

Norwegian Ministry of Transport and Communications  
Department for air, transport and communications  
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Ref: PKS-30830-1  
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## **COMMENTS TO THE DRAFT REGULATION ON ELECTRONIC COMMUNICATIONS NETWORKS AND SERVICES**

We refer to the letter from the Ministry of Transport and Communications dated 4 July 2003.

On behalf of our client, Hi3G Access Norway AS, we hereby submit comments to the proposed Regulation on electronic communications networks and services (the "Ecom-Regulation"). Hi3G was awarded the third 3G concession after the deadline stated in the hearing-letter and we have been granted an extension of the deadline until Tuesday 9 September.

Underlined text is considered confidential and we request that this is not disclosed to the public.

### **BACKGROUND**

- (1) Hi3G is a new entrant in the Norwegian market and will be the only 3G operator without a 2G network and is therefore dependent on obtaining national roaming. **(Ett punktum er unntatt offentlighet, jf offl § 5a jf fvl § 13 nr 2.)**
- (2) The need for regulatory safeguards to ensure adequate access (national roaming and co-location) in the event commercial negotiations fails are vitally important to enable Hi3G to enter the Norwegian market.
- (3) **(Ett avsnitt er unntatt offentlighet, jf offl § 5a jf fvl § 13 nr 2.)**
- (4) During the auction period, the Norwegian Post- and Telecommunications Authority ("NPT") answered several questions relating to national roaming, published on the NPTs website. Hi3G has been satisfied that the answers from the NPT give Hi3G a right to obtain national roaming on cost-oriented terms and conditions. **(Ett punktum er unntatt offentlighet, jf offl § 5a jf fvl § 13 nr 2.)**
- (5) Nevertheless, some of the NPTs answers gives us reason to question whether or not the proposed draft Ecom-Regulation provides a clear and predictable regulation of issues vital to

Hi3G. We therefore request that the Ministry clarify the situation relating to national roaming, co-location/facility sharing and the terms and conditions of such. In our view this necessitates some changes to the draft Ecom-Regulation.

## **CURRENT OBLIGATIONS UNDER THE PUBLIC NETWORK REGULATION AND TERMS OF 2G CONCESSIONS**

(6) The draft Ecom-Regulation does not contain the same ex-ante obligations for providers with significant market power as the existing Regulation on public telecommunications networks and services ("Public Network Regulation") § 4-6 and § 4-7 that regulates national roaming and co-location respectively. The wording of § 3-1 in the draft Ecom-Regulation is not an ex-ante rule since it only states that national roaming is considered to be within the scope of the Ecom-Act § 4-1. We agree with the comments submitted by the NPT that the wording of the Ecom-Regulation § 3-1 first paragraph is not preferable.

(7) The NPT has responded that "[...] *Telenor and NetCom are obliged to meet any reasonable request for such access, ref. §4-6 of the Public Network Regulations, second paragraph, first sentence*" (7 August, Question 1).

(8) We understand that Telenor Mobil and NetComs concessions for 2G and 3G place an obligation to provide co-location. However, the NPT has responded that the substance of the obligation will be interpreted in accordance with § 4-7 of the Public Network Regulation. (7 August, Question 7, 8 and 9). Also, the concession itself refers to § 4-7.

(9) The obligation for providing access at cost based prices (cost orientation) follows from the Public Network Regulation § 3-8 (and § 4-3 for interconnection). The NPT has stated that "[a]ccording to §4-6, second paragraph, ref. §3-8, of the Public Network Regulations, the price of national roaming should be cost oriented" (7 August, Question 4) .

(10) The NPT has stated that "*Price regulation of access to mobile networks have until now been based on the cost orientation requirement, ref. §3-8 of the Public Network Regulations. In new resolutions regarding significant market power, PT will have authority to utilize different forms of regulation of access prices, including cost orientation, ref. §4-9 of the E-com Act*" (7 August, general comment to transition to new regulations).

(11) The obligation to provide access at non-discriminatory terms and conditions follows from § 3-2 of the Public Network Regulation.

(12) Under § 10-6 of the draft Ecom-Regulation the current Public Network Regulation will be repealed from the time the Ecom-Regulation enters into force.

## **CONTINUING THE OBLIGATIONS RELATING TO NATIONAL ROAMING AND CO-LOCATION WHEN THE PUBLIC NETWORK REGULATION IS REPEALED**

(13) The ex-ante provisions in the existing Public Network Regulation applicable to providers with significant market power designated under the now repealed telecommunications Act, shall remain in force until new decisions has been made by the NPT. This follows from the Ecom-Act § 13-2 that implements the Access Directive art. 7. The NPTs answer published on 7 August confirms this, as well as the fact that both existing 2G/3G operators have significant market power.

(14) We also note that the providers designated to have significant market power under the repealed Telecommunications Act, shall be considered to have significant market power also in relation to the new Act.

(15) The NPT has stated that “[t]he transition provision grants PT (The Post and Telecommunications Authority) authority to enforce these obligations until new decisions are made”. The fact that the Public Network Regulation will be repealed makes the NPT’s statement difficult to understand. The legal basis should be clarified so that the statement from the NPT will be enforceable.

(16) In response to questions relating to national roaming, the NPT has stated that “*It is the opinion of PT that there is no significant legal uncertainty associated with the competence of PT to determine the price of national roaming. As mentioned above, existing obligations will continue until new resolutions regarding significant market powers are in place, ref. §13-2 of the E-com Act. PT bases its interpretation on §10-6 of the E-com Act, which grants PT competence to impose remedies for illegal conditions and to determine contractual terms and conditions, also includes remedies for breach of ongoing obligations according to the Telecom Act and the Public Network Regulations. According to Chapter 3 of the E-com Act, in the imposition of obligation for national roaming, PT will be able to choose between different price regulation methods. In other respects, please refer to question 4 above.*”

### **OUR CONCERN – LACK OF CLARITY AND UNPREDICTABILITY**

(17) Hi3G has put much emphasis on the statements from the NPT and Hi3G is in particular concerned that the situation, if the draft Ecom-Regulation is enacted with its present wording, will be unclear. In particular the legal basis for the NPT to decide that the price for national roaming and co-location shall be based on cost (and to set a price) may be unclear since there are no provisions in the existing concession’s terms and conditions and the new Ecom-Regulation that equals the Public Network Regulation § 3-8 (and § 3-2). Furthermore, it is not clear which would be the relevant markets for imposition of these obligations when new decisions by the NPT are made.

(18) Our concern is that the legal basis related to national roaming and co-location, and in particular the enforceability of such obligations, will be unclear since the new Ecom-Regulation does not contain similar provisions as the current Public Network Regulation.

(19) Furthermore, this lack of clarity will enable providers with significant market power to unduly delay the process, in the event that the NPT is called upon to intervene if commercial negotiations fail.

### **OUR PROPOSAL TO REMEDY THE SITUATION**

(20) In order to avoid legal uncertainty and unpredictability we suggest that the provisions regarding national roaming, co-location, cost orientation and non-discrimination in the Public Network Regulation is continued in the new Ecom-Regulation according to the Ecom-Act § 13-2. This should be done by incorporating the obligations in §§ 3-2, 3-8, 4-6 and 4-7 in the Public Network Regulation in the Ecom-Regulation.

(21) The reasons for this solution is as follows:

- Changes and amendments to the new Ecom-Regulation presents the best opportunity to clarify the obligations.
- It gives the most predictable and clear legal basis for such obligations since all obligations are contained in the same Regulation,

- The existing decisions from the NPT cannot be relied on to ensure a clear obligation relating to national roaming and co-location and the terms and conditions of such access.
- If the draft Ecom-Regulation is enacted without changes, the main Regulation will not contain any clear rules. The result is a fragmented and complex legal basis since the obligations will be partly regulated in a) the repealed Public Network Regulation that needs to be enforced under Ecom-Act § 13-2, b) the various parties concessions, c) the existing decisions, and d) future decisions under the new Ecom-Act.
- The imposition of the Access Directive art. 7 will be clearly defined and there will be no doubt as to the interpretation of the Ecom-Act § 13-2 and the NPTs powers to enforce such rules.
- Enforcement of such obligations will be difficult due to the regulatory uncertainty, in particular enforcement by the ordinary courts.

(22) Alternatively the situation could be remedied if the NPT adopts a formal decision, no later than the repeal date for the existing Public Network Regulation, ensuring that the obligations for the 2G concessionaires that were in place at the time Hi3G was awarded the concession (i.e. provision of national roaming and co-location at cost oriented prices and non-discriminatory, transparent and objective terms and conditions (same scope as above))) are continued.

(23) However, the nature of the NPTs answers indicate that it is unclear if such a decision will be based on the new Act or a continuance of the old rules, and if such decision will have to be subject to a public hearing (see Ecom-Act § 9-2). **(Ett punktum er unntatt offentlighet, jf offl § 5a jf fvl § 13 nr 2.)**

## SUMMARY

(24) **(To punktum er unntatt offentlighet, jf offl § 5a jf fvl § 13 nr 2.)** We fear that the Ecom-Regulation will create uncertainty and unclarity as to the obligations for providers with significant market power, in the event Hi3G may be forced to rely upon regulatory intervention to obtain acceptable terms and conditions. Hi3G therefore suggests that the draft Ecom-Regulation should be changed and that the existing ex-ante obligations, as explained by the NPT, are continued. This should be done by incorporating the text of the current Public Network Regulation §§ 3-2, 3-8, 4-6 and 4-7 (at least) in the Ecom-Regulation.

Yours sincerely  
Wiersholm, Mellbye & Bech, advokatfirma AS

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