyager Internet.

¹² Compass Communication, NOW New Zealand Limited, Spark New Zealand Limited, Symbio Wholesale NZ Limited, Two Degrees New Zealand, Vibe Communications Limited, Vodafone New Zealand (includes TelstraClear, ihug and Vodafone Next Generation Services), Vocus New Zealand Limited (includes 2Talk, CallPlus, Orcon and M2) and Voyager Internet.

¹³ As required by section 35 of the Act.

- 15.5 Reviewing consumer feedback on the LMNP Services based on complaints made to us and feedback from Consumer NZ.

Draft decision

16. Section 36 of the Act requires us to make reasonable efforts to undertake a number of tasks (including preparing a Draft Determination) not later than 60 working days after we gave written notice under section 35(b) of the Act.
17. Section 37 sets out the matters to be included in a draft determination. Section 37(1) requires that a draft determination must include:
- (a) a description of the functions that must be performed by a system for delivering the service and the standard to which those functions must be performed; and
 - (b) the formula for how the cost of delivering the service must be apportioned between the parties to the determination and every person who becomes an Access Provider after the determination is made; and
 - (c) the reasons for the determination; and
 - (d) the terms and conditions on which the determination is proposed to be made; and
 - (e) the actions (if any) that a party to the determination must do or refrain from doing; and
 - (f) the proposed expiry date of the determination.
18. On 3 November 2016, in accordance with section 36(1) of the Act, we published the Draft Determination and invited submissions on that Draft Determination.
19. The closing date for submissions was 1 December 2016.
20. We received a submission from the TCF, which submitted:¹⁴

The TCF agrees that number portability should continue to be regulated via a determination and that this would give best effect to the promotion of competition in telecommunications markets for the long-term benefit of end-users of these services in New Zealand. We have provided the Commission with our support for the process that it is following to issue a new determination to ensure continuity and regulatory certainty.

The TCF believes that the current regulatory framework for number portability works well. We support the Commission's position that the current formula for cost allocation is working and does not require review.

We also agree with the Commission's position that a conference or public hearing is not necessary for the completion of this piece of work. We do not believe that the matters are contentious amongst industry participants.

¹⁴ TCF, Submission on the Commerce Commission draft determination on number portability, 1 December 2016, p.1.

21. The TCF did “have some specific comments to make on certain aspects of the Draft Determination” and we have discussed the Commission’s consideration of those comments further on in this determination.¹⁵
22. Section 38 sets out the Commission’s statutory obligation with respect to consultation, conferences and public hearings. Section 38 provides:

The Commission may consult with interested parties, hold conferences, or, if it is satisfied that it is in the public interest to do so, hold a public hearing, in relation to a draft designated multinet network service determination.
23. We did not consider that a conference or public hearing was necessary as most parties to Decision 705 indicated that the determination is working well.

Final decision

24. After the completion of any consultation under section 38, conference or public hearing, or if none of those steps are taken, after the closing date for submissions, the Commission must as soon as practicable move to release a final determination under section 39.
25. Section 40 sets out the matters that must be included in the final determination. Section 40(1)(c) and (d) are requirements that are particular to final determinations only and are not required to be included in the Draft Determination.
26. The Commission is releasing this determination pursuant to section 39. The Commission has provided a copy of this determination to the parties to the determination and has given public notice by both putting a notice in the Gazette and by publishing this determination and its attachments on the Commission’s website.
27. In accordance with section 40 this determination includes:
 - 27.1 the functions that must be performed by the IPMS system and supporting systems, and the standard to which those functions must be performed;
 - 27.2 the formula for how the cost of delivering the service must be apportioned between the parties to the determination and every person who becomes an access provider after the determination is made;
 - 27.3 the requirement that all parties to the determination provide the service by a system that is consistent with the functions and standards set out in this determination;
 - 27.4 the requirement that any party to the determination make payments to an access provider of amounts calculated in accordance with the formula’s set out in the Cost allocation formula sections of this determination;

¹⁵ Ibid p.1.

- 27.5 the reasons for this determination;
 - 27.6 the terms and conditions on which the determination is made;
 - 27.7 the actions that a party to the determination must do or refrain from doing;
and
 - 27.8 that this determination will expire on the earlier of 20 December 2021 or the date on which the services cease to be designated multinetwork services under the Act.
28. Section 55 requires the Commission's costs of this determination to be met by the parties to the determination in the proportions directed by the Commission in writing. We have set out the proportions in which the costs of this determination must be met at paragraph 165 below.

Exemptions

- 29. On 1 June 2016, the Commission approved exemptions under clauses 14.2.1 and 14.2.3 of Decision 705's Network Terms for Spark New Zealand Limited (Spark) for the period 1 June 2016 to 31 December 2020. These exemptions are for Post Dialling Delay and In Ported Services and Features.
- 30. Because these exemptions are exemptions to Decision 705 only, in order for Spark to continue to be exempt from certain requirements in this determination, we must approve new exemptions. We have addressed the new exemptions at paragraph 181 below.

Decision-making framework

31. This section sets out our approach to deciding:
 - 31.1 Whether to continue regulation of the LMNP Services by issuing a new determination; and
 - 31.2 If we decide to continue regulation of the LMNP Services, whether we should make changes to Decision 705 and what those changes should be.

Should we continue regulation of the LMNP Services?

32. Section 18 sets out the purpose of Part 2 and Schedules 1-3 of the Act, which is “to promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand”. Section 18 provides as follows:¹⁶
 - (1) The purpose of this Part and Schedules 1 to 3 is to promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand by regulating, and providing for the regulation of, the supply of certain telecommunications services between service providers.
 - (2) In determining whether or not, or the extent to which, any act or omission will result, or will be likely to result, in competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand, the efficiencies that will result, or will be likely to result, from that act or omission must be considered.
 - (3) Except as otherwise expressly provided, nothing in this Act limits the application of this section.
 - (4) Subsection (3) is for the avoidance of doubt.
33. Section 19 of the Act requires us to consider the purpose set out in section 18 and to make the determination that the Commission considers best gives, or is likely to best give, effect to the purpose set out in section 18.
34. Accordingly, when deciding whether or not to continue regulation of the LMNP Services through a determination, we must be satisfied that continuing regulation is likely to best give effect to the promotion of “competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand”.

Should we make changes from Decision 705?

35. We decided to continue regulation of LMNP by issuing a new determination. We then had to decide whether or not we should make changes to the current determination, Decision 705, and what form those changes might take.

¹⁶ ‘The end-user is the ultimate user or consumer of telecommunications services. It is not restricted to subscribers, but extends to telecommunications’ users generally’, Commerce Commission Determination on the TelstraClear Application for Determination for Designated Services, Decision 477, 5 November 2002, p.10.

36. We have made changes to address issues raised with Decision 705 that we identified in our investigation. The steps we took as part of our investigation are set out at paragraph 15 above. The changes are identified in the Assessment of key issues section.
37. When considering any changes from Decision 705, we considered that any changes should:
 - 37.1 be likely to best give effect to the promotion of “competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand”, consistent with section 18;
 - 37.2 ensure industry and end-users continue to receive the benefits of number portability; and
 - 37.3 minimise unnecessary disruption and cost to the industry.

Decision to maintain regulation with limited changes

38. We have considered whether or not we should make a new determination that would in effect continue regulation of the LMNP Services. We have concluded that we should continue to regulate the LMNP Services because doing so would best give effect to section 18 of the Act.
39. We consider that the continued regulation of the LMNP Services is likely to best give effect to the promotion of competition as set out in section 18. As noted above, we consider that the LMNP Services promote competition by enabling end-users to switch service providers, with the costs being absorbed by the service provider that gains the customer, thereby promoting competition for the long-term benefit of end-users. Regulating the LMNP Services removes one of the most significant potential barriers for end-users who wish to switch service providers and enjoy the benefits of competition. It also removes a potential barrier to entry for firms wishing to enter the market or expand their service offering. By continuing regulation, we will ensure that end-users continue to receive the benefits of the LMNP Services.
40. Our investigation did not identify any reason for substantially changing Decision 705. However, we have made some limited changes in the new determination. The changes we have made are consistent with the purpose in section 18 as they will “promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand”.
41. The limited changes update the regulatory framework in Decision 705 to ensure it remains relevant to industry and end-users, and to ensure it is consistent with current industry practices and expectations.
42. We consider that making only limited changes in this determination will also have the following advantages:
 - 42.1 Ensuring that effective regulation is in place by 19 December 2016 which is when the current determination will expire.
 - 42.2 Minimising unnecessary disruption and cost to the industry.
43. The Assessment of key issues section describes the substantive changes and explains the reasons for those changes.

Stakeholder views on continued regulation of LMNP Services

44. Our decision to continue regulation of the LMNP Services is consistent with the views expressed by stakeholders both through the comments received on our initiation of the process for a determination under section 34(c) and through our engagement with stakeholders as part of our investigation.
45. We found that number portability is seen by stakeholders as beneficial to consumers, is seen as having effective systems, and gives rise to a low level of consumer complaints. We also found that overall the current regulation is seen as

being effective at removing a barrier to customer switching and promoting competition.

46. The Telecommunications Users Association of New Zealand (TUANZ) and the Enforcement Agency both supported continuing regulation of the LMNP Services and were of the opinion that the current regime was effective in providing the LMNP Services.¹⁷
47. The TCF, on behalf of its members, supported our rationale for there being reasonable grounds to investigate and noted the benefits of ensuring ongoing provision of the LMNP Services.¹⁸
48. Consumer NZ advised that it received few complaints from end-users about number portability.¹⁹
49. We received no complaints concerning the operation of Decision 705 through our contact centre from 1 January 2012 to 30 November 2016. This points to an absence of a significant underlying problem with the LMNP Services process.²⁰
50. TUANZ noted that delays in number porting can result in phone service being unavailable which has a negative impact on businesses' operations. TUANZ considered the current performance expectations to be working well for both copper and fibre based services.²¹

Stakeholders' suggested changes to Decision 705

51. While stakeholders have expressed support for continuing the regulation of the LMNP Services, they have also suggested changes to Decision 705. The changes suggested by stakeholders are summarised below.
52. TUANZ suggested that the SOH for number portability could be extended to include evenings and/or weekends.²²
53. The TCF, in its 8 August 2016 letter to the Commission, proposed a range of changes to the LMNP Terms,²³ including changes to SOH, planned system outages and that it

¹⁷ Phone conversation between the Commerce Commission and of the Enforcement Agency on 29 August 2016, Meeting with the CEO of TUANZ in Wellington on 30 August 2016. Email from TUANZ to the Commerce Commission 20 October 2016; and from the Enforcement Agency to the Commerce Commission 20 October 2016.

¹⁸ TCF, *Initiating Determination Process for designated multinet service determination for Number Portability*, 2 September 2016.

¹⁹ Email from Consumer NZ to the Commerce Commission on 19 October 2016.

²⁰ We did receive several complaints regarding issues connected to number portability, but not directly relating to Decision 705.

²¹ Meeting with the CEO of TUANZ in Wellington on 30 August 2016 and email from TUANZ to the Commerce Commission 20 October 2016.

²² Meeting with the CEO of TUANZ in Wellington on 30 August 2016.

should have the right to exclude firms from access to the IPMS system if it considers the firm lacks the required capabilities. We discuss these suggested changes in the next section.

54. The TCF also proposed a number of technical changes that address specific process issues. These changes appear to be designed to improve processes and the end-user experience. These changes include how delays in auctioning requests for number ports are handled, some shorter processing time frames, and updating an 'emergency returns' process due to changes resulting from increased automation.²⁴
55. The TCF also proposed a range of minor changes such as:
 - 55.1 updating terms to remove redundant provisions; and
 - 55.2 increased use of electronic information exchange (eg, shift from fax and email to email only as the main form of communication for some events).
56. The TCF did not propose changes to the Network Terms but stated that some amendments may be needed as a result of its proposed changes to the determination.²⁵ This is the document that specifies the requirements for participating parties' own number porting systems and helps ensure that IPMS and all the parties' systems can exchange porting data. It is Appendix 4 of Decision 705.
57. In addition to the changes sought by stakeholders, we identified that the level of transparency of the LMNP Services process could be improved by increasing the level of public disclosure of porting volumes and enforcement action.

Stakeholder's suggested changes to the Draft Determination

58. The TCF was the only party to make a submission on the Draft Determination.²⁶ Its submission was supportive of the Draft Determination but had some specific comments.²⁷ These comments concerned; the proposed operating hours, new parties to the determination, publishing of Porting statistics, transitional requirements, and changes to the Terms.

²³ TCF, *Application to Commission for Clarification, Mark-up for Comparison: LMNP Terms*, page 6, 6 August 2016.

²⁴ TCF, *Application to Commission for Clarification, Mark-up for Comparison: LMNP Terms*, page 6, 6 August 2016.

²⁵ Commerce Commission meeting with of the TCF, Wellington, 9 September 2016; and Email from TCF to the Commerce Commission, 7 October 2016.

²⁶ TCF, *Submission on the Commerce Commission draft determination on number portability*, 1 December 2016.

²⁷ TCF, *Submission on the Commerce Commission draft determination on number portability*, 1 December 2016, p.1.

59. The TCF's comments have been addressed in the Assessment of key issues section below.²⁸

Assessment of key issues

Operating hours

TCF August 2016 proposal

60. The TCF proposed changes to the definition of SOH that would have seen SOH defined in an industry managed document, rather than in the determination.
61. The TCF's proposed changes are shown below:²⁹

Standard Hours of Operation	Means 8.00am to 5.00pm on Business Days. Means the hours of availability during which ports may occur. Details on the hours of operation are contained in the LMNP Operations Manual. Parties to the Determination will comply with the Standard Hours of Operation.
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TUANZ view

62. TUANZ suggested that the SOH for number portability could be extended to include evenings and/or weekends.³⁰

Draft decision

63. In our draft decision we proposed to set the SOH as 8.00am to 5.00pm Mondays to Saturdays. The inclusion of Saturday extends the SOH by one day per week over the SOH in Decision 705. We also proposed to retain the approach of setting the SOH in the determination, rather than allowing SOH to be set by the parties.

Background

64. Decision 705 specifies the SOH for the LMNP Services, as 8.00am to 5.00pm Monday to Friday with exclusions for public holidays.³¹
65. In practice, many number ports are performed outside of defined SOH under an agreement between all of the parties to Decision 705 that is administered by the Number Portability User Group. This is an industry group to which all parties to LMNP Services are entitled to have representation. This agreement supports the porting of mobile and local numbers from 8.00am to 6.00pm Monday to Saturday. In

²⁸ TCF, *Submission on the Commerce Commission draft determination on number portability*, 1 December 2016, p.2-5.

²⁹ TCF, *Application to Commission for Clarification, Mark-up for Comparison: LMNP Terms*, page 16, 6 August 2016.

³⁰ Meeting with the CEO of TUANZ in Wellington on 30 August 2016.

³¹ In Decision 705 business days are defined as a day on which registered banks are open for trading, but excluding Saturday, Sunday, and nationwide public holidays.

addition many mobile number ports can be ported overnight and on Sunday because there is an online automated 24-hour system for porting of mobile numbers.

66. We also understand that extended porting hours can increase service providers' costs, particularly for smaller providers who may have fewer staff available outside of SOH as defined in Decision 705. We also recognise that the parties need to have periods available for upgrading and maintaining IPMS and the other systems supporting LMNP Services. We discuss changes to the times in which system outages can occur below.

Our preliminary view –setting SOH via the determination

67. In our draft decision we considered that our determination should define SOH as this ensures that there is a minimum period of SOH. This will benefit end-users by setting a baseline for when the parties must provide LMNP Services.
68. The TCF approach, if implemented, would lead to the SOH being set by industry. We consider that such an approach does not offer end-users the same certainty in terms of maintaining baseline SOH. If there was less certainty around when the LMNP Services were available, the ability of the LMNP Services to promote competition and the section 18 purpose would be reduced. However, there is nothing to prevent parties to the determination from agreeing to operating hours beyond the SOH set out in the determination.

Our preliminary view –including Saturday in SOH

69. In our draft decision we considered that the current SOH of 8.00am-5.00pm Monday to Friday reflect standard office hours, where we consider it reasonable to expect parties to have staff available to process porting requests.
70. We also consider that SOH should include Saturdays as it would:
- 70.1 formalise in regulation what is already happening and is largely agreed by industry.³² It should not result in the need for major system updates or impose significant additional costs.
 - 70.2 reduce disruption to end-user businesses that wish to port numbers. For businesses, porting risks having a period where the firm is unable (or restricted in its ability) to communicate via phone with its customers. Having ports performed outside of the end-user's core office hours may reduce this disruption.
 - 70.3 minimise disruption for end-users who wish to port their local number in conjunction with connecting to the UFB fibre network on a Saturday. This new benefit reflects that end-users are now connecting to the UFB network on Saturdays, and as part of their decision to buy UFB service, customers may

³² Email from TCF to the Commerce Commission, 7 October 2016.

have switched service providers (including for local calling services). It is easier for the end-user if the local number port can be completed in conjunction with the switch from a copper to a UFB connection, rather than on the Monday (ie, two days later).

- 70.4 provide greater certainty of convenience for mobile end-users. Many mobile customers make purchasing decisions at mobile service providers' stores on Saturdays. For customers who change mobile provider, it can be convenient to have their mobile number ported soon after making their purchase decision. Extending SOH to Saturdays will formalise what already occurs in practice for mobile numbers.
71. We do not consider that SOH should include Sunday as:
- 71.1 The UFB rollout does not currently have the same need for porting of local numbers on Sundays as on Saturdays because UFB installations are not generally performed on Sundays.
- 71.2 It would be likely to increase costs for service providers (eg, extra staffing costs on a Sunday) and, in particular for smaller providers, would be disproportionate to the benefits to end-users.
- 71.3 While porting of mobile numbers occurs, in practice, on Sundays, the automated nature of the mobile number porting system combined with end-user and retailer expectations provides sufficient certainty that standard mobile porting would continue to be provided on Sundays, without the need for this to be formalised in regulation.
- 71.4 By leaving Sunday outside of the SOH it gives flexibility for planned system outages.
72. We considered that extending SOH to include Saturday gives effect to section 18 by expanding the availability of LMNP Services to end-users. The greater the availability of LMNP Services is, the greater the ability of LMNP Services to promote competition by encouraging switching by end-users.
73. We also considered whether SOH should be extended to 6.00pm in line with current industry practice. Our preliminary view was to not extend SOH to 6.00pm, as we did not consider the benefits from extending SOH to 6.00pm are as significant as extending SOH to include Saturdays. In reaching this view we considered that:
- 73.1 SOH of 8.00am to 5.00pm already provides for same day porting; and
- 73.2 Excluding 5.00pm to 6.00pm from SOH provides technicians with a buffer for rectifying technical faults in completing ports.
74. The above draft decision to extend SOH was in keeping with feedback from TUANZ but differed from the original approach favoured by TCF.

TCF - Submissions on the draft decision

75. The TCF agreed with the inclusion of the Saturday in the definition of SOH for the reasons given in the draft decision.³³
76. The TCF disagreed with the Commission's preliminary view that the SOH not be extended to 6.00pm. It submitted that the customer's whose ports were actioned near the end of the day "experienced poor customer service as [they] were left without service overnight."³⁴
77. TCF further submitted that the industry had conducted a trial for extending the hours for porting to 6pm from May 2016. In July 2016 the trial was expanded to include porting on Saturdays.
78. The TCF submitted that the results of the trial were that the "extension of hours during weekdays through till 6.00pm has resulted in a significant decrease in the number of ports being left uncompleted overnight and has led to an improved customer experience when porting a local number."

Our final decision

79. We have, following submissions, decided that:
- 79.1 we will keep the addition of Saturday to the SOH for the reasons set out in the Draft Determination and repeated above; and
- 79.2 having considered the TCF's submission, we have decided to extend SOH to 8.00am to 6.00pm Monday to Saturday.
80. The Commission's draft position on extending SOH to 6.00pm for Monday to Saturday has changed because:
- 80.1 the TCF's submission reported that consumers experience improved as a result of the industry trialling an extension to 6.00pm;³⁵
- 80.2 the submission from the TCF indicated that the additional hour is not needed as a buffer for technical faults because the porting system is already operating during those hours³⁶; and
- 80.3 the rationale for extending SOH to 6.00pm on weekdays also applies to Saturday where current industry practice is to port until 6.00pm.

³³ TCF, *Submission on the Commerce Commission draft determination on number portability*, 1 December 2016, p.2

³⁴ *Ibid*,

³⁵ *Ibid*,

³⁶ *Ibid*,

81. We consider that this decision gives effect to Section 18 for the same reason as our draft decision, that is the greater the availability of LMNP Services is, the greater the ability of LMNP Services to promote competition by facilitating switching by end-users.

Measuring porting service level performance

TCF proposal

82. The TCF proposed amendments to the definitions of “working hours” and “working minutes”, which would change how a party’s service level performance is measured from Decision 705. The change would give parties an exemption from meeting the 95% performance threshold for delays caused by planned and unplanned system outages. It would also use an averaged approach to measuring service level performance, under which the time taken to achieve all ports is averaged and the average time compared to the time required by the performance measures.
83. The TCF’s proposed changes are shown below:³⁷

Working Hours	Means elapsed hours during the Standard Hours of Operation <u>but excluding any time when IPMS is unavailable, either for a Planned or Unplanned Outage.</u>
Working Minutes	Means the elapsed minutes during the Standard Hours of Operation <u>but excluding any time when IPMS is unavailable, either for a Planned or Unplanned Outage.</u>

Where the SQMSOM count per Service Provider or Carrier is:

- a) a) more than 40 for Mobile Numbers or Local Numbers in a calendar month.
~~↳~~ Parties are expected to meet these Service Levels either:
- i. 95% of the time.; or,
 - ii. by achieving an average elapsed time that falls within the required Service Level.³
- b) 40 or less for Mobile Numbers or Local Numbers in a calendar month.
Parties are expected to either:
- i. have no more than 2 failures.; or,
 - ii. achieve an average elapsed time that falls within the required Service Level.⁴

Draft decision

84. We proposed to retain the same service level performance standard as in Decision 705, which is that parties that port more than 40 mobile numbers or local numbers in a given calendar month must be required to port at least 95% of porting requests

³⁷ TCF, *Application to Commission for Clarification, Mark-up for Comparison: LMNP Terms*, page 16, 73 and 74, 6 August 2016.

within the timeframes specified in the Draft Determination without an allowance for system outages or averaging.³⁸

Background

85. Decision 705 requires parties that port more than 40 mobile numbers or local numbers in a given calendar month to complete at least 95% of their porting requests within specified timeframes. Parties with less than 40 ports per month must have no more than two failures.³⁹ Parties that fail to meet these requirements may be subject to enforcement action by the Enforcement Agency.⁴⁰
86. Decision 705 does not allow exclusions for system outages when assessing whether parties have met the performance measures, and expects planned outages to be scheduled between 1.00am and 3.00am (which is outside of SOH).
87. Our investigation found that delayed and failed number ports can result from:
- 87.1 Human error and understaffing.
 - 87.2 Failures by downstream service providers. For parties that provide wholesale services to downstream service providers, a failure by the downstream service provider is counted as a failure by the party that is the wholesaler.
 - 87.3 An outage of IPMS that can impact all porting requests.
 - 87.4 An outage of an individual party's porting system.
88. The Enforcement Agency stated that while parties do sometimes fail the threshold and have been issued Caution Notices of Breach or Warning Notices of Breach, the Enforcement Agency has never had reason to take the more serious enforcement action of issuing a Public Censure Notice. The Enforcement Agency stated that in most cases parties respond to its intervention and initiate steps to improve performance (eg, improving internal processes).⁴¹

Our preliminary view

89. Our preliminary view was to retain the approach in Decision 705 for measuring parties' service level performance. Our reasons were:
- 89.1 The current thresholds are achievable and are usually met.⁴²

³⁸ Commerce Commission, *Decision 705*, Appendix Tables, Table 2.

³⁹ Commerce Commission, *Decision 705*, Appendix Tables, Table 2.

⁴⁰ We note that the service level performance standards in Table 2 of Appendix: Tables states that there is an "expectation" that parties meet the performance measures. We have clarified in the draft LMNP Terms that compliance with the performance measures is a requirement, not an expectation.

⁴¹ Email from the Enforcement Agency to the Commerce Commission 20 October 2016.

⁴² This is based on feedback from the Enforcement Agency. For example the Enforcement Agency has never had to issue a Public Censure Notice.

- 89.2 When parties have failed due to factors under their control and have been issued a warning notice by the Enforcement Agency, those parties have often made internal changes to achieve the required performance levels. This suggests the current approach is acting as an effective incentive for parties to improve service levels.
- 89.3 Holding parties responsible for their own outages provides incentives to maintain best practice IT practices (eg, testing upgrades in a separate test environment before going live). It provides incentives to the industry, as a whole, to ensure that IPMS is operated and maintained to a high standard.
- 89.4 The Enforcement Agency may exercise discretion when it responds to non-compliance and can take the circumstances around non-compliance into account.
- 89.5 Having a materially lower threshold could risk having parties reduce service levels to the detriment of end-users.
- 89.6 Averaging would allow for a material number of failures to be offset by the often routine and/or highly automated processing of other port requests. We consider that this may lead to a lowering of service performance in many cases.
- 89.7 It provides incentives for parties that supply wholesale services to downstream service providers to encourage the downstream service providers to meet porting performance targets. This is because failures by downstream service providers are reported as failures by the party providing the wholesale service. Averaging, in particular, could reduce this incentive as a party could rely on its own high success rate in porting to offset failures by the downstream service providers.

Our final decision

90. The Commission did not receive any submissions on this aspect of the Draft Determination.
91. The Commission's decision and reasoning has not changed since the release of the Draft Determination. As such the Commission has retained the same service level performance level standard as Decision 705 for the reasons outlined above.

System outages

TCF proposal

92. The TCF has proposed removing the 3.00am to 5.00am restriction on planned outages and replace it with an “outside of SOH” approach. The TCF’s proposed wording is:⁴³

6.4.1 Planned Outages

Every effort must be made to ensure that Planned Outages ~~that may affect LMNP~~ do not occur ~~between 3am during Standard Hours of Operation and 5am~~ that the impact on LMNP is minimised.

Draft decision

93. In the draft decision we proposed that planned system outages may be scheduled between 8.00pm and 6.00am Monday to Sunday morning, and 4.00pm to 6.00am on Sunday afternoon to Monday morning and on public holidays. This is a longer period than the 3.00am to 5.00am Monday to Sunday window in Decision 705.
94. The TCF stated that the 3.00am to 5.00am window is too short for some planned upgrades. The TCF stated one upgrade took four days.⁴⁴
95. The TCF stated that a 3.00am to 5.00am window can lead to additional costs and difficulties in coordinating staff, often across multiple firms. The TCF also noted that resources may not be available at that time to test if the automated upgrades work which risks potential problems that could impact the parties and end-users.

Our preliminary view

96. Our preliminary view was to set the window for planned outages as between 8.00pm and 6.00am Monday to Sunday morning, and 4.00pm to 6.00am Sunday afternoon to Monday morning and on public holidays. Our reasons are:
- 96.1 The current two hour window is too short for larger upgrades;
- 96.2 A wider window for planned outages would make it easier and cheaper for industry to perform upgrades, particularly those that require or would benefit from having IT staff available during the upgrade. IT staff would be available for testing and resolving unexpected problems before the next day’s SOH. This increased system reliability during SOH should benefit end-users; and
- 96.3 This window provides a buffer between SOH and planned outages, so that these buffer hours may be used for porting outside SOH. This means that a

⁴³ TCF, *Application to Commission for Clarification, Mark-up for Comparison: LMNP Terms*, page 16, 6 August 2016.

⁴⁴ Email from TCF to Commerce Commission, 19 September 2016.

party that wishes to clear a backlog of porting requests can use that buffer period to do so and hence maintain (or improve) its service performance levels to the benefit of end-users. Allowing another party to plan an outage shortly after SOH ends would restrict other parties from using the buffer to complete outstanding port requests.

- 96.4 This does not intrude on the operating hours agreed by the Number Portability User Group.

TCF - Submissions on the draft decision

97. The TCF submitted that the changes to the planned outages window flow on to the reporting timeframes.
98. In Decision 705 the planned outage period, 3.00am to 5.00am, is excluded from service levels. As a result there was no requirement to report on service levels during these hours.
99. The TCF submitted that it would be “costly and complicated” to enable reporting as contemplated by the draft decision.
100. Accordingly, the TCF has submitted that the reporting requirement be suspended “during a planned outage.” The TCF stated that this could be achieved without additional cost or adding complexity to IPMS.

Our final decision

101. We have decided that the planned outage window will be extended to 8.00pm to 6.00am Monday to Sunday morning, and 4.00pm to 6.00am Sunday afternoon to Monday morning and on public holidays for the same reasons outlined in the draft decision.
102. The Commission has revised the service levels in tables 8.22; 8.4 and table 2 of Attachment C⁴⁵ to only allow the suspension of the reporting requirement when there is a planned outage and for the period of that planned outage that occurs within the planned outage window.
103. We consider that the revised approach will provide a meaningful measure of porting service level performance, while reducing the compliance costs of implementing this decision.

⁴⁵ Attachment C: Terms for Local and Mobile Number Portability in New Zealand (LMNP Terms)

Period for making port requests

TCF proposal

104. The TCF proposed extending the period for making port requests to 60 days and adding provisions for when there are delays with the availability of new services. The TCF's proposed wording is:⁴⁶

a) The GSP must make a Port Request not more than sixty (60) days after receipt of the relevant Customer Authorisation, unless the Customer and GSP expressly agreed otherwise.

b) In the instance of a customer connection being delayed (for example fibre connections with consents or civil works) leading to new services not being available until after the prescribed sixty (60) days, the Customer Authorisation will be deemed valid to complete the transfer unless the Customer has expressed their wishes to cancel the transfer in the meantime.

Draft decision

105. We proposed that requests to initiate number ports must be made not more than 60 days after the end-user authorises the port, unless the customer agrees otherwise or there are delays to new services being available. This is longer than the 30 day period in Decision 705.

Background

106. Decision 705 requires the GSP to make requests for number ports within 30 days from when the end-user authorises the port request. This period provides incentives for the GSP to remove any barriers to completing the number porting. Decision 705 does not include provisions for extending the period due to factors outside of the control of the GSP that prevent the number being ported.

107. The UFB rollout has seen situations where an end-user may authorise a number port in conjunction with requesting UFB service, but the UFB service cannot be provided within 30 days due to factors outside of the control of the GSP. For new connections to the UFB network, delays could be caused by the need for the local fibre company to finish installing shared UFB infrastructure, availability of third party service technicians to connect end-users' premises to the UFB network, or the end-user's neighbours being slow in responding to a request for consent to access a shared right of way. For example, the local fibre company Enable waits 90 days to obtain consent from neighbours, body corporates and/or the landlord before advising the end-user and the service provider that it will not provide a new service.⁴⁷

⁴⁶ TCF, *Application to Commission for Clarification, Mark-up for Comparison: LMNP Terms*, page 24, 6 August 2016.

⁴⁷ From Enable's website. <http://www.enable.net.nz/how/fibre-broadband-installation-consent-on-private-property.html>. Page viewed 27 October 2016.

Our preliminary view

108. Our preliminary view was to extend the period for making a port request from 30 days in Decision 705 to 60 days from when the end-user authorises the port request, with provision to extend the period beyond 60 days where either the end-user and GSP have agreed or there are delays leading to a new service not being available and the customer has not requested the transfer to be cancelled. Our reasons are:

108.1 A 60 day window, with provisions for extending it under specific circumstances, reflects the practical constraints that number ports are sometimes subject to delays beyond 30 days that are outside of the GSP's control, as noted above.

108.2 Having provisions to reflect the above factors reduces inconvenience to end-users from having to re-request a number port when there are delays.

Our final decision

109. The Commission did not receive any submissions on this aspect of the Draft Determination.

110. The Commission's decision and reasoning has not changed since the release of the Draft Determination. As such the Commission has changed the port request period to 60 days in the manner, and for the same reasons, outlined above.

New parties to the determination*Draft decision*

111. The Draft Determination proposed that service providers that have been allocated numbers will not be required to apply to the Commission to become parties to the determination.

Background

112. Decision 705 requires the Commission to confirm that a potential new party qualifies as a party to Decision 705, where the Commission is satisfied that a new party has connected to an existing party. The date on which the Commission is satisfied that a potential new party has successfully connected to an existing party becomes the "qualifying date". A new party must ensure that it is able to port numbers no later than three months after the qualifying date.⁴⁸

113. This requirement was introduced when IPMS was implemented. It was intended to manage the three month grace period given to new service providers to implement

⁴⁸ Clauses 4.4.1 and 4.4.3 of Decision 705's LMNP Terms.

the LMNP Services after becoming a party to the determination under Schedule 1 of the Act.⁴⁹

Our preliminary view

114. Our preliminary view was to remove the requirement for the Commission to confirm that a potential new party qualifies as a party to the determination.
115. In practice this requirement has proven unnecessary. The Enforcement Agency has other tools to deal with a party that fails to meet the service level performance requirements.
116. We consider that this requirement has had the effect of increasing the workload for any new parties and the Commission, without providing significant additional regulatory oversight or benefit to end-users.
117. We consider that removing this mechanism will reduce unnecessary compliance costs. Hence, for these firms the qualifying date will be set automatically when a party and at least one existing party have successfully interconnected.

TCF - Submissions on the draft decision

118. The TCF submitted that they did “not support the removal of this mechanism.”⁵⁰
119. The TCF said that the mechanism is not unnecessary and that the process was “important”.⁵¹ They point to the confirmation of new Parties as a step in new members joining the NAD and to clarify when a party becomes liable for the costs of delivering number portability services.

Our final decision

120. We have decided that this mechanism will be removed and replaced with two steps:
- 120.1 that the party will become a Party to this determination when they meet the definition of an access seeker and/or provider under the Act;⁵² and
- 120.2 that, unless it is aware of anything to the contrary, the Commission will accept that a party has met the definition of an access seeker when the Commission receives written notification from the NAD that the party has been allocated a number block and confirmation that the notification has also been sent to the new party.

⁴⁹ Clarification (No.3) of the Determination on the Multi-party Application for Determination on the Local and Cellular Telephone Number Portability Designated Multinetwork Service (Decision No. 605)

⁵⁰ TCF, *Submission on the Commerce Commission draft determination on number portability*, 1 December 2016, p.3

⁵¹ Ibid.

⁵² Subpart 2, Schedule 1, of the Act

121. The Commission considers that this will provide certainty to the TCF and the new party as to the point when they have definitively become a party to the determination while achieving the same result of reducing work load on the Commission discussed above.

Parties to the Determination – TCF proposal

TCF proposal

122. The TCF proposed that it should be able to withhold a new party's access to IPMS if it believes the new party is not ready or able to do so.⁵³ It has also proposed that the new party should endeavour to complete any bilateral agreements within a certain qualifying period after the determination would come into force.
123. Bilateral agreements are agreements between parties which must be consistent with, but may also improve upon, the terms in the determination.⁵⁴
124. The TCF's proposed wording is:⁵⁵

4.4.7 The TCF may reasonably withhold or limit a new Party's access to the IPMS production servers if it reasonably believes that the Party is not ready or able to port numbers and that permitting access may be detrimental to IPMS or to porting in general. A party may be required to demonstrate its ability to port numbers in test or development environment before gaining full access to IPMS.

4.4.8 New Parties should endeavour to complete any bilateral agreements with other Parties prior to the expiry of the relevant Qualifying Date.

Draft decision

125. We proposed that access to number porting should be determined by the criteria for being an Access Seeker or Access Provider as specified in Schedule 1 of the Act, rather than also requiring approval by the TCF.

Background

126. Decision 705 does not permit the TCF to determine who is a party to the determination. The requirements in Decision 705 for becoming a new party are summarised at paragraphs 112 to 113 above.

⁵³ The TCF's proposed wording did not define the criteria it would apply in making this assessment.

⁵⁴ Section 5.4 of the Network Terms.

⁵⁵ TCF, *Application to Commission for Clarification, Mark-up for Comparison: LMNP Terms*, pages 20 & 21, 6 August 2016.

Our preliminary view

127. Our preliminary view was that access to IPMS should be determined by the criteria for being an Access Seeker or Access Provider, as set out in Schedule 1 of the Act. Our reasons are:

127.1 The TCF's proposal would effectively transfer the ability to determine who is a party to the determination to an industry body. This would introduce a risk that industry could preclude, or be perceived as precluding, new entry. This would not be consistent with the promotion of competition as set out in section 18.

127.2 Access to the LMNP Services should be determined by the criteria for being an Access Seeker or Access Provider, as set out in Schedule 1 of the Act, rather than through the industry. Approval by the industry would be inconsistent with the definitions of Access Seeker and Access Provider in Schedule 1.

127.3 Any service provider that is allocated numbers under the Number Administration Deed requires access to porting in order to comply with the obligations of being allocated numbers. The Number Administration Deed is an industry-based mechanism for the centralised and independent administration of New Zealand's telecommunication numbering resources.

127.4 The Enforcement Agency already provides a process for addressing the risk that new parties will not be able to comply with the performance measures. That process is the procedure for enforcing the performance measures contained in the LMNP Services determination.

127.5 The Enforcement Agency has not found it necessary to take enforcement action beyond issuing a Caution Notice of Breach or Warning Notice of Breach. This suggests that new parties have not created issues significant enough to justify their exclusion from IPMS.

127.6 Bilateral agreements are agreements that parties may enter into which supplement the Network Terms, and which may contain obligations that go beyond those in the determination.⁵⁶ Any such obligations should not be compulsory. Requiring parties to enter into a bilateral agreement would also create a risk that incumbent service providers could restrict access to the LMNP Services by making the terms overly onerous.

Our final decision

128. The Commission did not receive any submissions on this aspect of the Draft Determination.

⁵⁶ Section 5.4 of the Network Terms.

129. The Commission's decision and reasoning has not changed since the release of the Draft Determination. As such access to IPMS will be determined by the criteria for being an Access Seeker or Access Provider.

Publication of porting statistics

Draft decision

130. We proposed that the TCF must publish porting service level performance information on its website.

Background

131. Prior to this determination the TCF published two reports on its website, one for local number portability and one for mobile number portability. Each report was to show ports per month and cumulative number of ports.⁵⁷ Decision 705 did not require the TCF to publish that information.

Our preliminary view

132. We considered that the TCF should publish, within one month of each quarter end, the following information for both mobile and local number ports for the previous 12 months:
- 132.1 number of ports by month (including ports of previously ported numbers);
 - 132.2 cumulative count of numbers ported since 2007 which was when IPMS was established;
 - 132.3 cumulative count of numbers ported as a percentage of active numbers; and
 - 132.4 percentage of ports completed within the timeframes specified in the LMNP Terms or within the timeframes as otherwise agreed with the end-user.

TCF - Submissions on the draft decision

133. The TCF's submission identifies a practical concern with compiling the required data on a quarterly basis, but did not question the merits of the proposed publication requirement.
134. The TCF submitted that the proposed requirement for one metric (cumulative count of numbers ported as a percentage of active numbers) would be costly to calculate as the TCF does not maintain quarterly data on active connections. The TCF stated that active numbers are highly confidential and only compiled on an annual basis.

⁵⁷ These reports can be found at www.tcf.org.nz/content/c9ee3f76-1253-4626-bf08-40c2f21f7ab3.html. (viewed on 21 September 2016).

135. The TCF proposed that active numbers are calculated using the “most current active number data” that it collects. This data is collected annually for connections as of 31 August.

Our final decision

136. After considering the variance in numbers between the approach proposed in the Draft Determination and the approach advanced by the TCF, we have concluded that the level of variance would have an immaterial impact on the reported metric or its value to readers.⁵⁸ In addition, we accept TCF’s submission that it would be burdensome on the TCF and on parties to collate this information quarterly.
137. The Commission’s decision is that the TCF must publish Porting statistics quarterly on the basis of the most current active number data collected by the TCF for the purpose of cost allocation. The basis on which the Porting statistics are calculated should be clearly stated where they are published.
138. With this revision, we consider that this information should reasonably be able to be compiled from the data currently available to the industry.
139. We consider that this will help interested parties arrive at informed views about the effectiveness of the LMNP Services in New Zealand and provide an incentive for the parties to meet the specified service level performance requirements. Interested parties will then be able to form a view on whether the LMNP Services are promoting competition for the long-term benefit of end-users, consistent with section 18.
140. As the reporting is at an industry level it should respect individual parties’ commercial confidentiality.
141. The Commission has decided that the publication of porting statistics will be included in the determination and shall include the above mentioned porting statistics.

Publication of enforcement action

Draft decision

142. We proposed that Public Censure Notices should be published:
- 142.1 on the TCF’s website until the determination expires; and
- 142.2 on the censured party’s website for at least six months (or until the determination expires, whichever is the shorter), in the form of a summary of the notice that has been approved by the Enforcement Agency, with a link to the notice itself. The summary and link must be placed on the most frequently visited page of the party’s website that is associated with switching to the service provider.

⁵⁸ Email from TCF to the Commerce Commission, 6 December 2016.

142.3 on our website, at our discretion.

Background

143. Decision 705 sets out the processes that the Enforcement Agency must follow should a party fail to meet the specified service level performance requirements in the LMNP Terms or the equivalent service criteria for ported and non-ported numbers in the Network Terms.
144. The Enforcement Agency may issue a Caution Notice of Breach and then in the case of continuing non-compliance, a Warning Notice of Breach. Neither notice involves public disclosure of the breach.
145. If a party refuses or fails to respond to the actions required by a Warning Notice of Breach, the Enforcement Agency may issue a Public Censure Notice, subject to several conditions.⁵⁹ Clause 7.4.10 of Decision 705's LMNP Terms states:

If the Public Censure Notice is proceeded with, it must be published in the New Zealand Gazette and the TCF's newsletter and, at the Enforcement Agency's discretion, may be published in any relevant industry newsletter or magazine, in the national newspapers or in Consumer bulletins.

Our preliminary view

146. We considered that the LMNP Terms should be updated to also require a Public Censure Notice to be published on the internet. This proposed revision reflects the increased use of the internet as a tool for publication and for interested parties to be informed. Hence having Public Censure Notices published on the internet can provide a further incentive for parties to ensure compliance with the Determination.
147. Requiring a Public Censure Notice to be published on both the TCF's website and the censured party's website should make it more likely that other telecommunication service providers and end-users are aware of non-compliance with the determination.
148. We proposed a requirement that a party that is the subject of a Public Censure Notice places links to the notice on a frequently visited page associated with the relevant mobile and/or local services so that end-users are more likely to be informed about the Notice. Requiring a link to be placed on a frequently visited page will ensure that a party cannot undermine the intention behind publication by only placing a link on a webpage that is rarely accessed by end-users.

⁵⁹ We note that the wording of clause 7.4.8 may be interpreted as requiring the Enforcement Agency to issue a Public Censure Notice upon a failure to comply with a Warning Notice of Breach. However, we consider that clause 7.4.1 makes it clear that the issuing of a Public Censure Notice is at the discretion of the Enforcement Agency. We have made minor clarifications to clause 7.4.8 to ensure that the issue of a Public Censure Notice is discretionary.

149. We considered that requiring the wider publication of a Public Censure Notice will give effect to the promotion of competition in section 18. Publication of a Public Censure Notice may provide an additional incentive for parties to comply with the service level performance requirements because a party may seek to avoid the negative public perception that may arise upon publication of a Public Censure Notice.

Our final decision

150. The Commission did not receive any submissions on this aspect of the Draft Determination.
151. The Commission's decision and reasoning has not changed since the release of the Draft Determination. As such the Commission has changed the way that Public Censure Notices will be required to be published as outlined above.

Functions and standards

152. We are required under section 40(1)(a) of the Act to include in this determination a description of the functions that must be performed by a system for delivering the LMNP Services and the standards to which those functions must be performed.
153. In addition, we must include the “terms and conditions on which the determination is proposed to be made” under section 40(1)(f).
154. Section 40(1)(c) also requires a final determination to include “the requirement that all the parties to the determination provide the service by means of a system that is consistent with the functions and the standards set out in the determination”.
155. The LMNP Terms (Attachment C) and Network Terms (Attachment D) attached to this determination contain the functions for delivering the LMNP Services through the IPMS, and the standard to which those functions must be performed. In our view, the LMNP Terms and Network Terms are consistent with the scope of the LMNP Services set out in Part 2 of Schedule 1 of the Act, with the requirements for a determination under Part 2 of the Act, and the requirements of the section 18 purpose statement.
156. All parties to the determination must provide the LMNP Services by means of a system that is consistent with the functions and standards set out in this determination, including all terms and conditions set out in the LMNP Terms and Network Terms.⁶⁰

⁶⁰ Section 40(1)(c) of the Act.

Cost allocation formula

157. We are required under section 40(1)(b) to determine “the formula for how the cost of delivering the service must be apportioned between the parties to the determination and every person who becomes an access provider after the determination is made.”
158. Further, in accordance with section 40(1)(d), a final determination must include the requirement that “any party to the determination make payments to an access provider of amounts calculated in accordance with the formula set out in the determination”.
159. In Decision 554, the relevant part of which was adopted by Decision 705, we considered the impact of allocating costs incurred in the provision of number portability to the various market participants based on:
- 159.1 the incentives of operators to compete with each other for customers; and
- 159.2 the switching costs faced by customers, i.e. the cost to a customer of porting a number.⁶¹
160. In response to our written notice that we had initiated the process for making a determination, the TCF, on behalf of some of the parties to Decision 705, submitted that we should uphold the existing cost allocation mechanism.⁶²
161. This position did not change with their submission on the Draft Determination.⁶³
162. We remain of the view that the guiding principles relevant to determining the cost allocation formula (as outlined in Decision 554) remain appropriate. The reasoning set out in Decision 554 relating to the cost allocation formula is incorporated by reference in this Draft Determination.⁶⁴
163. In summary, in deciding how to allocate the costs associated with the LMNP Services, we were guided by the promotion of competition for the long-term benefits of end-users, under section 18, by lowering the switching costs incurred by customers when changing service providers. We adopted four guiding principles to allocate costs, namely: cost minimisation, cost causation, alignment of costs with benefits and practicality. On this basis, we concluded that:
- 163.1 *Industry common system costs*: Allocated amongst all providers of the LMNP Services on the basis of market share based on active numbers.

⁶¹ Commerce Commission, *Decision 554*, 31 August 2005, para. 58.

⁶² TCF, *Initiating Determination Process for designated multinetwork service determination for Number Portability*, 2 September 2016.

⁶³ TCF, *Submission on the Commerce Commission draft determination on number portability*, 1 December 2016, p.1.

⁶⁴ Commerce Commission, *Decision 554*, 31 August 2005, para. 69 to 105, 114 to 123, 128 to 132, 141 to 149, 158 to 179.

163.2 *Per-operator set-up costs*: Each operator will bear its own costs.

163.3 *Per-line set-up costs*: Recoverable by the donor network operator from a recipient network operator.

163.4 *Additional call conveyance costs*: Each operator will bear its own costs.

164. Any party to the determination must make payments (covering per-line set-up costs and industry common system costs) to an Access Provider of amounts calculated in accordance with the formula set out in Attachment A to this determination.⁶⁵

⁶⁵ Section 40(1)(d) of the Act.

Commission's costs

165. Under section 55 of the Act, our costs of preparing a determination must be met by the parties to the Determination in the proportion we direct.
166. We consider that the costs of this determination should be recovered in the same proportion as the cost allocation for industry common system costs, as described above. This reflects that our costs are part of the industry's common costs of having regulated LMNP Services.
167. Accordingly, our costs be allocated amongst all providers of the LMNP Services on the basis of market share, based on active numbers, and will be invoiced to the parties as soon as practical after this determination is published.
168. The active numbers will be taken from the figures used in the last cost allocation made under Decision 705. This is the allocation made on 31 August 2016.

Commencement date and date of expiry

169. We consider that we must determine the commencement date and are required by the Act to determine the expiry date of this determination. This provides certainty about the term for which regulation should apply.

Commencement date

170. The commencement date will be 20 December 2016 which is the day after the expiry of Decision 705.
171. This commencement date will ensure that there is continuity of the regulation of the LMNP Services so that all parties to the determination remain bound by the LMNP Terms and the Network Terms as amended by the determination on and from the expiry of Decision 705.

Date of Expiry

172. We are required under section 40(1)(h) of the Act to determine the expiry date of the determination.
173. We are also required to consider whether there are reasonable grounds to commence an investigation into whether a service listed in Schedule 1 should be omitted from the Schedule at intervals of not more than five years after the date on which a designated service or specified service came into force.⁶⁶

⁶⁶ Clause 1(3) of the Schedule 3 of the Act. "Designated service" is defined in section 5 of the Act as meaning (among other things) a "designated multinetwork service".

174. In our 2016 review of designated services, we decided that there were not reasonable grounds to commence an investigation into the omission of the LMNP Services from Schedule 1. Hence the LMNP Services remain in Schedule 1.⁶⁷
175. We consider that the expiry of the number portability determination should coincide with one of the five yearly reviews. This approach is consistent with the framework of the Act which contemplates five yearly reviews of Schedule 1 services.
176. We also consider that a five-year term is required to secure the competition benefits arising from this determination so as to best give effect to section 18. We also consider that if there was a significant shift in the market, that we would be able to undertake an earlier review of the inclusion of the Number Portability Services in Schedule 1. This is because clause 1(1) permits the Commission to investigate whether Schedule 1 should be altered, if the Commission considers that there are reasonable grounds for doing so.
177. The next five year review of these regulated services is due to be completed by December 2021. Accordingly, our view is that the number portability determination should be for a period of five years and expire in December 2021.
178. The terms for the expiry dates are set out below.

Expiry dates

179. The determination, so far as it relates to Local Number Portability, will expire on the earlier of—
- 179.1 19 December 2021; or
- 179.2 the date on which the local telephone number portability service ceases to have designated multinetwork service status because it has been omitted from Schedule 1 under section 66 of the Act.
180. The determination, so far as it relates to the Cellular Number Portability, will expire on the earlier of—
- 180.1 19 December 2021; or
- 180.2 the date on which the cellular telephone number portability service ceases to have designated multinetwork service status because it has been omitted from Schedule 1 under section 66 of the Act.

⁶⁷ Commerce Commission, *Review of Designated and Specified Services under Schedule 1 of the Telecommunications Act*, 5 July 2016, page 44-45.

Exemptions

181. On 1 June 2016, the Commission approved exemptions under clauses 14.2.1 and 14.2.3 of the Network Terms for Spark New Zealand Limited for the period 1 January 2016 until 31 December 2020. These exemptions are for Post Dialling Delay and In Ported Services and Features. Because the exemptions are only exemptions from Decision 705, which will expire on 19 December 2016, we have provided exemptions to this determination on the same terms as the exemptions to Decision 705.
182. The exemptions are set out in Attachment B.

Attachment A: formula for the cost of delivering the services

Formula for Allocating Industry Common System Costs

List of terms and abbreviations⁶⁸

Access Provider	means every person who operates- (c) a PSTN to which numbers have been allocated; and (d) a telephone service that relates to the local or mobile number portability service
Capex	means capital expenditure.
Financing Parties	means the parties to the determination at the beginning of each Financial Year.
Liabile Parties	parties to the determination at the end of each Financial Year.
Opex	means operational expenditure.
Financial Year	means the year beginning on the anniversary date of this determination.
Market Share	means the market share based on active numbers.

The Framework

- A.1 Capex and Opex incurred in any particular Financial Year of the determination will be financed by the Financing Parties based on their Market Share at the beginning of that Financial Year.
- A.2 The Financing Parties in any particular Financial Year will receive at the end of that Financial Year, a Capital Cost Payment and an Operational Cost Payment from Liabile Parties based on their Market Share at the end of that Financial Year.
- A.3 The calculation of the Capital Cost Payment and Operational Cost Payment is described below.
- A.4 A Capital Cost Payment calculation will be undertaken for the assets financed as Capex in a particular Financial Year and this Capital Cost Payment will be allocated annually amongst the parties until those assets are fully depreciated. The total Capex

⁶⁸ Where a term or abbreviation is defined in the Telecommunications Act, the statutory definition is adopted for the purposes of this list.

contribution which a Liable Party is required to make in any particular Financial Year will be the sum of their allocations for that Financial Year.

- A.5 If a new entrant is assessed to be an eligible Access Provider in respect of a particular year and, therefore, becomes a party to the determination, that new entrant will be liable for a Capital Cost Payment and an Operational Cost Payment for that Financial Year based on its Market Share on the last day of that Financial Year.
- A.6 Liable Parties will be required to contribute in accordance with the following payment formulae.

The Capital Cost Payment Formula

- A.7 The Capital Cost Payment ensures that Capex, which generates benefits beyond the year in which it is incurred, is amortized over the period of the determination and recovered annually from all parties to the determination (including new entrant Access Providers) based on the benefits they derive from the Capex.
- A.8 The Capital Cost Payment for the Capex incurred in a particular Financial Year will be calculated in accordance with the following formula:

$$\text{Capital Cost Payment} = \frac{\text{Capex}}{\left[\frac{1 - \left(\frac{1}{\left(1 + \frac{i}{t} \right)^{(n \times t)}} \right)}{\frac{i}{t}} \right]}$$

where: Capex: capital expenditure in that Financial Year;
 i: funding rate;
 n: number of years until the asset has been fully depreciated;
 t: number of payments per year.

- A.9 Any assets financed as Capex will be depreciated using a straight line method at a rate that will result in the asset being fully depreciated after six years from the date of this determination.
- A.10 The funding rate reflects the opportunity cost associated with the financing of Capex. Given that the Financing Parties are likely to face minimal risk of default on payment, the funding rate will be the New Zealand Government bond rate of a maturity equal to the number of years until the asset has been fully depreciated.

- A.11 The bond rate used for Capex incurred in a particular Financial Year will be the bond rate published on the first day of that year.

The Operational Cost Payment Formula

- A.12 At the beginning of each Financial Year the Financing Parties will prepare and finance an Opex budget, including maintenance, with each contributing towards this budgeted amount based on their Market Share at the beginning of that year. At the end of each Financial Year, the Financing Parties will receive from the Liable Parties, an Operational Cost Payment based on the actual Opex incurred in that Financial Year and based on their Market Share at the end of that Financial Year.

Attachment B: Exemptions

Reasons for granting Spark exemptions from clauses 14.2.1 and 14.2.3 of the network terms for local and mobile number portability

List of terms and abbreviations⁶⁹

Act	means the Telecommunications Act 2001
Commission	means the Commerce Commission.
Decision 554	means the Final Determination for Local and Cellular Number Portability Services, 31 August 2005.
Decision 705	means the Final Determination for Local and Cellular Number Portability Services, 15 December 2010.
Spark	Spark New Zealand Limited

Purpose

B.1 This attachment provides for the inclusion in Determination [2016] NZCC [XXXX] of the exemption provide to Spark to Decision 705.

Summary

B.2 Spark's exemption to Decision 705 for the period 1 June 2016 to 31 December 2020 from:

- 2.1 clause 14.2.1 of the network terms, noting that this exemption is specific to the PDD of calls made from kai exchanges to numbers ported off the same kai exchanges and to calls that require their signalling to transit another switch; and
- 2.2 clause 14.2.3 of the network terms for the seven services and features listed in paragraph 9 below⁷⁰

is extended for the same period and applies the same clauses in the new determination.

⁶⁹ Where a term or abbreviation is defined in the Telecommunications Act, the statutory definition is adopted for the purposes of this list.

⁷⁰ While the exemptions were sought from 1 January 2016 they are only granted from 1 June 2016, being the date on which we decided to grant them. This is because an exemption cannot be granted for a period before the decision to grant the exemption was made. However, we note that we have not received any complaints relating to Spark's failure to comply with the network terms and we do not intend taking any action on our own initiative.

Background

B.3 Spark had exemptions from the 'Post Dialling Delay' and the 'Services and Features' criteria of the Network Terms for Local and Mobile Number Portability. These exemptions related to Spark's old generation NEAX Kai switches, which are not capable of meeting these number portability criteria. These exemptions expired on 31 December 2015.

B.4 In November 2015 Spark requested the TCF Management Committee to recommend that the Commission extend the exemptions until 31 December 2020, with a view to them becoming indefinite thereafter.

B.5 In December 2015 we received a unanimous recommendation from the TCF Management Committee supporting the extension of Spark's exemptions until 31 December 2020.

B.6 On 1 June 2016 the Commission granted the exemption to Decision 705 for the period 1 June 2016 to 31 December 2020.

The exemptions granted

B.7 Spark's exemption from clause 14.2.1 of and 14.2.3 the network terms of Decision 705 is extend to the same provision of this determination for the period 19 December 2016 to 31 December 2020,

B.8 The exemption to 14.2.1 is specific to the PDD of calls made from kai exchanges to numbers ported off the same kai exchanges and to calls that require their signalling to transit another switch.

B.9 Spark's exemption from clause 14.2.3 of the network terms for the seven services and features listed in paragraph B.10 below is granted.

B.10 The seven services and features to which the exemption from clause 14.2.3 applies are:

Centrex services:

- Automatic Callback
- Automatic call Distribution Agent
- Call Queuing
- Calling Name Registration

- MHG Preferential Multiline Hunting
- Code Restriction and Diversion

DDI service:

- DDI Diversion.⁷¹

Purpose in relation to which the exemptions apply

B.11 The exemptions apply to the assessment of Spark's compliance with the network terms.

Customers or class of customers to which the exemptions apply

B.12 The exemption from clause 14.2.1 of the network terms applies to customers served by Spark's Kai exchanges (both Spark customers and customers of resellers of Spark's voice services).

B.13 The exemption in relation to clause 14.2.3 of the network terms applies to customers of Centrex and DDI services in-porting to Spark's network (both Spark customers and customers of resellers of Spark's voice services).

Conditions on which the exemptions are made

B.14 The exemptions are granted without conditions.

Section 18 considerations

B.15 We consider that granting the exemptions is likely to give best effect to the purpose set out in section 18.

B.16 The impact of the exemption in relation to clause 14.2.1 is minor. The additional PDD only affects a small number of calls, and callers are unlikely to discern the difference. The cost of replacing the Kai exchanges would be high and would need to be carried by end-users in the long run.

B.17 The exemption from clause 14.2.3 only affects customers in-porting to Spark's network, and then only where there is no alternative available. If the requested exemption was not granted it is possible that Spark would simply withdraw these services from all customers. This would not be in the interests of customers who already use these services.

⁷¹ This is a diversion service offered in conjunction with DDI to a PBX.

B.18 There is no indication that the exemptions have, since the exemption was first granted 12 February 2007, prevented or deterred competition in any way. The unanimous support for the exemptions by the TCF Management Committee in 2015 supports the view that the exemptions have not given rise to any competition concerns.

Attachment C: Terms for Local and Mobile Number Portability in New Zealand (LMNP Terms)

Attachment D: Network Terms for Local and Mobile Number Portability (Network Terms)