

12 June 2009

Osmond Borthwick  
Director  
Telecommunications Branch  
Commerce Commission  
PO Box 2351  
Wellington

By email: [Osmond.Borthwick@comcom.govt.nz](mailto:Osmond.Borthwick@comcom.govt.nz)

Dear Osmond,

### **IP Interconnection – Schedule 3 Investigation**

Please find enclosed InternetNZ's submission in response to Commissioner Anita Mazzoleni's letter of 6 May 2009, seeking feedback on whether the Commission should commence a Schedule 3 investigation into IP Interconnection issues.

The Society is conducting further work on this issue and will forward that to the Commission when it is complete. We anticipate that this will be of value to the Commission regardless of whether a Schedule 3 investigation is commenced or not.

With many thanks for your consideration,

Yours sincerely,



Keith Davidson  
**Executive Director**

For further information contact:

Jordan Carter  
Deputy Executive Director  
+64 4 495 2118 / [jordan@internetnz.net.nz](mailto:jordan@internetnz.net.nz)



POST P.O. Box 11-881, Wellington, New Zealand  
PHONE +64 4 495 2119  
FAX +64 4 495 2115  
EMAIL [office@internetnz.net.nz](mailto:office@internetnz.net.nz)  
WEB [www.internetnz.net.nz](http://www.internetnz.net.nz)

## 1. Summary

- 1.1 InternetNZ considers that regulation of IP Interconnection, in the broad sense outlined below, is necessary.
- 1.2 However, there are benefits in seeking to achieve sector-wide agreement on as many issues as possible. We therefore suggest some ways in which this might be achieved, although ultimately regulation is required. We propose that innovative solutions should be sought to:
  - (a) Reduce cost and time markedly, as a cost benefit analysis would show;
  - (b) Minimise the need for regulatory intervention as stakeholders sort out and agree more issues;
  - (c) Produce better economic outcomes.
- 1.3 InternetNZ plans to lodge a further submission expanding on the matters raised in this submission next week.

## 2. The current approach to IP Interconnection is too narrow

- 2.1 Of necessity, the interconnection issue is not just about the exchange of traffic at a point of interconnection (POI). It raises issues as to transit, and termination with the end user as well. For example, in the PSTN world, voice interconnection includes not just exchanging traffic at the POI, but also termination with the receiver.
- 2.2 Yet the IP Interconnection debate in New Zealand is marked by a more limited approach, most explicitly demonstrated by the two specified IP I/C services listed in the operational separation undertakings. By definition those services terminate in a “no-man’s-land”: at the first switch on the Telecom side of the POI<sup>1</sup>. This does not deal with the path between that switch and the end user. Yet, in the IP world, as the European Regulators Group’s 2008 report confirms, that path remains a termination monopoly (just as it is for legacy telephony (fixed line and mobile)).
- 2.3 The European Regulators Group recognises the need to take this broader approach to IP Interconnection in its 2008 report:<sup>2</sup>

*Interconnection is the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking. The terms interconnection or interconnection services used subsequently include any additional agreements related to interconnection such as supply, transit or termination, in addition to the actual traffic handover at the point of interconnection, because these aspects are dealt with together with network interconnection in terms of market regulation.*

- 2.4 In terms of the breadth of review and regulation of IP Interconnection, InternetNZ agrees with the TCF’s and Telecom’s initial approach to broaden the review beyond the two services named in the Undertakings. As we note below, regulation is required at some point on all IP Interconnection services and the time to start the process is now.

---

<sup>1</sup> See the definition of the two services in Clause 1 of the Undertakings

<sup>2</sup> At Page 5

### 3. Reasons to have the Schedule 3 investigation

- 3.1 Here we set out some of the reasons why regulation is needed.
- 3.2 First we acknowledge that much positive work has been done by the TCF working party and this will be valuable going forward, even if, on a number of issues, the position reached so far appears to remain unresolved.
- 3.3 The working party's draft report indicates that wide areas of difference remain between the participants. Particularly importantly, it is readily apparent that the working party has not had the benefit of sufficient third party advice such as economic analysis. For example, a highly controversial solution is proposed to what is regarded as one of the most intractable problems in telecoms: interconnection. This problem is no less intractable with IP Interconnection. Yet there is little analysis in the draft report as to why there should be such a radical change from how interconnection has been handled in the past.
- 3.4 To take a simple example; the working party's draft report makes no reference to the important 2008 ERG report. That is a clear sign that the analysis has not been anywhere near as comprehensive as it should be on such important issues. There are also the signs, often seen in the New Zealand regulatory debate, of the difficulty of smaller players contributing, leading to a distorted position in favour of other parties. As with interconnection traditionally (and there is little reason for change), those with market power have strong incentives to exercise that power in this context.
- 3.5 Further, IP Interconnection is not just about fixed line: this is an issue that also affects mobile operators with market power (this is, after all, another facet of the Bill and Keep debate seen in relation to mobile termination rates).
- 3.6 There are therefore formidably different interests between those with market power and those without. Early intervention by the Commission should seek to level the playing field.
- 3.7 InternetNZ anticipates strong opposition to regulatory steps by those with market power, for the reasons just explained. In view of the limited information and position of the smaller players, we expect limited submissions from them. This is a common dynamic in the industry, and should not deter the Commission from acting firmly.
- 3.8 Importantly, this is an issue that has implications beyond the Telco service providers and the TCF. Resolution without consideration of consumer welfare issues is risky. Additionally, IP Interconnection affects, for example, content providers, who are not at the table. Who pays for traffic over the network (e.g. the content providers or the networks and their customers) is a key part of the IP Interconnection debate. As noted above, focussing only on what happens at the point of interconnection does not deal with all relevant IP Interconnection issues. As was controversially said by Ed Whitacre, CEO of SBC (now AT&T):

*Now what [Google, MSN, Vonage, and others] would like to do is use my pipes free, but I ain't going to let them do that because we have spent this capital and we have to have a return on it. So there's going to have to be some mechanism for these people who use these pipes to pay for the portion they're using. Why should they be allowed to use my pipes? The Internet can't be free in that sense, because we and the cable companies have made an investment and for a Google or Yahoo! or Vonage or anybody to expect to use these pipes [for] free is nuts!*

#### **4. TCF cannot resolve all issues**

- 4.1 Whatever the merits of the TCF approach, it cannot resolve all issues and therefore regulation is necessary. We give two examples.
- 4.2 First, the TCF concludes it cannot deal with price issues as that would be collusive under the Commerce Act. Therefore regulation, or some other solution beyond the TCF, is needed in any event, whether there is a Bill and Keep or a payment solution.
- 4.3 Second, the operational separation undertakings (e.g. as to EOI) do not apply unless there is a determination or a registered undertaking in place. For that to happen there must first be a service in Schedule 1. Therefore regulation is necessary if equivalence is to be carried into the IP Interconnection environment.
- 4.4 That is so despite the inclusion of two services and the consultation process in the Undertakings:
  - (a) The Undertakings only apply in any material way if there is a determination or registered undertaking for the service. Clause 6.1 states this, and, further, EOI only applies where Telecom is required to provide a Relevant Service (that is, only where there is a determination or registered undertaking under Clause 6.1).<sup>3</sup>
  - (b) Therefore, even though IP Interconnection services are currently within “Relevant Wholesale Services” (under Clause 45.2 (a) (v)), or may become Relevant Wholesale Services (under Clause 45.2 (a) (ii)), the Undertakings do not apply to them until there is a determination or registered undertaking.
- 4.5 Significantly, the Undertakings apply if there is a registered undertaking (which is something that occurs within a Schedule 3 investigation). This gives the opportunity for stakeholders to agree an outcome and encapsulate that in an undertaking which has stakeholder approval.
- 4.6 In looking at solutions we come back to that point.

#### **5. Solutions**

- 5.1 While regulation is necessary, this also comes at a cost (such as the lost benefits of industry agreement). No solution is perfect although a solution via TCF alone will not be sufficient.
- 5.2 Are there ways to achieve the benefits of both, while also reducing the need for regulatory input? We consider that stakeholders and the Commission should actively seek out solutions, recognising that regulation is ultimately necessary. InternetNZ would welcome the opportunity to proactively support the Commission and stakeholders in seeking innovative solutions.
- 5.3 The ability to have a registered undertaking, backed up by stakeholder support, provides one way to achieve negotiated outcomes against a regulatory backdrop. This is also consistent with the scheme of the regulatory regime, designed to achieve resolution against a regulatory backdrop.

---

<sup>3</sup> As the definition of EOI at Clause 1.2 notes, EOI applies only to services where Telecom is required to provide a Relevant Service, and under Clause 6.1, that is only a service under a determination or registered undertaking.

- 5.4 As happened with LLU, InternetNZ supports stakeholders agreeing as many issues as possible. At a minimum, technical interconnection issues are examples. But much more can be done.
- 5.5 Particularly important will be to enable the parties to have full information including strong economic advice and material. The absence of such advice would point to an inadequate treatment of this issue.
- 5.6 One way to achieve this is to simply commence the Schedule 3 investigation. This will bring all the issues to the surface.
- 5.7 InternetNZ would, however, support innovative approaches. These could include:
- (a) The Commission finding a way to fund strong external advice for the use of all stakeholders so that the debate is adequately informed.
  - (b) The Commission supporting or establishing an informal way of facilitating resolution of as many issues as possible.
- 5.8 This is not an issue that can be left only to the TCF. Ofcom has shown a useful example with its NGNUK initiative. Importantly, such an initiative would:
- (a) Probably reduce cost and time markedly, as a cost benefit analysis would show;
  - (b) Minimise the need for regulatory intervention as stakeholders sort out and agree more issues;
  - (c) Produce better economic outcomes.
- 5.9 The initiative does not need to be the same as NGNUK; it could be a variation suitable to New Zealand conditions.
- 5.10 All that can be done within the context of pursuing regulation.
- 5.11 As regulation is inevitable, in our view, we would prefer to see the Schedule 3 process started now. We therefore do not favour a detailed Section 9A review of IP Interconnection (probably as part of the current study) unless:
- (a) The Commission indicates it would consider whether to launch a Schedule 3 investigation, say, 3 months after the Study report comes out;
  - (b) The Study undertakes a detailed review and enables stakeholders to be fully informed. There would be no inefficiency in this as it is work that needs to be done for the investigation anyway.
- 5.12 A further option, aimed at seeking innovative solutions, is for the Commission to hold a meeting or meetings, seeking to achieve agreement as to the way forward. This could be facilitated by an independent party (outside TCF as wider stakeholder interests are involved) if that is easier for the Commission. TCF input would be valuable of course.