

Draft determination for the designated multinet services of 'local telephone number portability service' and 'cellular telephone number portability service'

**Draft determination under section 36 of the Telecommunications Act 2001
(‘the Act’)**

The Commission: Dr Stephen Gale
Elisabeth Welson
Dr Jill Walker

**Date of draft
determination:** 3 November 2016

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List of terms and abbreviations¹

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| 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. |
| 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 draft 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 multinection 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. |
| 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 and means the proposed draft attachment D to this draft determination and/or |

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

Appendix 3 to Decision 705, as the context requires.

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| 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 and the proposed draft attachment D and/or Appendix 3 to Decision 705 as the context requires. |
| Port or Porting | means the process by which a number is transferred between an Access Provider and Access Seeker of LMNP Services. |
| 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 draft determination sets out our preliminary decision to issue a new determination for the LMNP Services, which are the two designated multinetwor 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 multinetwor service, as required by section 40 of the Act.
- (iv) We consider that the continued regulation of the LMNP Services through a determination 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”, 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) We propose to make a new determination that will, in effect, continue the regulation of the LMNP Services for five years beginning on 19 December 2016 which is the day after the expiry of Decision 705.
- (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, we consider that this new determination should be based on Decision 705.
- (vii) However, we consider that certain limited changes should be made to Decision 705, in order to ensure that the 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 propose including Saturday in the standard operating hours for the LMNP Services, increasing the window for planned upgrades to the systems supporting the LMNP Services, simplifying the process for adding new parties, and requiring the industry to publish service level performance information.
- (ix) We have also made some changes from 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 draft LMNP Terms and Network Terms are in Appendices C and D of this draft determination. The draft determination, along with the LMNP Terms and Network Terms together make up the

required contents of a draft determination for a designated multinet 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.
- (xii) On 8 July 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.

Submissions

- (xiii) In accordance with section 36(1) of the Act, we invite submissions on this draft determination.
- (xiv) The closing date for submissions is **5pm, 1 December 2016**. Your submission should be provided as an electronic copy in an accessible form. Submissions should be sent by email to: telco@comcom.govt.nz.
- (xv) We intend to publish all submissions on our website. Any confidential information should be clearly marked and preferably included as an appendix. When confidential information is provided, submitters should provide both confidential and public versions of their submissions. The responsibility for ensuring that confidential information is not included in a public version of a submission rests with the party making the submission.

Introduction

Background to Number Portability

1. Subpart 2 of Schedule 1 of the Act contains two designated multinetwor 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 This determination will expire on 19 December 2016.⁴ Decision 705 consists of the following key parts:
 - 4.1 the Determination for the designated multinetwor 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 multinetwor service determination, as set out in sections 31AA and 40 of the Act.

Background to this process

Process followed to date

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 the current determination 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 service. Subpart 3 of Part 2 of the Act specifies the process that we must follow.
9. A designated multinet 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

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).

uncertainty and the risk of opportunistic behaviour during an unregulated period.¹⁰

- 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.

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 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.

- 15.3 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.
- 15.5 Reviewing consumer feedback on the LMNP Services based on complaints made to us and feedback from Consumer NZ.

Future process

- 16. Section 36 of the Act requires us to make reasonable efforts to undertake a number of tasks (including preparing this 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 the 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. 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 multinetwrok service determination.
- 19. At this stage, we do not consider that a conference or public hearing is necessary as most parties to Decision 705 have indicated that the determination is working well. However, we will further consider whether a conference or public hearing is necessary after the receipt of submissions on the draft determination.
- 20. 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.

21. 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.
22. 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 we propose the costs of this determination must be met at paragraph 125 below.

Exemptions

23. 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.
24. 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 140 below.

Decision-making framework

25. This section sets out our approach to deciding:
- 25.1 Whether to continue regulation of the LMNP Services by issuing a new determination; and
 - 25.2 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?

26. 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:¹⁴
- (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.
27. 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.
28. 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”.

¹⁴ ‘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.

Should we make changes from Decision 705?

29. If we decide to continue regulation of LMNP by issuing a new determination, we must then decide whether or not we should make changes to the current determination, Decision 705, and what form those changes might take.
30. We propose to make 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.
31. When considering any changes from Decision 705, we consider that any changes should:
 - 31.1 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;
 - 31.2 ensure industry and end-users continue to receive the benefits of number portability; and
 - 31.3 minimise unnecessary disruption and cost to the industry.

Draft decision to maintain regulation with limited changes

32. We have considered whether or not we should make a new determination that would in effect continue regulation of the LMNP Services. We propose that we should continue to regulate the LMNP Services because doing so would best give effect to section 18 of the Act.
33. 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 any potential barrier 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.
34. Our investigation did not identify any reason for substantially changing Decision 705. However, we intend to make some limited changes in the new determination. The changes we intend to make 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”.
35. The limited changes will 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.
36. We consider that making only limited changes in the new determination will also have the following advantages:
 - 36.1 Ensuring that effective regulation is in place by 19 December 2016 which is when the current determination will expire.
 - 36.2 Minimising unnecessary disruption and cost to the industry.
37. The substantive changes are described, and the reasons for those changes included, in the assessment of key issues section.

Stakeholder views on continued regulation of LMNP Services

38. 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.

39. 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.
40. 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.¹⁵
41. 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.¹⁶
42. Consumer NZ advised that it received few complaints from end-users about number portability.¹⁷
43. We received no complaints concerning the operation of Decision 705 through our contact centre from 1 January 2012 to 31 July 2016. This points to an absence of a significant underlying problem with the LMNP Services process.¹⁸
44. 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.¹⁹

Stakeholders' suggested changes to Decision 705

45. 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.

¹⁵ 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.

¹⁶ TCF, *Initiating Determination Process for designated multinetwrok service determination for Number Portability*, 2 September 2016

¹⁷ Email from Consumer NZ to the Commerce Commission on 19 October 2016.

¹⁸ We did receive several complaints regarding issues connected to number portability, but not directly relating to Decision 705.

¹⁹ Meeting with the CEO of TUANZ in Wellington on 30 August 2016 and email from TUANZ to the Commerce Commission 20 October 2016.

46. TUANZ suggested that the SOH for number portability could be extended to include evenings and/or weekends.²⁰
47. The TCF, in its 8 August 2016 letter to the Commission, proposed a range of changes to the LMNP Terms,²¹ including changes to SOH, planned system outages and that it should have the right to exclude firms from access to the IPMS system if it considers the firm lacks the required capabilities.
48. We discuss these suggested changes in the next section.
49. 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.²²
50. The TCF also proposed a range of minor changes such as:
 - 50.1 updating terms to remove redundant provisions; and
 - 50.2 increased use of electronic information exchange (eg, shift from fax and email to email only as the main form of communication for some events).
51. 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.²³ 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.
52. 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.

²⁰ Meeting with the CEO of TUANZ in Wellington on 30 August 2016.

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

²² TCF, *Application to Commission for Clarification, Mark-up for Comparison: LMNP Terms*, page 6, 6 August 2016.

²³ Commerce Commission meeting with the TCF, Wellington, 9 September 2016; and Email from TCF to the Commerce Commission, 7 October 2016.

Assessment of key issues

Operating hours

TCF proposal

53. The TCF has proposed changes to the definition of SOH that would have seen SOH defined in an industry managed document, rather than in the determination.
54. The TCF's proposed changes are shown below:²⁴

| | |
|-----------------------------|---|
| 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. |
|-----------------------------|---|

TUANZ view

55. TUANZ suggested that the SOH for number portability could be extended to include evenings and/or weekends.²⁵

Draft decision

56. We propose 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 propose to retain the approach of setting the SOH in the determination, rather than allowing SOH to be set by the parties.

Background

57. Decision 705 specifies the SOH for the LMNP Services, as 8.00am to 5.00pm Monday to Friday with exclusions for public holidays.²⁶
58. 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 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.

²⁴ TCF, *Application to Commission for Clarification, Mark-up for Comparison: LMNP Terms*, page 16, 6 August 2016.

²⁵ Meeting with the CEO of TUANZ in Wellington on 30 August 2016.

²⁶ 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.

59. 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

60. We consider 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.
61. 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

62. We consider 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.
63. We also consider that SOH should include Saturdays as it would:
- 63.1 formalise in regulation what is already happening and is largely agreed by industry.²⁷ It should not result in the need for major system updates or impose significant additional costs.
 - 63.2 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.
 - 63.3 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 have switched service providers (including for local calling services). It is

²⁷ Email from TCF to the Commerce Commission, 7 October 2016.

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).

- 63.4 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.
- 64. We do not consider that SOH should include Sunday as:
 - 64.1 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.
 - 64.2 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.
 - 64.3 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.
 - 64.4 By leaving Sunday outside of the SOH it gives flexibility for planned system outages.
- 65. We consider 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.
- 66. We also considered whether SOH should be extended to 6.00pm in line with current industry practice. Our preliminary view is to not extend SOH to 6.00pm, as we do not consider the benefits from extending SOH to 6.00pm are as significant as extending SOH to include Saturdays. In reaching this view we consider that:
 - 66.1 SOH of 8.00am to 5.00pm already provides for same day porting; and
 - 66.2 Excluding 5.00pm to 6.00pm from SOH provides technicians with a buffer for rectifying technical faults in completing ports.

67. The above draft decision to extend SOH is in keeping with feedback from TUANZ but differs from the approach favoured by TCF.

Measuring porting service level performance

TCF proposal

68. 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.
69. The TCF’s proposed changes are shown below:²⁸

| | |
|-----------------|--|
| 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. b) 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

70. We propose 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

²⁸ 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.²⁹

Background

71. 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.³⁰ Parties that fail to meet these requirements may be subject to enforcement action by the Enforcement Agency.³¹
72. 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).
73. Our investigation found that delayed and failed number ports can result from:
 - 73.1 Human error and understaffing.
 - 73.2 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.
 - 73.3 An outage of IPMS that can impact all porting requests.
 - 73.4 An outage of an individual party's porting system.
74. 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).³²

Our preliminary view

75. Our preliminary view is to retain the approach in Decision 705 for measuring parties' service level performance. Our reasons are:

²⁹ Commerce Commission, *Decision 705*, Appendix Tables, Table 2.

³⁰ Commerce Commission, *Decision 705*, Appendix Tables, Table 2.

³¹ 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.

³² Email from the Enforcement Agency to the Commerce Commission 20 October 2016.

- 75.1 The current thresholds are achievable and are usually met.³³
- 75.2 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.
- 75.3 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.
- 75.4 The Enforcement Agency may exercise discretion when it responds to non-compliance and can take the circumstances around non-compliance into account.
- 75.5 Having a materially lower threshold could risk having parties reduce service levels to the detriment of end-users.
- 75.6 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.
- 75.7 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.

System outages

TCF proposal

- 76. 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:³⁴

³³ This is based on feedback from the Enforcement Agency. For example the Enforcement Agency has never had to issue a Public Censure Notice.

³⁴ TCF, *Application to Commission for Clarification, Mark-up for Comparison: LMNP Terms*, page 16, 6 August 2016.

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

77. We propose 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.
78. 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.³⁵
79. 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

80. Our preliminary view is 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:
 - 80.1 The current two hour window is too short for larger upgrades.
 - 80.2 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.
 - 80.3 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 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.

³⁵ Email from TCF to Commerce Commission, 19 September 2016.

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

Period for making port requests

TCF proposal

81. The TCF has 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:³⁶
- 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

82. We propose 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

83. 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.
84. 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

³⁶ TCF, *Application to Commission for Clarification, Mark-up for Comparison: LMNP Terms*, page 24, 6 August 2016.

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.³⁷

Our preliminary view

85. Our preliminary view is 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:
 - 85.1 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.
 - 85.2 Having provisions to reflect the above factors reduces inconvenience to end-users from having to re-request a number port when there are delays.

New parties to the determination

Draft decision

86. We propose that service providers that have been allocated numbers will not be required to apply to the Commission to become parties to the determination.

Background

87. 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.³⁸
88. 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 the LMNP Services after becoming a party to the determination under Schedule 1 of the Act.³⁹

³⁷ From Enable's website. <http://www.enable.net.nz/how/fibre-broadband-installation-consent-on-private-property.html>. Page viewed 27 October 2016.

³⁸ Clauses 4.4.1 and 4.4.3 of Decision 705's LMNP Terms.

³⁹ 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)

Our preliminary view

- 89. Our preliminary view is to remove the requirement for the Commission to confirm that a potential new party qualifies as a party to the determination.
- 90. 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.
- 91. 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.
- 92. 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.

Parties to the Determination – TCF proposal

TCF proposal

- 93. The TCF has 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.⁴⁰ 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.
- 94. Bilateral agreements are agreements between parties which must be consistent with, but may also improve upon, the terms in the determination.⁴¹
- 95. The TCF's proposed wording is:⁴²

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.

⁴⁰ The TCF's proposed wording did not define the criteria it would apply in making this assessment.

⁴¹ Section 5.4 of the Network Terms.

⁴² TCF, *Application to Commission for Clarification, Mark-up for Comparison: LMNP Terms*, pages 20 & 21, 6 August 2016.

Draft decision

96. We propose 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

97. 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 87 to 88 above.

Our preliminary view

98. Our preliminary view is 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:
 - 98.1 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.
 - 98.2 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.
 - 98.3 Any service provider that is allocated numbers under the Number Administration Deed⁴³ 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.
 - 98.4 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.
 - 98.5 The Enforcement Agency has not found it necessary to take enforcement action beyond issuing a Caution Notice of Breach or Warning Notice of

⁴³ Numbering Administration Deed, 1 May 2000.

Breach. This suggests that new parties have not created issues significant enough to justify their exclusion from IPMS.

- 98.6 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.⁴⁴ 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.

Publication of porting statistics

Draft decision

99. We propose that the TCF must publish porting service level performance information on its website.

Background

100. The TCF publishes two reports on its website, one for local number portability and one for mobile number portability. Each report shows ports per month and cumulative number of ports.⁴⁵ Decision 705 does not require the TCF to publish this information.

Our preliminary view

101. We consider 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:
- 101.1 number of ports by month (including ports of previously ported numbers);
 - 101.2 cumulative count of numbers ported since 2007 which was when IPMS was established;
 - 101.3 cumulative count of numbers ported as a percentage of active numbers; and
 - 101.4 percentage of ports completed within the timeframes specified in the LMNP Terms or within the timeframes as otherwise agreed with the end-user.
102. We consider that this information should reasonably be able to be compiled from the data currently available to the industry.

⁴⁴ Section 5.4 of the Network Terms.

⁴⁵ These reports can be found at www.tcf.org.nz/content/c9ee3f76-1253-4626-bf08-40c2f21f7ab3.html. (viewed on 21 September 2016).

103. 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 is promoting competition for the long-term benefit of end users, consistent with section 18.
104. As the proposed reporting is at an industry level it should respect individual parties' commercial confidentiality.

Publication of enforcement action

Draft decision

105. We propose that Public Censure Notices should be published:
 - 105.1 on the TCF's website until the determination expires; and
 - 105.2 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.
 - 105.3 on our website, at our discretion.

Background

106. 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.
107. 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.
108. 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.⁴⁶ Clause 7.4.10 of Decision 705's LMNP Terms states:

⁴⁶ 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.

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

109. We consider 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.
110. 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.
111. We have 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.
112. We consider 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.

Functions and standards

- 113. We are required under section 37(1)(a) of the Act to include in this draft 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. Section 40(1)(a) contains a materially identical requirement for the final determination.
- 114. In addition, we must include the “terms and conditions on which the determination is proposed to be made” under section 37(1)(d). Section 40(1)(f) contains a materially identical requirement for a final determination.
- 115. 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”.
- 116. 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.
- 117. 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.⁴⁷

⁴⁷ Section 40(1)(c) of the Act.

Cost allocation formula

118. We are required under section 37(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.” Section 40(1)(b) contains an identical requirement for a final determination.
119. 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”.
120. 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:
 - 120.1 the incentives of operators to compete with each other for customers; and
 - 120.2 the switching costs faced by customers, i.e. the cost to a customer of porting a number.⁴⁸
121. 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.⁴⁹
122. 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.⁵⁰
123. 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:
 - 123.1 *Industry common system costs:* Allocated amongst all providers of the LMNP Services on the basis of market share based on active numbers.

⁴⁸ Commerce Commission, *Decision 554*, 31 August 2005, para. 58.

⁴⁹ TCF, *Initiating Determination Process for designated multinetwerk service determination for Number Portability*, 2 September 2016

⁵⁰ Commerce Commission, *Decision 554*, 31 August 2005, para. 69 to 105, 114 to 123, 128 to 132, 141 to 149, 158 to 179.

- 123.2 *Per-operator set-up costs:* Each operator will bear its own costs.
 - 123.3 *Per-line set-up costs:* Recoverable by the donor network operator from a recipient network operator.
 - 123.4 *Additional call conveyance costs:* Each operator will bear its own costs.
124. 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 Appendix 2 to this determination.⁵¹

⁵¹ Section 40(1)(d) of the Act.

Commission's costs

- 125. 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.
- 126. 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.
- 127. Accordingly, we propose that our costs be allocated amongst all providers of the LMNP Services on the basis of market share, based on active numbers, as at the date of the determination.

Commencement date and date of expiry

- 128. 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

- 129. We consider that the commencement date should be 20 December 2016 which is the day after the expiry of Decision 705.
- 130. 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

- 131. We are required under section 37(1)(f) of the Act to determine the expiry date of the determination.
- 132. 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.⁵²

⁵² 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 multinetworck service".

- 133. 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 1.⁵³
- 134. 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.
- 135. 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.
- 136. The next five year review of all 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.
- 137. The terms for the expiry dates are set out below.

Expiry dates

- 138. The determination, so far as it relates to Local Number Portability, will expire on the earlier of—
 - 138.1 19 December 2021; or
 - 138.2 the date on which the local telephone number portability service ceases to have designated multinetworck service status because it has been omitted from Schedule 1 under section 66 of the Act.
- 139. The determination, so far as it relates to the Cellular Number Portability, will expire on the earlier of—
 - 139.1 19 December 2021; or
 - 139.2 the date on which the cellular telephone number portability service ceases to have designated multinetworck service status because it has been omitted from Schedule 1 under section 66 of the Act.

⁵³ Commerce Commission, *Review of Designated and Specified Services under Schedule 1 of the Telecommunications Act*, 5 July 2016, page 44-45.

Exemptions

140. On 8 July 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.
141. 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 abbreviations⁵⁴

| | |
|-------------------|--|
| 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. |
| Liable 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 Liable 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

⁵⁴ Where a term or abbreviation is defined in the Telecommunications Act, the statutory definition is adopted for the purposes of this list.

annually amongst the parties until those assets are fully depreciated. The total Capex 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:

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

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

Purpose

B.1 This notice is prepared in accordance with section 15.4.9 of the Network Terms for local and mobile number portability in New Zealand, Appendix 4 to the Designated Multi-network Determination (Decision 705) (“network terms”).

Summary

B.2 Spark New Zealand Limited (Spark) is granted an exemption 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 below.⁵⁵

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 Commerce 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.

⁵⁵ 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.

The exemptions granted

B.6 Spark's application for an exemption from clause 14.2.1 of the network terms is granted for the period 1 June 2016 to 31 December 2020, 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.

B.7 Spark's application for an exemption from clause 14.2.3 of the network terms for the seven services and features listed in paragraph 9 below is granted.

B.8 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.⁵⁶

Purpose in relation to which the exemptions apply

B.9 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.10 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).

⁵⁶ This is a diversion service offered in conjunction with DDI to a PBX.

B.11 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.12 The exemptions are granted without conditions.

Section 18 considerations

B.13 We consider that granting the exemptions is likely to give best effect to the purpose set out in section 18.

B.14 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.15 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.

B.16 There is no indication that the exemptions have, over the last 5 years, prevented or deterred competition in any way. The unanimous support for the exemptions by the TCF Management Committee 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)