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COMMERCE COMMISSION

Decision No. 447

Determination pursuant to the Commerce Act 1986 in the matter of an application for clearance of a business acquisition involving:

TELSTRA CORPORATION LIMITED OR TELSTRASATURN LIMITED

and

CLEAR COMMUNICATIONS LIMITED

The Commission:	PR Rebstock D Curtin PJ Taylor
Summary of Application:	The acquisition by Telstra Corporation Limited or TelstraSaturn Limited of the entire issued share capital of CLEAR Communications Limited or the business conducted by CLEAR Communications Limited.
Determination:	Pursuant to section 66(3) of the Commerce Act 1986, the Commission determines to give a clearance for the proposed acquisition.
Date of Determination:	7 December 2001

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THE PROPOSAL

1. On 7 November 2001 Telstra Saturn Limited (TSL) registered a notice with the Commission seeking clearance under s66 (1) of the Commerce Act 1986 for the acquisition by Telstra Corporation Limited ("Telstra"), TSL, or a subsidiary company of either Telstra or TSL, of the entire issued share capital of CLEAR Communications Limited ("CLEAR") or the business conducted by CLEAR.

THE PROCEDURES

2. Section 66(3) of the Act requires the Commission either to clear or to decline to clear a notice given under section 66(1) within 10 working days, unless the Commission and the person who gave notice agree to a longer period. Two extensions of time were sought by the Commission and agreed to by the applicant. Accordingly, a decision on the application was required by 7 December 2001.

3. In its application, TSL sought fact confidentiality until 12 November 2001. An order granting fact confidentiality until 12 November 2001 was made. An extension of fact confidentiality until 15 November 2001 was sought by TSL and granted by the Commission. TSL also sought confidentiality for specific aspects of the application. A confidentiality order was made in respect of the information for a period of 20 working days from the Commission's determination notice. When that order expires, the provisions of the Official Information Act 1982 will apply.

4. The Commission's determination is based on an investigation conducted by staff.

5. The Commission's approach is based on principles set out in the Commission's *Practice Note 4*.[1]

THE PARTIES

TSL

6. TSL was incorporated in New Zealand on 19 July 1999. Its shareholders are Austar United Communications Limited, Telstra Holdings Pty Limited and Saturn (NZ) Holding Company Pty Limited.

7. TSL currently employs more than 900 staff. It offers voice, broadband and narrowband Internet, data, wireless, and cable TV services to residential and business customers. TSL also runs the internet service provider (ISP) Paradise.net, which has an estimated [ ] customers and owns a web design company, Zivo.

8. TSL has built fibre optic networks in Wellington and Christchurch and prior to the date of the application, had taken steps to obtain resource management consent to

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[1] Commerce Commission, *Practice Note 4: The Commission's Approach to Adjudicating on Business Acquisitions Under the Changed Threshold in Section 47 – A Test of Substantially Lessening Competition*, May 2001.

build a network in Auckland. It has recently completed a submarine fibre optic cable connecting Auckland, Wellington and Christchurch that carries voice and data traffic.

9. TSL made [ ] in the last financial year.

CLEAR

10. CLEAR was incorporated in New Zealand on 1 August 1990. The sole shareholder of CLEAR is Newgate (NZ) Holdings Limited, which is incorporated in New Zealand and is a directly wholly owned subsidiary of BT (Netherlands) Holdings B.V.

11. BT has an extensive worldwide presence with operations in more than 30 countries with joint ventures and wholly owned subsidiaries in Europe, Asia Pacific and the Americas. CLEAR is part of BT's broadband division, BT Ignite.

12. CLEAR employs more than 770 people. It offers a range of voice, data, broadband and narrowband Internet and e-commerce services. It owns CLEARNet and Zfree ISPs. CLEAR has fibre optic networks in the CBDs of Auckland, Wellington, and Christchurch.

13. CLEAR owns a fibre-optic backbone system that carries voice and data traffic nationally. It also has a digital microwave broadband network.

14. CLEAR’s turnover for the previous financial year was [ ].

OTHER INDUSTRY PARTICIPANTS INTERVIEWED

Telecom New Zealand Limited (Telecom)

15. Telecom competes in every market that TSL and CLEAR operate in. It is a wholly owned subsidiary of Telecom Corporation of New Zealand Limited. Telecom is a supplier of a broad range of telecommunication services in New Zealand including fixed line and mobile voice, data, wireless, broadband and narrowband Internet, and wireless services to business and residential customers. It owns the Xtra ISP.

16. Telecom owns fibre-optic, wireless and copper based networks throughout the New Zealand providing both local access and backbone capacity.

17. Telecom has 5717 employees in New Zealand. Its turnover for the half-year ended 31 December 2000 was $2.673 billion.

Broadcasting Communications Limited (BCL)

18. BCL is a wholly owned subsidiary of TVNZ and functions as its engineering and linking network arm. Approximately [ ] is derived from telecommunications. It owns a high capacity microwave radio transmission backbone which extends from Whangarei to Invercargill with a core backbone from Auckland to Dunedin. It also has access to some fibre optic transmission capacity through an agreement with CLEAR.

19. BCL's major customers are telecommunications network operators such as [ ], and some niche operators such as [ ] and some ISPs.

WorldxChange

20. WorldxChange, which commenced operations in New Zealand in 1996, was at that stage a wholly owned subsidiary of WorldxChange Communications Inc. It is now locally owned. Its core business is tolls and it offers national and international toll services throughout New Zealand. It has [ ]

UnitedNetworks Limited (UNL)

21. UNL is a network infrastructure company that owns and operates networks that carry gas, electricity and telecommunications. Its main shareholder is Utilicorp NZ Ltd (70.2%). Its net profit after tax in the last financial year was [ ].

22. In February 2001 UNL completed fibre optic networks in the Auckland and Wellington CBDs. These were laid out in the existing network of gas reticulation mains that UNL acquired when it purchased Orion. It identified 170 buildings in each CBD and designed the networks to pass each of those.

Walker Wireless Limited (Walker Wireless)

23. Walker Wireless is a broadband fixed wireless operator. It has points of presence (POPs) in Whangarei, Auckland, Tauranga, Hamilton, Napier, Wanganui, Palmerston North, Wellington, Christchurch and Dunedin. It has approximately 1000 customer sites, and its main customers are businesses including [ ]. It also provides some residential services and wholesales wireless access to other carriers such as [ ].

Radionet Limited (Radionet)

24. Radionet is a broadband fixed wireless operator and an ISP. It has POPs in Whangarei, Auckland, Pukekohe, Rotorua, Palmerston North, Christchurch and Queenstown. Its annual turnover is [ ]. It focuses on providing wireless services to small to medium enterprises, primarily retailers and has approximately [ ] subscribers. Its largest customer is [ ].

CityLink Limited (CityLink)

25. CityLink is a network access provider. It provides two network access products – dedicated private fibre access circuits and links which it leases to customers, and broadband public local area network (LAN) ethernet services which provide high speed network connections between Internet users and ISPs. CityLink has installed fibre optic cable networks in the Auckland and Wellington CBDs. Its main customers are Government departments and businesses such as banks. CityLinks's annual turnover is [ ]. CLEAR owns 25% of the shares in CityLink and has two directors on its board. TSL owns 1.3% of CityLink.

The Internet Group Limited (IHUG)

26. IHUG provides various telecommunication products to consumers. It is an ISP, a toll provider, and provides ISDN, ADSL, Frame Relay and wireless broadband products. It has approximately [ ] internet customers.

TransPower New Zealand Ltd (TransPower)

27. TransPower owns and operates New Zealand's high-voltage electricity transmission grid. Some parts of that network are leased to [ ]. It owns a fibre optic network which runs from Haywards to Benmore. It also owns an extensive microwave transmission network that covers most of New Zealand.

INDUSTRY BACKGROUND

28. The telecommunication industry or various sections of it have been described in detail in several Commission decisions. Accordingly only a brief description of the parts of the industry relevant to this application follows.

Telecommunications Services

Fixed Voice Services

29. Fixed voice services include local, long distance and international calls, toll free calls, and fixed to mobile calls. Local call services are supplied either through a fixed connection or through a fixed wireless connection. Fixed wireless has some shortcomings including cost to the consumers and the requirement for line of sight. However, technological advances are about to result in fixed wireless that does not require line of sight.

30. Provision of toll-free calls involves an intelligent network that sits "on top" of the telephone network. It is a data base that ascertains what the 0800 number is associated with, where it should be sent and so on.

Internet Services

31. Internet services include narrowband and broadband access, and web hosting. Narrowband internet services are primarily provided by way of a dial-up connection. Broadband tends to be based around always on, high bandwidth, and high security connectivity. There are more than 70 ISPs in New Zealand at present. Some provide narrowband, some broadband, and some provide both.

Data Services

32. This includes private data network services such as leased lines, frame relay, ATM and managed IP services, and public data network services. Data services may be switched or dedicated. A switched service uses a dial-up connection that is only available for a limited period of time. These services are used by customers who do not require a permanent connection, for example where data can be transmitted in intermittent bursts of varying volumes. A dedicated service is based on a dedicated line that is continuously and exclusively available to a particular customer.

33. The basic components of a data circuit are essentially wholesale services used in the production of retail data services. To provide such services, competing carriers require access to the various constituent parts of an “end-to-end” data circuit. The “local access” component of a data circuit refers to the physical connection between a customer and a local exchange. Such a connection may be achieved in a number of ways, for example over standard copper telephone lines, fibre optic lines, or through the use of wireless or satellite technology. The backbone is larger transmission pipes that run between exchanges and carry data gathered from smaller lines that interconnect with it.

Mobile Services

34. Mobile services include cellular access and call services.

Types of Service Providers

35. Many of the industry participants differ in the nature of the services they provide. Some important distinctions include:

- *Facilities based v services based* – facilities based carriers provide services by directly connecting customers to their own networks. Other carriers with less substantial infrastructure rely on obtaining access and transmission services from facilities based carriers.

- *Wholesale v retail* – some carriers mainly provide wholesale services, some offer only retail services, while others are fully integrated and offer a range of wholesale and retail services.

- *Business v residential* – some carriers focus on business customers while others offer services to both the business and residential markets.

- *Full service v narrower focus* – some carriers focus only on mobile services, others on services from fixed networks, some on wireless services only, while many offer services using a variety of delivery platforms.

Future Developments

36. The speed with which telecommunications technology is developing means that the industry is undergoing significant change. Examples of these changes include:

- The current system of voice services over the PSTN is expected to be gradually replaced by voice over internet protocol (VoIP) which will result in significantly lower call costs. At present, VoIP is not used to any great extent because of quality issues.

- Demand for data traffic is increasing significantly with a resultant demand for increasing bandwidth.

- Increasing bundling of products such as local calls, tolls, internet access and pay TV.

MARKET DEFINITION

37. The Act defines a **market** as:

> *. . . a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.*

38. For the purpose of competition analysis, a relevant market is the smallest space within which a hypothetical, profit-maximising, sole supplier of a good or service, not constrained by the threat of entry, could impose at least a small yet significant and non-transitory increase in price, assuming all other terms of sale remain constant (the '*ssnip* test'). For the purpose of determining relevant markets, the Commission will generally consider a *ssnip* to involve a five percent increase in price for a period of one year.

39. It is substitutability at competitive market prices which is relevant in defining markets. Where the Commission considers that prices in a given market are significantly different from competitive levels, it may be necessary for it to assess the effect of a *ssnip* imposed upon competitive price levels, rather than upon actual prices, in order to detect relevant substitutes.

40. This point is of particular relevance in defining markets within the telecommunications industry. For example, in most areas throughout New Zealand, Telecom is the only supplier of residential local access and local call services. Basic line rental in these areas is priced at around $36 per month. It is possible that this price differs from that likely to prevail in a competitive market.[2] Indeed, in those areas where TSL has established a local residential network, line rentals appear to have dropped to around $30 per month. In other areas, such as higher cost rural regions, prevailing residential line rentals may be below the competitive price. The application of a *ssnip* to a price that significantly departs from the competitive level may result in an inappropriate market definition which captures products or regions that are not genuine economic substitutes.

41. However, for the markets relevant to this application – namely those in which there is some horizontal aggregation – there appears to be some degree of competition, in which case observed prices could be taken as a proxy for competitive prices.

42. The Commission will usually seek to define relevant markets in terms of four characteristics or dimensions:

- the goods or services supplied and purchased (the product dimension);
- the level in the production or distribution chain (the functional level);
- the geographic area from which the goods or services are obtained, or within which the goods or services are supplied (the geographic extent); and
- the temporal dimension of the market, if relevant (the timeframe).

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[2] It should also be noted that Telecom's pricing of residential local access is largely determined by the Kiwi Share Obligations.

43. The Commission will seek to define relevant markets in a way that best assists the analysis of the competitive impact of the acquisition under consideration. A relevant market will ultimately be determined, in the words of the Act, as a matter of fact and commercial common sense.

44. Where markets are difficult to define precisely, the Commission will initially take a conservative approach. If the proposed acquisition can be cleared on the basis of a narrow market definition, it would also be cleared using a broader one. If the Commission is unable to clear the proposed acquisition on the basis of the narrower market, it will be necessary to review the arguments and evidence in relation to broader markets.

45. In the application, the following markets are submitted:

Retail Markets

- Local access business
- Local access residential
- National calls
- International calls
- Calls to cellular networks
- National toll-free
- High speed data
- Narrowband internet
- Broadband internet
- Mobile

Wholesale markets

- Interconnection – originating and terminating access
- Local access business
- Local access residential
- High speed data
- International internet connectivity

46. The applicant has argued that the actual product dimensions are likely to be somewhat broader. In particular, there are unlikely to be separate markets for national calls, international calls, and calls to cellular networks. However, the applicant notes that it has adopted a conservative approach and has put forward separate markets for each.

47. In terms of the functional level, the applicant has:

> "conservatively assumed a distinction at the functional level between wholesale and retail markets. The wholesale markets are arguably best viewed as part of integrated wholesale/retail markets (with the possible exception of interconnection). As noted below, however, there appear to be no SLC concerns in distinct wholesale markets."[3]

48. There is a high degree of vertical integration in the telecommunications industry, and this may blur any functional distinction. However, the Commission believes that such a distinction may be justified for a number of reasons.

49. First, despite the vertically integrated nature of the industry, there are important transactions that take place between carriers beneath the retail level. As noted by the applicant, interconnection is a critical feature of the industry, as there are a number of different networks over which telecommunication services are provided. The need for customers on one network to be able to communicate with customers on another network ("any-to-any connectivity") means that network operators must interconnect with one another.

50. In addition, there are other wholesale transactions. For example, under an agreement recently negotiated, [ ]. CLEAR and TSL also purchase components of Telecom's network in order to be able to provide data services to retail customers.

51. Furthermore, there is also some reselling that takes place, for example where a carrier purchases a complete data circuit from Telecom at a wholesale price, and then resells that circuit to a retail customer. Another example is the reselling by both CLEAR and TSL of Vodafone's mobile service.

52. Similar points have been made by the ACCC, which noted that:

> "in some cases the vertical structure of an industry will be indicative of the relative efficiency of market coordination vis-à-vis intra-firm coordination. However, for recently deregulated industries, where the industry has traditionally been organised as a vertically integrated government-owned monopoly, it is difficult to draw conclusions about the efficiency of such a structure or its future sustainability.
>
> The development of competition since deregulation … suggests that entry is likely to occur at several levels by both integrated and non-integrated service providers. For instance:
>
> - In order to terminate calls made to end-users connected to other networks, service providers … acquire … terminating services from other service providers.
> - Service providers operating long distance transmission networks purchase originating and terminating services … in order to form end-to-end carriage

[3] Application, Page 9.

services that are supplied as wholesale services to service providers or as retail services to end-users.

- Some service providers focus on performing retail activities … by purchasing wholesale call services from carriers."[4]

53. The Commission therefore believes that it is appropriate to make a distinction between the retail and wholesale functional levels.

54. The applicant contends that all of the above markets are national, although it recognises the possibility of sub-national markets in some cases, based on the level of network competition. For example, the applicant has noted that there may be an Auckland metro retail market for local access business. Again, this narrower market definition has been included in the application.

55. The market definitions proposed in the application are now discussed.

The Retail Market for Residential Local Access

56. The applicant has proposed that there is a retail market for residential local access. Residential local access refers to the provision of local telephone calls to residential customers. It appears that this market includes both line rental and the actual carriage of calls within a local calling area.

57. The Commission has previously considered this market, for example in the context of investigations into Telecom's pricing of residential line rental in Wellington and Christchurch[5]. In these investigations, the Commission concluded that the appropriate markets were for fixed local telephony services, with particular emphasis on the geographic boundaries being determined by the extent of emerging network competition. At the time, Saturn's residential local network was being rolled out throughout the Wellington and Christchurch regions, and therefore distinct markets were defined around these regions.

58. This approach to the geographic boundaries of telecommunications markets is similar to that taken by the ACCC: [6]

> "Substitutability tests tend to be of limited relevance when delineating the geographical dimensions of telecommunications markets. For example, a local call in one capital city is unlikely to be substitutable for one made in another capital city. Accordingly, in delineating the geographical dimension of telecommunications markets, the Commission looks to factors such as the area over which major suppliers operate to ensure that it describes the relevant arena of competition."

59. With respect to the proposed acquisition, the Commission has therefore considered the extent to which network competition has emerged throughout New Zealand, and

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[4] ACCC: "Declaration of local telecommunications services" (July 1999), page 32.
[5] Commission Termination Report "Telecom's Pricing of Fixed Telephony Services in Lower Hutt" (30 July 1998); Commission Termination Report "Telecom Line Rental Pricing Investigation" (5 March 2001).
[6] ACCC: "Anti-competitive conduct in telecommunications markets – An information paper" (August 1999), page 34.

where appropriate, will use this to identify the relevant geographic markets. This will be particularly important in defining the markets at a wholesale level. At the retail level, the lack of a wholesaling regime for local access in New Zealand has meant that retail local call services have only been provided where the supplier has rolled out its own network, which is then interconnected with competing networks. This suggests that the geographic boundaries of the retail market are likely to mirror those at a wholesale level.

60. However, as the proposed merger does not involve any aggregation in the residential local access market, due to the fact that CLEAR does not supply (and never has supplied) local residential calls, no further consideration is given to this market.

The Retail Market for Business Local Access

61. There is, however, aggregation in the retail provision of local call services to business customers. Both CLEAR and the applicant supply local calls to businesses through their respective local networks. Of the two, CLEAR's local access network is the more comprehensive, covering the CBDs of Auckland, Wellington, and Christchurch, as well as smaller centres such as Whangarei, Hamilton, Rotorua, Tauranga, Gisborne, Napier, New Plymouth, Wanganui, Masterton, and Dunedin. The applicant's local access network is limited to Auckland, Wellington and Christchurch.

62. It therefore appears that the proposed acquisition would result in some aggregation of local call services to businesses in the three major centres. While the applicant believes that there is a national market for local access, it accepts that there may be sub-national markets that reflect competition at the local access (or "local loop") level.

63. The other major issue in relation to local access is the substitutability of other services, in particular mobile telephony, but also newer services such as voice over internet protocol (VoIP).

64. In the past, the Commission has not regarded mobile and fixed telephony as being in the same markets. For example, in its investigation into Telecom's introduction of the 0867 numbering range, the Commission's market definition excluded mobile telephony, and referred to the fact that the Courts had previously adopted a similar position[7]. However, it should be noted that the court decision referred to in that investigation was *Clear v Telecom* (1993), and it is therefore important to test whether the distinction between local fixed and mobile telephony still holds.

65. The applicant has noted that the functionality of a fixed local service and mobile is very similar although not identical. In particular,

> "a cellular connection does not yet enable dial up internet connection but does enable mobility, and is often bundled with other services (eg text messaging)."[8]

66. The key difference, however, is price. The applicant notes that cellular service is usually significantly more expensive than fixed local access. Table 1 summarises the

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[7] Commerce Commission investigation report 99/256 "0867" (29 June 2000), see paragraphs 42 to 49.
[8] Memorandum to Commerce Commission from Simpson Grierson (30 November 2001), page 2.

range of prices of the mobile plans offered by Telecom and the applicant, compared to the price of fixed local business calls.

Table 1: Prices of Mobile and Fixed Local Calls

	Monthly Fee	**Per-minute Charge**		**Free Minutes (per month)**
		Peak	Off-peak	
MOBILE				
Telecom:				
Go Mobile (off-peak)	$14.95	$1.29	$0.49	50 (off-peak)
Go Ahead 750	$300.00	$0.35	$0.25	750 (anytime)
TelstraSaturn				
Daytime 50	$45.00	$0.70	$0.44	50
Daytime 750	$300.00	$0.35	$0.35	750
FIXED LOCAL				
Telecom:				
Local business	$58.42	$0.05	$0.01	n/a

67. The above table indicates that cellular continues to be priced significantly higher than fixed local calls, and therefore may not be a strong economic substitute. This suggests that the Commission previous approach continues to apply. In Australia, the Productivity Commission has noted that:

> " most analyses of competition in telecommunications markets treat fixed and mobile services as separate markets, because while mobile services are the main alternative to fixed local services, they may not be considered close enough substitutes to be included in the same market."[9]

68. However, this may change if the relative price of cellular declines. In this regard, the Commission understands that in Australia, Hutchison has started offering a free local call mobile service. However, given current prices in New Zealand as listed above,

[9] Productivity Commission "Telecommunications Competition Regulation Draft Report" (29 March 2001), page 4.10. The productivity Commission report did refer to comments by Ericsson and Telstra that suggest increasing substitutability between fixed and mobile services.

cellular is not regarded as a substitute for fixed local call services supplied to businesses.

69. One other potential substitute for traditional local call services provided over the PSTN is telephony provided over the internet, referred to as voice over internet protocol (VoIP). VoIP is capable of providing call services over the data network, and is currently provided by some ISPs such as Ihug. However, the Commission understands that there are currently some issues in terms of the quality of VoIP services which limit their substitutability for fixed call services. For example, according to Walker Wireless, there is currently an issue with VoIP in terms of reliability and also latency, which results in delays and echo. The Commission has therefore not considered VoIP to fall within the same market as fixed call services, although it recognises that this may change in the future.[10]

70. The Commission therefore concludes that the relevant markets are as follows:

- the retail market for business local access in the Auckland CBD (excluding mobile);
- the retail market for business local access in the Wellington CBD (excluding mobile);
- the retail market for business local access in the Christchurch CBD (excluding mobile).

The Retail Markets for National Tolls, International Tolls and Calls to Cellular

71. These three markets are considered together, as the applicant has suggested that there may in fact be a single market covering all three call types, although a conservative position of distinct markets has been adopted in the application.

72. In defining the product dimensions of the relevant telephony markets, a demand-side perspective appears to lead to a conclusion that there are separate markets for different call types. [11] For example, a local call to a particular end-user is unlikely to be regarded as a substitute for a long distance call to a different end-user. A *ssnip* applied to a national toll call is therefore unlikely to induce a switch in demand to other types of calls.

73. Service bundling is a common feature of the telecommunications industry. For example, there may be some economies of scope that suggest that a range of services can be most efficiently supplied as part of a bundle. This may have implications for market definition. For example, the current practice of bundling line rentals with local call services indicates that both are provided in the context of a single market.

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[10] A number of parties spoken to believe that within 10 years, VoIP will account for in excess of 95% of voice telephony in New Zealand. As this technology develops, the distinction between local, domestic long distance, and international toll markets is likely to become increasingly redundant.

[11] The ACCC considers that an examination of demand-side substitution will be unhelpful in determining telephony product market boundaries. See, for example, ACCC: "Declaration of local telecommunications services" (July 1999), pages 36 and 37.

74. The ACCC has observed that a significant proportion of end-users prefer to purchase national and international toll calls from the local call provider.[12] The main advantage from an end-user perspective is the convenience of receiving a single bill and having a single point of contact for service inquiries. However, despite this, the ACCC does not believe that local and long distance calls form a single bundle, but rather are supplied in different markets.

75. A key feature that suggests that separate markets may be appropriate is the ability of end-users to purchase local and long distance call services from different suppliers. As noted in a paper recently commissioned by Telecom: [13]

[

]

76. The telecommunications industry in New Zealand has introduced carrier pre-selection for national and international tolls. Pre-selection, sometimes referred to as non-code access, means that an end-user can purchase local call services from carrier A, and long distance (national and international) calls from a different carrier B without having to dial an access code. This is achieved by storing information at the customer's local exchange that automatically routes toll calls from that customer via the designated tolls carrier. Customers can over-ride their pre-selected choice on a call-by-call basis by dialling the carrier selection number of another carrier.

77. Importantly, carrier pre-selection reduces the costs and inconvenience to customers of switching between telephone operators. The customer does not have to dial a carrier selection code (unless they are over-riding their pre-selected choice). Currently, there is only 'single-basket' pre-selection in New Zealand, where the customer selects one provider to supply all the pre-selectable services (national and international tolls). However, the Commission understands that multi-basket pre-selection is soon to be introduced, which will allow different carriers to be selected for national tolls and international tolls.

78. Fixed-to-mobile carrier pre-selection has only recently emerged in New Zealand. CLEAR has informed the Commission that a commercial agreement was negotiated with Telecom in September 2000 which provided for fixed-to-mobile pre-selection, and that this is now available to all carriers. Fixed-to-mobile pre-selection is also listed as a designated service in the current version of the Telecommunications Bill. Fixed-to-mobile has been a pre-selectable service in Australia since December 1998.

79. Pre-selection suggests that there may be separate markets for each type of call. Specifically, the degree to which service bundling complicates market definition is mitigated to some extent by the availability of carrier pre-selection.

80. However, it is also useful to examine the issue of market definition from the supply-side. The Productivity Commission in Australia has suggested that national,

[12] ibid, page 37.

[13] "Review of Issues Relating to Market Definitions in Telecommunications", Charles River Associates (30 November 2001), page 3.

international and fixed-to-mobile calls could be considered to be provided in the same market:

> "the long distance telephony market comprises two sub-markets: the national long distance market and the international services market. It is also sensible to consider fixed-to-mobile calls in this market. As AAPT pointed out:
>
> > … the fixed-to-mobile service has generally been defined as part of the mobile telephony market, when in fact it appears to belong more naturally to the fixed telephony market since these calls originate in the fixed network."

81. This type of argument would appear to be behind the applicant's contention that national tolls, international tolls, and calls to cellular are all provided in the same market. In support of this contention, CLEAR has noted that the typical pattern of new entry into telecommunications is to focus initially on international toll calls, and then to progress into national toll calls. This progress involves a relatively small increment in cost, and so international toll service providers could be regarded as near entrants with respect to national tolls. This view is consistent with that expressed by WorldxChange, who entered the tolls market in New Zealand in the mid-1990s.

82. However, a move into fixed-to-mobile would, according to CLEAR, be a more discrete step due to the high termination charges prevailing in the mobile market. Similar comments were made to the Productivity Commission: for example, that the introduction of fixed-to-mobile carrier pre-selection has meant that the provision of these calls is now subject to the same competitive pressures as fixed network long distance calls; however, high mobile termination charges suggest a lack of competition for fixed-to-mobile services[14].

83. The Commission therefore accepts that it may be appropriate to draw a product boundary that encompasses both national and international toll calls, while there may be less justification for the inclusion of fixed-to-mobile calls. However, given the applicant's approach in defining relatively narrow markets, the Commission has, for the purposes of assessing the proposed acquisition, adopted a separate market for each call type.

The Retail Market for National Toll-Free Services

84. For most telephone calls, the party making the call pays for the call. However, in the case of toll-free services, the recipient pays for the call. As a result, toll-free services are used by businesses to encourage customers to call them from anywhere around the country. There are a range of additional features available as part of a toll-free service which enhance its value as a marketing tool. These include *inter alia* routing, whereby calls made from a particular area or during a particular time of day can be automatically directed to a destination that has been nominated by the customer; name or word numbers, based on the alpha-numeric telephone key pads; and various means of call-analysis which can be used for example to target promotions.

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[14] Productivity Commission "Telecommunications Competition Regulation Draft Report" (29 March 2001), pages 4.26-4.27.

85. The applicant has adopted a similar view:[15]

> "the applicant does not consider that there is any arguable substitute {for national toll free services}. Toll free numbers provide a unique functionality."

86. The provision of toll-free services is similar to the provision of national toll calls, in that both types of call are carried over the same infrastructure. There is, however, one important difference. Toll-free services are based on 'Intelligent Network' (IN) architecture that enables the additional functionality, such as geographic routing, to be provided. This added network intelligence takes the form of software installed at exchanges that identifies the number being called and follows any instructions associated with that call. Carriers have informed the Commission that the necessary IN investment would be a considerable expense for a new entrant who, for example, had previously supplied only national toll calls.

87. Telecom and CLEAR recently signed an agreement that provides for the transfer of toll-free numbers from one carrier to the other. For example, customers who have historically used Telecom's 0800 service can now switch to CLEAR and retain the same 0800 number, thus avoiding the costs and inconvenience of changing numbers. This is currently being achieved through an interim call forwarding arrangement, although according to CLEAR, full toll-free number portability is expected to be in place by December 2001/January 2002[16]. Toll-free number portability is also a designated service under the new Telecommunications Bill.

88. In light of the above, the Commission has accepted that there is a distinct retail market for the provision of toll-free services.

The Retail Market for High-Speed Data Services

89. The applicant contends that there is a retail market for the provision of high-speed data services in New Zealand. In terms of testing the product dimensions of this market, the applicant notes that:[17]

> "the potential substitute with regard to this market is broadband internet service. Broadband internet, however, is not yet a good technical substitute because of speed and security issues. However, the technologies are frequently very similar, if not identical.
>
> The distinction is that broadband internet service provides a fast connection to the internet. The transport of data is not, however, controlled from the beginning of its journey until the end. High speed data services route data quickly and securely directly from one site to another.
>
> The speed and security of broadband internet therefore does not match that of high speed data services. The basic function though is the same (ie transferring data from one point to another). That being so, given a small change in relative prices, there may be some migration among buyers. On the supply side there is also potential for sellers to divert production from one service/product to the other.

[15] Memorandum to Commerce Commission from Simpson Grierson (30 November 2001), page 5.
[16] CLEAR website.
[17] Memorandum to Commerce Commission from Simpson Grierson (30 November 2001), page 5.

> The applicant's view is that this could be significant, but it is virtually impossible to quantify this."

90. It is interesting to note that the Productivity Commission appears to have placed the provision of broadband internet services to businesses within the data market, while accepting a separate market for residential broadband access: [18]

> "the broadband services market has residential and business segments. The business segment overlaps with the data services market … Here, the focus is on broadband services to the residential market."

91. Telecom has noted that the definition of high-speed is constantly changing. In the past, high-speed was regarded as being 64kbps and above, although it may be more appropriate to define high-speed now as anything over 1Mbps. Retail high-speed data services are supplied through services such as frame relay or ADSL. However, retail demand is driven by a particular functionality and does not distinguish between technologies used to meet that demand.

92. The Commission has previously considered whether the data services market can be broken down further into separate economic markets for switched and dedicated data services. A switched service uses a dial-up connection which is only available for a limited period of time. Data is transmitted in intermittent bursts of varying volumes. In contrast, a dedicated service provides the customer with an 'always on' and exclusive connection. Although switched services may be unsuitable for some applications such as video, the Commission concluded that there is likely to be sufficient migration between switched and dedicated services in response to a change in relative prices to suggest that a single market is appropriate. The majority of the parties consulted accepted that there is a single high-speed data market.

93. The Commission accepts that there is a retail market for the provision of high-speed data services.

The Retail Markets for Narrowband Internet Services and Broadband Internet Services

94. The retail market for narrowband internet services is generally accepted as involving the provision of internet access through a dial-up connection, whereas broadband internet services involve a permanent, high-speed connection. In both cases, ISPs provide customers with access to the internet. In order to do this, an ISP will establish a POP on the internet, using equipment such as routers and servers, as well as line access to the customer. Larger ISPs tend to have their own high-speed access lines, while others will lease access lines from a telecommunications carrier.

95. Most parties accepted that narrowband internet services are distinct from broadband internet services, although the applicant has indicated that there may be some substitutability:

> "each is a potential substitute for the other. Both serve generally the same purpose. Broadband is faster and more reliable. It may be that, given a change in

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[18] Productivity Commission "Telecommunications Competition Regulation Draft Report" (29 March 2001), page 4.42.

> relative pricing, there would be movement on the demand side. Sellers can also relatively easily divert production from one product/service to the other." [19]

96. This suggests that there may be a single market, encompassing both narrow-band and broadband internet services. However, the applicant goes on to say that it:

> "suspects that a *ssnip* in either market would be profitable, suggesting that the two are distinct markets. Convergence is evident though, and the applicant expects it to continue until narrowband internet becomes obsolete." [20]

97. A number of service providers supply both narrowband and broadband internet; for example, according to the application, Telecom, CLEAR, TSL, Ihug, Voyager and AsiaOnLine have historically provided both narrowband and broadband internet services. Significant growth is expected in relation to broadband internet services, and, given the applicant's above comment with respect to convergence, it may be that a single internet market, based around broadband, emerges. However, for the purposes of assessing the proposed acquisition, the Commission has accepted that there are separate retail markets for narrowband and broadband internet services.

The Retail Market for Mobile Telephony

98. As noted earlier, the Commission is of the view that there remains a separate market for the provision of mobile telephony. Both CLEAR and the applicant have a presence in the mobile market through reselling arrangements with Vodafone. However, as the level of aggregation appears to very small, no further consideration is given to this market.

The Wholesale Market for Interconnection (originating and terminating access)

99. This is the wholesale market in which originating and terminating access is traded between networks. Originating and terminating access refers to the carriage of calls between customer premises on one network and a point of interconnection (POI) with another network. For example, when a business customer connected to CLEAR's network calls a customer connected to Telecom, CLEAR originates the call by carrying it to the nearest POI. The call may then be handed over to Telecom, who terminates the call.

100. The ACCC has defined origination and termination as follows:[21]

> "The Local PSTN Originating Service is a service for the carriage of telephone calls from customer equipment at an end-user's premises to a point of interconnection, or potential point of interconnection, located at or associated with a local switch and located on the outgoing trunk side of the switch.
>
> …
>
> The Local PSTN Terminating Service is a service for the carriage of telephone calls from a point of interconnection, or potential point of interconnection, located

[19] Memorandum to Commerce Commission from Simpson Grierson (30 November 2001), pages 5-6.
[20] ibid, page 6.
[21] ACCC "Declaration of local telecommunications services" (July 1999), pages 117 and 119.

at or associated with a local switch and located on the incoming trunk side of the switch to customer equipment at an end-user's premises."

101. Competing network operators negotiate agreements with one another, which provide for network interconnection. Under such agreements, calls originating in one network can be handed over to another network for termination. In a report to the Commission on the 0867 investigation, Professor Stephen King made reference to this wholesale interconnection market:[22]

[

]

102. In that case, Professor King concluded that a wholesale market for the purchase and sale of originating and terminating access in New Zealand is likely to be appropriate.

103. The Commission is of the view that this definition continues to be appropriate.

The Wholesale Market for Residential Local Access

104. As alluded to in the earlier discussion of the retail market for residential local access, the proposed acquisition does not involve any aggregation with respect to residential local access, as CLEAR is not involved in the supply of local calls to residential customers. This relates to both the network level (CLEAR does not have any residential local access network) and the retail level (CLEAR does not resell residential local access). Therefore, no further consideration is given to this market.

The Wholesale Market for Business Local Access

105. Local call services supplied to retail business customers are provided through the local access networks of telecommunications companies. The application states that Telecom, CLEAR, and TSL are the only players in the wholesale business local access market in New Zealand, although it also notes that TSL to date has built only very limited local business access network infrastructure.

106. The earlier discussion of the corresponding retail market referred to the likely geographic boundaries based around the extent of emerging network competition in New Zealand. It is this level of competition at the network level that is useful in determining geographic market boundaries at both the retail and wholesale levels. Following that earlier discussion, the Commission believes that there are likely to be distinct geographic markets based around each of the CBDs of Auckland, Wellington, and Christchurch. There may be further sub-national markets throughout New

[22] King, S.P., "Report on potential breach of s.36 of the Commerce Act relating to the Telecom New Zealand 0867 service and Internet Dial-up Charge" (12 July 2000), page 8.

Zealand, but these do not appear to involve any aggregation as a result of the proposed acquisition.

The Wholesale Market for High-speed Data

107. The application refers to a wholesale market for high speed data. Table 2 of the application lists the main players in this market as being Telecom, CLEAR, TSL, UNL, Tangent, CityLink, BCL, Walker Wireless, and Radionet. All of these players own network infrastructure, although the applicant notes that not all provide wholesale access to their networks.

108. The Commission has previously considered the question of data market definition in its investigation into Telecom's pricing of data services. In that investigation, the Commission makes a distinction between local data access networks (sometimes referred to as "data tails") and backbone transmission.

109. Data tails refer to the key connection between a network termination point at a customer site and a network switch housed in a digital exchange. Such a connection may be over a number of media, for example standard copper lines, fibre optic lines, or through the use of wireless radio or satellite technology.

110. Backbone capacity refers to large transmission pipes that run between exchanges. Such capacity is usually provided through fibre optic cables, although transmission also takes place over digital microwave networks.

111. In terms of the players listed in the application, Telecom, CLEAR, and TSL all have both local access networks as well as transmission capacity. Telecom has the most extensive local access network in New Zealand, based largely around its copper "local loops". Telecom also owns a national fibre optic backbone which carries both voice and data traffic.

112. CLEAR also has an extensive fibre- and microwave-based local access network, covering the CBDs of Auckland, Wellington, and Christchurch, with more limited access in smaller centres. CLEAR's backbone runs from Whangarei to Dunedin and includes a fully redundant self-healing ring in the North Island.

113. TSL has a local access network throughout Wellington, parts of Christchurch, and the CBD of Auckland. TSL has recently completed the roll-out of a major fibre backbone from Auckland to Christchurch.

114. Other players have emerged either at a local access level or a transmission level. UNL and CityLink have both built local fibre loops around the CBDs of Auckland and Wellington, while Tangent has also developed a local fibre network in Auckland. Walker Wireless and Radionet have been developing wireless local access networks in the major cities as well as in smaller provincial centres. BCL currently provides intercity microwave-based transmission services through its national network of radio towers.

115. Most parties with whom the Commission has spoken agree that at a wholesale level, there are separate markets for local access and transmission. For example, UNL has submitted that:

"there are separate markets for the operation and management of networks/the provision of network services and the retail supply of various communications products and services.

The network market is divided into:

- transmission – the "backbone" between regional centres. Telecom, Telstra and Clear are the only operators in this market.
- local networks – ie networks in regional centres and CBDs."

116. CityLink also refers to the wholesale market for intercity bandwidth, noting that local loops and backbones are in quite distinct markets. Other parties have pointed to the aggregation in backbone transmission capacity that will result from the proposed acquisition.

117. In a memo provided to the Commission, the applicant accepts that the "wholesale high speed data market could be split into backbone transmission and data tails." [23]

118. Telecom was the only party that disputed the concept of a 'data tail', noting that it sells data circuits on a wholesale basis, and that there is no such product as a "data tail".[24]

119. The tails and backbone components are to a significant extent complementary products. In most cases, both are required in order to be able to provide data services at a retail level. However, the components are not substitutable for one another. A carrier providing only backbone capacity would be faced with considerable sunk costs in attempting to roll out the access component of a data circuit. These sunk costs relate in particular to the laying and ducting of a copper or fibre link through to the customer site.

120. The Commerce Commission's *Practice Note 4* notes that supply-side factors can be considered in the process of market definition. In the context of a supply-side approach, the concept of a market "embraces cross-elasticity of supply (production substitution) but stops short of comprehending that substitution or competition which would require the creation of entirely new capacity for entry." [25]

121. In other words, it is important to focus on 'near entrants'. These are businesses that would be able to quickly enter the market in response to a small but significant increase in price. As such, 'near entrants' "must not require a significant new investment in facilities, especially in sunk costs, as this would take longer to put into effect and would be more akin to what is required of new entrants. Firms in that position could not be considered to be existing competitors in a market."[26]

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[23] Page 7, Memorandum to Commerce Commission from Simpson Grierson (30 November 2001).

[24] Telecom New Zealand's Response to Commerce Commission Questions on TelstraSaturn Limited's Application for Clearance to Acquire Clear Communications Limited, attached to letter from D Knight, Assistant General Counsel, Telecom, to Commerce Commission (30 November 2001), page 6.

[25] Brunt M., " 'Market Definition' Issues in Australian and New Zealand Trade Practices Legislation", in "Competition Law and Policy", Rex Ahdar (ed.), page 131.

[26] Commerce Commission, *Practice Note 4: The Commission's Approach to Adjudicating on Business Acquisitions Under the Changed Threshold in Section 47 – A Test of Substantially Lessening Competition*, May 2001, page 19.

122. The high sunk costs referred to above indicate that supply-side switching between the provision of local access and backbone components is unlikely to be significant in response to a small but significant change in the relative price. This suggests that there are separate markets for local access and backbone capacity.

123. Towards the end of 1999, the Office of Telecommunications (OFTEL) in the United Kingdom initiated a comprehensive review of competition in data markets. As part of that review, OFTEL identified two distinct economic markets at the wholesale level. The first is the market for ‘terminating segments’, which connect the customer site to a Digital Main Switching Unit (DMSU). The second is the market for ‘trunk segments’, which relates to transmission capacity between DMSUs. This distinction is similar to that discussed above.

124. In terms of the geographic dimension of the local access market, the Commission has examined the level of local network competition that has been developing throughout New Zealand. In particular, the network competition that is relevant to the proposed acquisition centres around the main CBDs. As indicated earlier, it is in the CBDs of Auckland, Wellington, and Christchurch where the proposed acquisition would result in some aggregation at the local level. CLEAR also has local access connections in other centres.

125. In terms of backbone, both CLEAR and Telecom have significant transmission capacity, based on national fibre optic networks which include self-healing fibre rings[27]. BCL also has a comprehensive national digital microwave radio (DMR) network. The applicant also has invested in a backbone running from Auckland down the west coast of the North Island to Wellington, across the Cook Strait, and on down the east coast of the South Island as far as Christchurch. While this main trunk could be distinguished from the rest of New Zealand (in a way that the main corridors are distinguished in Australia), the Commission has adopted a national backbone market.

126. The Commission has therefore decided to disaggregate the market definition contained in the application. While the application proposed a single wholesale high speed data market, the Commission believes that a more appropriate definition of the markets is as follows:

- The wholesale market for data access in the Auckland CBD;
- The wholesale market for data access in the Wellington CBD;
- The wholesale market for data access in the Christchurch CBD;
- The wholesale market for backbone transmission in New Zealand.

The Wholesale Market for International Internet Connectivity

127. The applicant has proposed a wholesale market for international internet connectivity. This market relates to the gaining of access to internet portals around the world. Most websites are either hosted or accessible through the United States, and therefore it is

[27] These rings contain “redundant capacity”, which means that in the event of a breakage, transmission can continue around the ring. Although the Applicant does not own a fibre ring, it does lease capacity from the other carriers (in particular, CLEAR), which gives it the protection of a ring configuration.

important for ISPs around New Zealand to have network connections through to the US.

128. In New Zealand, the Southern Cross cable provides connectivity through to the west coast of the US. Telecom is a part-owner of Southern Cross, and CLEAR also owns some capacity on that cable. TSL purchases international capacity through the REACH joint venture between Telstra and PCCW (Hong Kong). TSL is effectively a middleman, onselling its capacity to ISPs. ISPs can also purchase capacity directly from Southern Cross or from other suppliers such as Optus.

129. The Commission accepts the applicant's contention that there is a wholesale market for international internet connectivity. However, there do not appear to be any concerns in this market as a result of the proposed acquisition, and therefore no further consideration is given to this market.

Conclusion on Market Definition

130. The Commission concludes that the relevant markets are as follows:

- the wholesale market for the supply of business local access in the Auckland CBD;
- the wholesale market for the supply of business local access in the Wellington CBD;
- the wholesale market for the supply of business local access in the Christchurch CBD;
- the wholesale market for the supply of originating and terminating access in New Zealand;
- the wholesale market for data access in the Auckland CBD;
- the wholesale market for data access in the Wellington CBD;
- the wholesale market for data access in the Christchurch CBD;
- the wholesale market for backbone transmission in New Zealand;
- the retail market for the supply of business local access in the Auckland CBD (excluding mobile) (the Auckland CBD business retail market);
- the retail market for the supply of business local access in the Wellington CBD (excluding mobile) (the Wellington CBD business retail market);
- the retail market for the supply of business local access in the Christchurch CBD (excluding mobile) (the Christchurch CBD business retail market);
- the retail market for the supply of national toll call services in New Zealand (the national toll retail market);

- the retail market for the supply of international toll call services in New Zealand (the international toll retail market);
- the retail market for the supply of fixed-to-mobile call services in New Zealand (the fixed-to-mobile retail market);
- the retail market for the supply of toll-free services in New Zealand (the toll-free retail market);
- the retail market for the supply of high-speed data services in New Zealand (the high-speed data retail market);
- the retail market for the supply of narrowband internet services in New Zealand (the narrowband internet retail market); and
- the retail market for the supply of broadband internet services in New Zealand (the broadband internet retail market).

COMPETITION ANALYSIS

Substantially Lessening Competition

131. Section 47 of the Act prohibits particular business acquisitions. It provides that:

> A person must not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.

132. Section 2(1A) provides that substantial means "real or of substance". Substantial is taken as meaning something more than insubstantial or nominal. It is a question of degree.[28] What is required is a real lessening of competition that is not minimal. The lessening needs to be of such size, character and importance to make it worthy of consideration.[29]

133. Section 3(2) provides that references to the lessening of competition include references to the hindering or preventing of competition.[30]

134. While the Act defines the words "substantial" and "lessening" individually it is desirable to consider the phrase as a whole. For each relevant market, the Commission will assess:

- the probable nature and extent of competition that would exist in a significant section of the market, but for the acquisition (the counterfactual);
- the nature and extent of the contemplated lessening; and

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[28] *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406, 434; *Mobil Oil Corporation v The Queen in Right of NZ* 4/5/89, International Centre for Settlement of Investment Disputes, Washington DC, International Arbitral Tribunal ARB/87/2 (paras 8.2, 19, 20).

[29] *Dandy Power Equipment Ltd v Mercury Marina Pty Ltd* (1982) ATPR 40-315, 43-888; *South Yorkshire Transport Ltd v Monopolies & Mergers Commission* [ ] 1 All ER 289.

[30] For a discussion of the definition see *Commerce Commission v Port Nelson Ltd*, supra n 6, 434.

✍ whether the contemplated lessening is substantial.[31]

135. In interpreting the phrase "substantially lessening competition", the Commission will take into account the explanatory memorandum to the Commerce Amendment Bill (No 2). The memorandum notes that:

> *"Two of the 3 key prohibitions are strengthened to bring New Zealand into line with Australian competition law, which will facilitate a more economic approach to defining anti-competitive behaviour."*

and, in relation to s47:

> *"This proposed new threshold is the same as the threshold for these types of acquisitions in section 50 of the Trade Practices Act 1974 (Australia)."*

136. For the purposes of the analysis, the Commission takes the view that a lessening of competition and a strengthening of market power may be taken as being equivalent, since they are the two sides of the same coin. Hence, it uses the two terms interchangeably. Thus, in considering whether the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market, the Commission will take account of the scope for the exercise of market power, either unilaterally or through co-ordination between firms.

137. When the impact of enhanced market power is expected predominantly to be upon price, the anticipated price increase relative to what would otherwise have occurred in the market has to be both material, and able to be sustained for a period of at least two years, for the lessening, or likely lessening, of competition to be regarded as substantial. Similarly, when the impact of increased market power is felt in terms of the non-price dimensions of competition, these also have to be both material and able to be sustainable for at least two years for there to be a substantial lessening, or likely substantial lessening, of competition.

The Counterfactual

138. The Commission uses a forward-looking, counterfactual type of analysis in its assessment of business acquisitions, in which two future scenarios are postulated: that with the acquisition in question, and that in the absence of the acquisition (the counterfactual). The impact of the acquisition on competition can then be viewed as the difference between those two scenarios. It should be noted that the status quo cannot necessarily be assumed to continue in the absence of the acquisition, although that may often be the case. For example, in some instances a clearly developing trend may be evident in the market, in which case the appropriate counterfactual may be based on an extrapolation of that trend.

139. According to TSL, the application assumes a counterfactual in which both TSL and CLEAR would continue to operate in New Zealand. However, both parties would likely be very weak competitors and would be faced with [

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[31] See *Dandy*, supra n 5, pp 43–887 to 43-888 and adopted in New Zealand: *ARA v Mutual Rental Cars* [ ] 2 NZLR 647; *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [ ] 2 NZLR 352; *Fisher & Paykel Ltd v Commerce Commission* [ ] 2 NZLR 731; *Commerce Commission v Carter Holt Harvey*, unreported, High Court, Auckland, CL 27/95, 18/4/00.

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140. British Telecom is shifting its focus away from the Asia-Pacific region, and as a result, CLEAR is finding it increasingly difficult to attract new investment. Although CLEAR reported a small profit recently, it appears that a one-off settlement with BCL may have contributed to this result.

141. If the acquisition does not go ahead, TSL believes that the [ ] However, TSL believes that the best possible counterfactual would be that the two parties would continue for the foreseeable future as two weak competitors.

142. The Commission has considered what is likely to happen in the absence of the proposed acquisition. One significant development within the telecommunications industry is the introduction of the new regulatory regime, which designates, for example, interconnection of fixed networks and wholesaling. However, at this stage, it is unclear what the implications of the new regime will be for the parties to the proposed acquisition.

143. The Commission believes that the applicant's approach to the counterfactual is appropriate, and that in the absence of the acquisition, the two parties are likely to continue to have a presence in the New Zealand telecommunications industry, although that presence is likely to be constrained in terms of future network build.

Competition Analysis Principles

144. The Act prohibits business acquisitions that would be likely to have the effect of substantially lessening competition in a market. The Commission makes this assessment against a counterfactual of what it considers would be likely to happen in the absence of the acquisition. In the present case, the counterfactual is considered to involve both parties facing some constraint in terms of new network build. A substantial lessening of competition is taken to be equivalent to a substantial increase in market power. A business acquisition can lead to an increase in market power by providing scope either for the combined entity to exercise such power unilaterally, or for the firms remaining in the market to co-ordinate their behaviour so as to exercise such power.

145. In broad terms, a substantial lessening of competition cannot arise from a business acquisition where there are sufficient competitive constraints upon the combined entity. The remainder of this Decision considers and evaluates the constraints that might apply in each of the defined markets under the following headings:

- existing competition; and
- potential competition from entry.

146. A final section considers several other competition factors relevant to the assessment of the proposed acquisition.

THE WHOLESALE MARKET FOR THE SUPPLY OF BUSINESS LOCAL ACCESS IN THE AUCKLAND CBD

Analysis of Existing Competition

Scope for Unilateral Market Power

Introduction

147. An examination of concentration in a market post-acquisition can provide a useful guide to the constraints that market participants may place upon each other, including the combined entity. Both structural and behavioural factors have to be considered. However, concentration is only one of a number of factors to be considered in the assessment of competition in a market. Those other factors are considered in later sections, as noted above.

148. Market shares can be measured in terms of revenues, volumes of goods sold, production capacities or inputs (such as labour or capital) used. All measures may yield similar results in some cases. Where they do not, the Commission may, for the purposes of its assessment, adopt the measure which yields the highest level of market share for the combined entity. The Commission considers that this will lead to an appropriately conservative assessment of concentration, and that the factors which lead to the other different market share results are more appropriately considered elsewhere during the assessment of the acquisition.[32]

149. In determining market shares, the Commission will take into account the existing participants (including 'near entrants'). This is followed by a specification of the Commission's 'safe harbours', an estimation of market shares, and an evaluation of existing competition in the market. Under the Commission's safe harbours, a business acquisition is considered unlikely to substantially lessen competition in a market where, after the proposed acquisition, either of the following situations exist:

- where the three-firm concentration ratio (with individual firms' market shares including any interconnected or associated persons) in the relevant market is below 70%, the combined entity (including any interconnected or associated persons) has less than in the order of a 40% share; or

- where the three-firm concentration ratio (with individual firms' market shares including any interconnected or associated persons) in the relevant market is above 70%, the market share of the combined entity is less than in the order of 20%.

Existing Competitors

[32] For example, where market share measured in terms of capacity produces a significantly lower share of the market in the hands of participants than a measure in terms of sales volumes, the constraint on a combined entity from that unemployed capacity might be taken into account when identifying near entrants or the constraint from new market entry. In some cases, the model of market power being used may influence the choice as to which market share measure is used.

150. There are only three local access networks on which local call services are supplied to businesses in Auckland. These networks have been built by Telecom, TSL, and CLEAR. Telecom's network is the most extensive, as indicated by the figures contained in Table 2 below. The table shows the estimated distribution of local access business lines in Auckland across the three operators.

Table 2: Local Access Business Lines (Auckland CBD)

	Number (000)	**Share**
Telecom	[ ]	[ ]%
CLEAR	[ ]	[ ]%
TSL	[ ]	[ ]%
Total	**[ ]**	**100%**

151. According to Table 2, the merged entity would account for around [ ]% of the total number of local access business lines in Auckland. This falls within the Commission's second safe harbour discussed above.

> The applicant notes that in many of the markets for which market share information is available, the incumbent has a market share in excess of [
>
>] The *Practice Note* simply does not consider this form of market structure. The position appears to be the same in Australia but is perhaps slightly better considered in the United States. There, the Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission acknowledge that where there are only minor changes in the Herfindahl-Hirschman Index as a result of a merger then, even in highly concentrated markets, there are unlikely to be adverse competitive consequences."[33]

152. In the Auckland local access market considered here, and each of the Wellington and Christchurch local access markets below, Telecom appears to have a market share in excess of [ ]%. In all three cases, it appears that the merger would only slightly increase the level of market concentration. Telecom has agreed with the applicant's contention that the proposed acquisition is unlikely to result in an aggregation of market share sufficient to raise any concerns over unilateral market power.

<u>Conclusion on Unilateral Market Power</u>

153. The Commission concludes that the merged entity will be constrained by existing competition in any attempt to exercise unilateral market power.

Scope for the Exercise of Co-ordinated Market Power

<u>Introduction</u>

[33] Application, page 26.

154. A business acquisition may lead to a change in market circumstances such that coordination between the remaining firms either is made more likely, or the effectiveness of pre-acquisition coordination is enhanced. Firms that would otherwise compete may attempt to co-ordinate their behaviour in order to exercise market power by restricting their joint output and raising price. In extreme cases, where all firms in the market are involved and coordination is particularly effective, they may be able to behave like a collective monopolist. Where not all firms are involved, and market share in the hands of the collaborators is reduced, co-ordinated market power becomes more difficult to exercise because of competition from the independent firms in the market.

155. In broad terms, successful coordination can be thought of as requiring two ingredients: 'collusion' and 'discipline'. 'Collusion' involves the firms individually coming to a mutually profitable expectation or agreement over coordination; 'discipline' requires that firms that would deviate from the understanding are detected and punished (thereby eliminating the short-term profit to be gained by the firm from deviating).

156. When assessing the scope for coordination in the market during the consideration of a business acquisition, the Commission will evaluate the likely post-acquisition structural and behavioural characteristics of the relevant market or markets to test whether the potential for coordination would be materially enhanced by the acquisition. The intention is to assess the likelihood of certain types of behaviour occurring, and whether these would be likely to lead to a substantial lessening of competition.

<u>Collusion</u>

157. "Collusion" involves firms in a market individually coming to a mutually profitable expectation or agreement over coordination. Both explicit and tacit forms of such behaviour between firms are included.

158. The structural and behavioural factors that are usually considered to be conducive to collusion are set out in the left-hand column Table 3. The significance of these is explained more fully in the Commission's *Practice Note 4*. The right-hand column of the table then assesses the extent to which those factors are present, or are likely to be enhanced post-merger, in the business local access market. A high proportion of 'yes' responses would suggest that the market was particularly favourable to 'collusion'; a high proportion of 'no' responses the reverse.

Table 3: Testing the Potential for 'Collusion' in the Business Local Access Market

Factors conducive to collusion	Presence of factors in the market
High seller concentration	Yes, but large disparity in size
Undifferentiated product/service	Yes
New entry slow	Yes
Lack of fringe competitors	Yes – although alternative platforms for providing local call access are emerging

Factors conducive to collusion	Presence of factors in the market
	(such as VoIP)
Price inelastic demand curve	Uncertain
Industry's poor competition record	No – not in terms of collusive behaviour
Presence of excess capacity	Uncertain
Presence of industry associations/fora	Yes – some industry bodies

159. A number of factors in Table 3 suggest that there may be an increased potential for collusion in this market. However, the increase in seller concentration is only marginal compared to the counterfactual. In addition, the significant disparity in size between Telecom and the merged entity may lessen this potential.

Discipline

160. For coordination to be successful, deviations of individual firms from the collusive behaviour have to be discouraged by being detected swiftly and punished by the other firms.

161. The structural and behavioural factors that are usually considered to be conducive to 'discipline' in co-ordinated markets are set out in the left-hand column in Table 4. Again, the significance of these is explained more fully in the Commission's *Practice Note 4*. The right-hand column of the Table then assesses the extent to which those factors are present, or are likely to be enhanced post-merger. A high proportion of 'yes' responses would suggest that the market was particularly favourable to 'discipline; a high proportion of 'no' responses the reverse.

Table 4: Testing the Potential for 'Discipline' in the Business Local Access Market

Factors conducive to collusion	Presence of factors in the market
High seller concentration	Yes
Sales small and frequent	Yes
Absence of vertical integration	No
Demand slow growing	Probably
Firms have similar costs	No
Price transparency	Yes

162. A number of factors in Table 4 indicate that discipline could be effective. However, the high degree of vertical integration and the likely asymmetry of costs suggest that it would be difficult to maintain any collusive behaviour that did take place.

Conclusion on Collusion and Discipline

163. While there are a number of factors present in the local access business market which indicate some potential for collusion, such potential does not appear to increase as a result of the proposed acquisition. On balance, it appears unlikely that the proposed acquisition will materially enhance the likelihood of co-ordinated market power.

Constraints from Market Entry

164. A business acquisition is unlikely to result in a substantial lessening of competition in a market if behaviour in that market continues to be subject to real constraints from the threat of market entry.

165. Where barriers to entry are clearly low, it will not be necessary for the Commission to identify specific firms that might enter the market. In other cases, the Commission will seek to identify likely new entrants into the market.

166. The Commission will consider the history of past market entry as an indicator of the likelihood of future entry. The Commission is also mindful that entry often occurs on a relatively small scale, at least initially, and as such may not pose much of a competitive constraint on incumbents within the relevant time frame.

Barriers to Entry

167. The likely effectiveness of the threat of new entry in constraining the conduct of market participants, following a business acquisition that might otherwise lead to a substantial lessening of competition in a market, is determined by the nature and height of barriers to entry into that market.

168. The Commission considers that, for the purpose of considering this issue, a barrier to entry is best defined as an additional or significantly increased cost or other disadvantage that a new entrant must bear as a condition of entry. In evaluating the barriers to entry into a market, the Commission will generally consider the broader 'entry conditions' that apply, and then go on to evaluate which of those constitute entry barriers.

169. It is the overall obstacle to entry posed by the aggregation of the various barriers that is relevant in determining whether entry is relatively easy or not, and therefore whether or not potential entry would prevent a substantial lessening of competition.

170. The main entry barriers in this market relate to the costs of building a local access network over which local call services can be supplied. These costs are largely irreversible, and are discussed in greater detail in relation to local data access below. Although new entry in the form of a new stand-alone voice network appears to be unlikely, telephony services can usually be supplied at little or no incremental costs where a network operator has built a local data network. However, Walker Wireless noted that one limitation of its current generation wireless technology is that it is unable to deliver voice services.

Conclusion on Constraints from Market Entry

171. The Commission has concluded that the merged entity is unlikely to be constrained by market entry at a wholesale level.

Conclusion on the Wholesale Market for the Supply of Business Local Access in the Auckland CBD

172. The Commission has considered the probable nature and extent of competition that would exist in the Auckland CBD wholesale market for business local access but for the acquisition.

173. The Commission has considered the nature and extent of the contemplated lessening, in terms of the competitive constraints that would exist following the merger from:

- existing competition; and
- potential entry from competition.

174. The Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the Auckland CBD wholesale market for business local access.

THE WHOLESALE MARKET FOR THE SUPPLY OF BUSINESS LOCAL ACCESS IN THE WELLINGTON CBD

175. The above comments in relation to the Auckland business local access market apply to the wholesale supply of local access to businesses in Wellington. The only difference is in relation to the estimated market shares, which are summarised in the following table.

Table 5: Local Access Business Lines (Wellington CBD)

	Number (000)	**Share**
Telecom	[ ]	[ ]%
CLEAR	[ ]	[ ]%
TSL	[ ]	[ ]%
Total	**[ ]**	**100%**

176. According to Table 5, the merged entity would account for around [ ]% of the total number of local access business lines in Wellington. This falls within the Commission's second safe harbour discussed above.

Conclusion on the Wholesale Market for the Supply of Business Local Access in the Wellington CBD

177. The comments made in relation to the supply of business local access in the Auckland CBD also apply to the Wellington CBD. Given the aggregation summarised in Table 5 above, the Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the wholesale market for the supply of business local access in the Wellington CBD.

THE WHOLESALE MARKET FOR THE SUPPLY OF BUSINESS LOCAL ACCESS IN THE CHRISTCHURCH CBD

178. The above comments in relation to the Auckland business local access market apply to the wholesale supply of local access to businesses in Christchurch. The only difference is in relation to the estimated market shares, which are summarised in the following table.

Table 6: Local Access Business Lines (Christchurch CBD)

	Number (000)	**Share**
Telecom	[ ]	[ ]%
CLEAR	[ ]	[ ]%
TSL	[ ]	[ ]%
Total	**[ ]**	**100%**

179. According to Table 6, the merged entity would account for around [ ]% of the total number of local access business lines in Christchurch. This falls within the Commission's second safe harbour discussed above.

Conclusion on the Wholesale Market for the Supply of Business Local Access in the Christchurch CBD

180. The comments made in relation to the supply of business local access in the Auckland CBD also apply to the Christchurch CBD. Given the aggregation summarised in Table 6 above, the Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the wholesale market for the supply of business local access in the Christchurch CBD.

THE WHOLESALE MARKET FOR THE SUPPLY OF ORIGINATING AND TERMINATING ACCESS IN NEW ZEALAND

181. This market refers to the sale and purchase of originating and terminating access between different networks. Any market power that exists in this market will flow directly from any market power at the network level. However, having considered

above the business local access markets that are relevant to the proposed acquisition, the Commission was satisfied that the acquisition is unlikely to result in a substantial lessening of competition in any of those markets. As a result, the Commission has also concluded that the proposed acquisition is unlikely to substantially lessen competition in the wholesale market for interconnection.

THE WHOLESALE MARKET FOR DATA ACCESS IN THE AUCKLAND CBD

Analysis of Existing Competition

Scope for Unilateral Market Power

Existing Competitors

182. The Auckland CBD is characterised by a considerable number of competing local network operators providing data access to customers. These include both fibre-based local networks as well as wireless local networks.

183. Telecom, CLEAR and TSL each run fibre optic, wireless and copper-based connections to customers within the Auckland CBD. TSL has noted that much of Telecom's local network is based on copper, which is restrictive in terms of data speeds. Telecom has invested in DSL technology which has increased the capacity of its copper infrastructure.

184. CLEAR has invested in a fibre optic ring through the CBD, based on ATM technology which can offer speeds of up to 155Mbps. TSL uses a pure internet protocol Ethernet to provide access to the customer at speeds of up to 1Gbps.

185. In addition, UNL and Tangent have built local fibre networks in Auckland, offering Ethernet access. UNL's optical fibre is able to deliver speeds of up to 2.5Gbps per fibre. UNL's core network consists of 216-fibre cable, which provides network capacity of 540Gbps.

186. CityLink has also recently been installing a fibre network in downtown Auckland.

187. In addition to the fibre operators, fixed wireless local access networks have been developed by companies such as Walker Wireless and RadioNet. For example, Walker Wireless has installed a point-of-presence (POP) on Sky Tower. A limitation of current wireless local access networks is that they use 'line-of-sight' technology, which is not always suitable for built-up CBDs. New wireless technology is being developed which does not rely on having a clear line-of-sight. The Commission also understands that current fixed wireless platforms can also be limited in terms of the type of data service that can be offered over them. For example, CityLink indicated that a lack of scaleability limits wireless access, as many of their customers increase their demand for bandwidth in relatively large increments. However, the Commission accepts that fixed wireless local operators are likely to provide some constraint to fixed local networks.

188. Several of the parties spoken to regarded the Auckland CBD as being very competitive, and that the proposed acquisition would not result in a substantial lessening of competition in that market.

Conclusion on Unilateral Market Power

189. The proposed acquisition will result in a concentration of fixed and fixed wireless network operators in the Auckland CBD, from 8 to 7. As a result, the Commission has concluded that the merged entity will continue to be constrained by existing competition within the market.

Scope for the Exercise of Co-ordinated Market Power

Collusion and Discipline

190. There appear to be a number of factors which suggest that collusion is unlikely to be attempted, and that if it were attempted, it is unlikely to be successful. In particular, there are several smaller network operators who could easily accommodate additional demand in the face of any raised prices. In addition, both the merged entity and Telecom are vertically integrated companies; technology is advancing rapidly; and the merged entity and Telecom have asymmetric costs.[34] These factors all suggest that collusion will be unlikely.

Conclusion on Co-ordinated Market Power

191. The Auckland CBD data access market exhibit a number of characteristics which are not conducive to collusive behaviour. This suggests that the proposed acquisition is unlikely to materially enhance the likelihood of co-ordinated power in this market.

Conclusion on Existing Competition

192. The Commission considers that existing competition will alleviate any concerns of unilateral power being exercised by the merged entity.

193. Furthermore, the Commission considers that the scope for the exercise of co-ordinated market power would not be enhanced by the acquisition.

Constraints from Market Entry

Barriers to Entry

194. The Commission understands that there are significant sunk costs associated with building an underground fibre local network. The majority of these costs relate to the digging of trenches into which the fibre cable is laid. For example, research commissioned by the ACCC has found that trenching and cabling costs account for around 70% of the total cost of building a fixed local access network, and that trenching costs in particular are likely to be largely sunk.[35] As a result, the ACCC

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[34] See letter from D Knight (Assistant General Counsel, Telecom) to Commerce Commission (30 November 2001).
[35] ACCC "Declaration of local telecommunications services" (July 1999), page 49.

concludes that the threat of new entry is unlikely to provide much constraint on incumbent operators.

195. TSL has provided the Commission with some information which shows that the average cost per kilometre of constructing an overhead network (where the wires are strung between poles) is [ ], while the average per kilometre cost of underground construction in permeable ground is [ ]. These figures relate to network construction outside of the main CBDs.

196. Construction costs within a CBD appear to be considerably higher. According to CityLink, trenching costs within a CBD work out to be approximately [ ] per kilometre, compared to around [ ] per kilometre in other areas. CityLink estimates that fibre installed above-ground costs around one-tenth of the costs of underground installation.

197. Telecom has confirmed that building a network in a CBD is very expensive compared to non-CBD construction, although the former offers access to dense concentrations of high-value customers.

198. These levels of sunk costs are being reduced in a number of ways. For example, UNL has avoided a lot of trench-related costs by installing fibre in an old gas piping system. [

]

199. Fixed wireless technologies have relatively low sunk costs, as the assets can be easily redeployed.

200. Despite the high levels of irrecoverable construction costs that may be associated with installing underground fibre (noting exceptions such as UNL), the high density of high-value customers within CBDs has attracted significant new entry into these areas.

The "LET" Test

201. In order for the threat of market entry to be such a constraint on the exercise of market power as to alleviate concerns that a business acquisition could lead to a substantial lessening of competition, entry of new participants in response to the exercise of market power must be likely, sufficient in extent and timely (the *let* test). If they are to act as a constraint on market participants following a business acquisition which might otherwise lead to a substantial lessening of competition in a market, entry must be relatively easy, or to put it another way, barriers to entry must be relatively low.

Likelihood of Entry

202. The mere possibility of entry is, in the Commission's view, an insufficient constraint on the exercise of market power to alleviate concerns about a substantial lessening of competition. In order to be a constraint on market participants, entry must be likely in commercial terms. An economically rational firm will be unlikely to enter a market unless it has a reasonable prospect of achieving a satisfactory return on its investment, including allowance for any risks involved.

203. Several parties have expressed an intention to develop a broadband local access service. For example, BCL has acquired some spectrum which it intends to use for broadband wireless access.

Extent of Entry

204. If entry is to constrain market participants, then the threat of entry must be at a level and spread of sales that is likely to cause market participants to react in a significant manner. The Commission will not consider entry that might occur only at relatively low volumes, or in localised areas, to represent a sufficient constraint to alleviate concerns about market power.

205. If new entry into the local data access market were to take place, such entry is likely to involve substantial new capacity, particularly if it is based on a new fibre optic loop. New capacity is usually built in advance of current demand in order to avoid having to re-incur provisioning costs. In addition, once new fibre is laid, the capacity can be ramped up at little incremental cost, through the deployment of electronics at either end of the cable.

Timeliness of Entry

206. If it is effectively to constrain the exercise of market power to the extent necessary to alleviate concerns about a substantial lessening of competition, entry must be likely to occur before customers in the relevant market are detrimentally affected to a significant extent. Entry that constrains must be feasible within a reasonably short timeframe from the point at which market power is first exercised.

207. The Commission considers that, for most markets, entry which cannot be achieved and have a significant effect within two years from initial planning is unlikely to be sufficiently timely to alleviate concerns about market power.

208. It appears that a new local fibre loop could be installed reasonably quickly in a CBD. CityLink has advised that it has spent the last 12 months installing its fibre optic network around central Auckland. The Commission understands that a fixed wireless access could be installed even quicker than an underground fibre-based network.

Conclusion on the LET Test

209. The Commission therefore concludes that the various components of the LET test are satisfied with respect to this market.

Conclusion on the Constraint from Market Entry

210. The Commission concludes that the barriers to entry in this market are not likely to deter expansion or new entry in the Auckland CBD market for data access. Potential new entry is likely to provide some constraint on the merged entity.

Conclusion on the Wholesale Market for Data Access in the Auckland CBD

211. The Commission has considered the probable nature and extent of competition that would exist in the Auckland CBD data access market but for the acquisition.

212. The Commission has considered the nature and extent of the contemplated lessening, in terms of the competitive constraints that would exist following the merger from:

- existing competition; and

- potential entry from competition.

213. The Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the wholesale market for data access in the Auckland CBD.

THE WHOLESALE MARKET FOR DATA ACCESS IN THE WELLINGTON CBD

214. The Commission believes that the general conclusions drawn with respect to the data access market in the Auckland CBD will also apply to the markets for data access in the Wellington and Christchurch CBDs. This section briefly discusses the Wellington CBD market, and the following section considers the Christchurch CBD market.

Analysis of Existing Competition

Scope for Unilateral Market Power

<u>Existing Competitors</u>

215. In addition to the data access networks of Telecom, TSL, and CLEAR, CityLink and UNL have built local fibre rings around central Wellington. Since 1997, CityLink has built a 50 kilometre fibre network throughout the CBD, with the cables hung alongside the trolley bus wires. The network connects in excess of 230 key buildings within the CBD.

216. UNL has also been building a local fibre-based network in Wellington, using redundant gas reticulation assets acquired from Orion. Both the Wellington network and the Auckland network of UNL were rolled out within 16 weeks, as they generally avoided the need to physically dig trenches in which to lay the cables.

217. As with the other major CBDs, central Wellington appears to be very competitive in terms of local fibre networks. CityLink has said that the Wellington CBD is very competitive, and that the acquisition will have no impact in this market. CityLink claims to have less than [ ]% of the Wellington market in terms of customer numbers, although its actual share would be higher due to the size of its clients. CityLink has informed the Commission that it is a significant supplier of data and internet connectivity to large customers.

218. Walker Wireless also provides wireless data access services in Wellington through its four POPs. Radionet has [ ] in Wellington, [ ]

<u>Conclusion on Unilateral Market Power</u>

219. The Wellington CBD is currently served by the three main telecommunications carriers, as well as more specialised local access providers such as UNL, CityLink, and Walker Wireless. As a result, the Commission has concluded that the merged entity will continue to be constrained by existing competition within the market.

Scope for the Exercise of Co-ordinated Market Power

<u>Collusion and Discipline</u>

220. The Commission believes that the earlier comments in relation to the Auckland CBD also apply to the Wellington CBD.

<u>Conclusion on Co-ordinated Market Power</u>

221. The Wellington CBD data access market exhibits a number of characteristics which are not conducive to collusive behaviour. This suggests that the proposed acquisition is unlikely to materially enhance the likelihood of co-ordinated power in this market.

Conclusion on Existing Competition

222. The Commission considers that existing competition will alleviate any concerns of unilateral power being exercised by the merged entity.

223. Furthermore, the Commission considers that the scope for the exercise of co-ordinated market power would not be enhanced by the acquisition.

Constraints from Market Entry

224. The discussion on market entry in respect of the Auckland CBD market for data access also relates to the Wellington CBD market.

225. The Commission therefore concludes that barriers to entry are not likely to deter expansion or new entry in the Wellington CBD market for data access. Potential new entry is likely to provide some constraint on the merged entity.

Conclusion on the Wholesale Market for Data Access in the Wellington CBD

226. The Commission has considered the probable nature and extent of competition that would that would exist in the Wellington CBD data access market but for the acquisition.

227. The Commission has considered the nature and extent of the contemplated lessening, in terms of the competitive constraints that would exist following the merger from:

- existing competition; and
- potential entry from competition.

228. The Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the wholesale market for data access in the Wellington CBD.

THE WHOLESALE MARKET FOR DATA ACCESS IN THE CHRISTCHURCH CBD

Analysis of Existing Competition

Scope for Unilateral Market Power

Existing Competitors

229. In Christchurch, Telecom, TSL, and CLEAR each have local infrastructure in place, while both Walker Wireless and Radionet also have POPs over which various data access services are provided. Several parties referred to Orion as being a potential supplier of fibre access in Christchurch, although Orion has informed the Commission that it has installed only limited fibre, all of which is used internally.

Conclusion on Unilateral Market Power

230. The Christchurch CBD is currently served by the three main telecommunications carriers, as well as wireless local access providers such as Walker Wireless and Radionet. As a result, the Commission has concluded that the merged entity will continue to be constrained by existing competition within the market.

Scope for the Exercise of Co-ordinated Market Power

Collusion and Discipline

231. The Commission believes that the earlier comments made in relation to the Auckland CBD also apply to the Christchurch CBD.

Conclusion on Co-ordinated Market Power

232. The Christchurch CBD data access market exhibits a number of characteristics which are not conducive to collusive behaviour. This suggests that the proposed acquisition is unlikely to materially enhance the likelihood of co-ordinated power in this market.

Conclusion on Existing Competition

233. The Commission considers that existing competition will alleviate any concerns of unilateral power being exercised by the merged entity.

234. Furthermore, the Commission considers that the scope for the exercise of co-ordinated market power would not be enhanced by the acquisition.

Constraints from Market Entry

235. The earlier discussion on market entry in respect of the Auckland CBD market for data access also relates to the Christchurch CBD market.

236. The Commission concludes that the barriers to entry in this market are not likely to deter expansion or new entry in the Christchurch CBD market for data access. Potential new entry is likely to provide some constraint on the merged entity.

Conclusion on the Wholesale Market for Data Access in the Christchurch CBD

237. The Commission has considered the probable nature and extent of competition that would that would exist in the Christchurch CBD data access market but for the acquisition.

238. The Commission has considered the nature and extent of the contemplated lessening, in terms of the competitive constraints that would exist following the merger from:

- existing competition; and
- potential entry from competition.

239. The Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the wholesale market for data access in the Christchurch CBD.

THE WHOLESALE MARKET FOR BACKBONE TRANSMISSION IN NEW ZEALAND

Analysis of Existing Competition

Scope for Unilateral Market Power

<u>Existing Competitors</u>

240. As noted earlier, market shares can be measured using a number of different metrics such as revenues or capacity. The metric used to measure market share in many telecommunications markets is particularly important, as is interpretation of those market shares. This is due to a number of factors, including the level of excess capacity and the impact of technology, both of which are discussed below in the context of the transmission market.

241. Backbone transmission services are provided by way of high-capacity fibre and microwave infrastructure, such as that owned by Telecom, CLEAR, TSL, and BCL. Telecom and CLEAR have comprehensive national fibre networks, including complete "self-healing" fibre rings which effectively provide insurance in case of a fibre breakage. TSL has recently laid a predominantly submarine fibre backbone running from Auckland to Christchurch.

242. BCL has an extensive national microwave-based transmission network (as well as access to fibre capacity within CLEAR's backbone), which covers around 98% of the

population. BCL carries telecommunications traffic for all the main carriers (Telecom, CLEAR, TSL, Vodafone) as well as for smaller players (ISPs, WorldxChange).

243. Neither Telecom nor BCL has opposed the merger.

244. A number of other parties own some backbone capacity throughout New Zealand. For example, Budde notes that: [36]

> "TransPower has a significant telecommunications network and leases capacity to the two main telecommunications companies, Telecom New Zealand Limited and CLEAR Communications. These leases generate approximately $6 million of TransPower's annual revenue."

245. The Commission understands that TransPower has fibre running from the Haywards substation in the Hutt Valley down to Benmore. TransPower also has some microwave-based capacity. Although the following assessment of the transmission market does not explicitly consider parties such as TransPower, such parties could potentially have an increasing influence on the transmission market.[37]

Market Shares

246. As noted earlier, the application contains no market share information for any of the wholesale markets. However, the applicant was subsequently able to supply some information relating to the level of capacity within the backbone transmission market, and this is summarised and discussed below.

247. The Commission has also received some indication of the current value of the wholesale transmission market from Amos Aked Swift (AAS), a firm of engineering consultants specialising in telecommunications. In a submission which focuses on BCL's backbone transmission network, AAS estimate that the total value of the national transmission market is around $1 billion per annum, of which BCL is estimated to have a share of around [ ]%. These market estimates include the value of "external" wholesale transactions – for example, where a network operator wholesales capacity to an independent tolls operator – and "internal" transactions – where a network operator carries its own tolls traffic.

248. The value of "external" wholesale transmission transactions is estimated by AAS to be around $50 million. However, AAS qualify this estimate as a result of limitations in terms of data availability. The majority of these sales are made by Telecom (in excess of [ ]%), CLEAR (around [ ]%), and BCL ([ ]%). TSL is gaining a share of this market through its recently completed transmission trunk, while other operators, such as TranzRail and TransPower, are considered by AAS to be much less significant in terms of current wholesaling.

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[36] Budde P., "Telecommunications and Information Highways New Zealand 2001", page 200.
[37] For example, TransPower has informed the Commission that it has been assessing opportunities for increasing its presence in telecommunications. However, it currently sees a huge amount of excess capacity in the transmission market.

249. AAS list the main buyers as being:[38]

> "new entrant operators who do not have their own transmission networks, the ISPs with connections to the Internet backbones, and Vodafone for cellular network links … Telstra Saturn, and other operators also purchase capacity … CLEAR and Telecom also purchase some capacity (from each other, and from others) for network protection and restoration purposes … Broadcast network operators (TVNZ, SKY, Telstra Saturn etc) buy capacity from BCL, Telecom, and CLEAR."

250. It should be noted, however, that BCL has only relatively recently entered into the transmission market in terms of telecommunications traffic. [

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251. There is a significant difference between used transmission capacity and installed transmission capacity in New Zealand. For example, CLEAR has informed the Commission that around [ ] of its backbone fibres are currently lit, although effective excess capacity is far greater, due to new technologies such as Dense Wavelength Division Multiplexing (DWDM). By splitting fibre light into different colours, DWDM is able to significantly increase the capacity of a fibre strand. CLEAR has estimated that DWDM would reduce its backbone utilisation to around [ ]%.

252. The Commission has therefore examined the level of transmission capacity in New Zealand, and the ownership of and access to that capacity. While capacity can be quantified, considerable care needs to be taken in interpreting such capacity figures. Issues such as the use of technologies such as DWDM and the level of redundancy carried within a particular backbone have important implications for the amount of capacity that is available. The existence of a [ ] also needs to be considered. These issues are discussed further below.

253. The applicant has supplied the Commission with information relating to the capacity of the various national transmission networks in New Zealand. Telecom, CLEAR, and TSL have fibre-based transmission networks, while BCL operates an extensive national digital microwave radio (DMR) network. Raw capacity figures are summarised in Table 7 below. It should be noted that the figures in Table 7 relate to capacity ownership.

Table 7: Ownership of Transmission Capacity in New Zealand

	Gbps	*%*
Telecom	[ ]	[ ]%

[38] AAS submission to Commerce Commission "Report on BCL Backbone Transmission Network" (December 2001), page 11.

CLEAR	[ ]	[ ]%
TSL	[ ]	[ ]%
BCL	[ ]	[ ]%
Total	[ ]	100%

254. According to these shares, the three-firm concentration ratio is currently [ ]%, and would increase to [ ]% post acquisition. The merged entity would have a market share of around [ ]%. These percentages lie outside the Commission's safe harbours discussed earlier.

255. However, the above market shares need to be interpreted with considerable caution. For example, although TSL's current share is given as [ ]%, this relates to capacity on a rather limited and otherwise unprotected backbone configuration. This limitation is discussed further below.

256. The [ ]Gbps capacity owned by BCL relates to its DMR transmission network. However, in addition to this wireless capacity, BCL also has access to a significant amount of transmission capacity on CLEAR's fibre backbone. This capacity, equivalent to a further [ ]Gbps, is the subject of [ ].

257. [

]

258. The figures contained in Table 8 have been adjusted in light of the level of transmission capacity to which [ ] These new shares are set out in Table 8 below.

Table 8: Effective Transmission Capacity in New Zealand

	Gbps	**%**
Telecom	[ ]	[ ]%
CLEAR	[ ]	[ ]%
TSL	[ ]	[ ]%
BCL – DMR (microwave)	[ ]	[ ]%
– fibre (CLEAR)	[ ]	[ ]%

Total	[ ]	100%

259. Two other factors are important in interpreting these market share figures. The first is the availability of technologies that effectively expand the capacity of a particular transmission platform. For example, the capacity of a strand of fibre can be significantly ramped up through the use of DWDM electronics connected to each end of the fibre. The applicant has noted that increases by a factor of at least 64 can be achieved by such electronics, with no need to upgrade the actual fibre. BCL has informed the Commission that its DMR capacity can also be expanded, but not to the same extent.

260. There is also the issue of the level of redundancy that must be carried within a backbone system. Redundancy is important in order to provide transmission protection. According to AAS, the level of redundancy within a fibre backbone tends to be higher than redundancy levels within BCL's DMR network. This tends to reduce the ratio of available capacity to installed capacity in the case of fibre.

261. One limiting feature of TSL's new submarine cable, referred to above, relates to the issue of transmission protection. While CLEAR and Telecom both operate terrestrial, fully redundant "self-healing" fibre rings, TSL's fibre is a single trunk running from Auckland down the west coast of the North Island to Wellington, across Cook Strait and down the east coast of the South Island to Christchurch. This single-line configuration does not by itself offer the protection that a ring provides. The Commission understands that TSL would continue to rely on capacity leased from another backbone operator to provide such protection.

262. In relation to BCL, AAS concludes that it:[39]

[

]

Conclusion on Unilateral Market Power

263. Tables 7 and 8 provide an indication of the respective shares of transmission capacity in New Zealand. Such shares need to be carefully interpreted in light of issues such as capacity-expansion technologies and the need for redundancy. However, it appears that the merged entity would continue to face strong competition, both from Telecom as the major incumbent, and BCL.

[39] AAS submission to Commerce Commission "Report on BCL Backbone Transmission Network" (December 2001), pages 8, 11.

Scope for the Exercise of Co-ordinated Market Power

Collusion

Table 9: Testing the Potential for 'Collusion' in the Transmission Market

Factors conducive to collusion	Presence of factors in the market
High seller concentration	Yes
Undifferentiated product/service	Yes
New entry slow	Yes
Lack of fringe competitors	No – there are several smaller fringe competitors
Price inelastic demand curve	Uncertain
Industry's poor competition record	No – not in terms of collusive behaviour
Presence of excess capacity	Yes
Presence of industry associations/fora	Yes – some industry bodies

264. The assessment of the relevant conditions in the transmission market suggests that the market has a number of characteristics that may be conducive to collusion. However, while several factors are suggestive of the increased potential for collusion, this potential may be limited for the following reasons.

265. First, the concern with the presence of any excess capacity is that it may reflect output restrictions resulting from co-ordinated behaviour.[40] However, in building fibre optic backbone transmission infrastructure, carriers must incur significant sunk costs associated with digging trenches in which to lay the cables. As a result, carriers tend to install surplus capacity which will be able to accommodate future demand growth. In addition, as discussed above, new technology, such as DWDM, has meant that the capacity of existing fibre can be significantly increased without significant additional investment.

266. TSL has argued that the presence of large amounts of surplus transmission capacity, in conjunction with the low marginal cost of transmission, will increase the level of wholesale competition within this market, as the respective backbone operators will want to attract as much traffic as possible.

267. Therefore, the surplus capacity present within backbone transmission infrastructure does not appear to be the result of previous attempts by parties to restrict output.

268. There are several fringe competitors within the transmission market. Parties such as TransPower currently have some fibre, most of which is currently used for its own internal purposes. However, [

[40] See Commerce Commission *Practice Note 4,* page 36.

] TransPower has noted that whether there are three players or two players in the transmission market will make little difference. The market will be competitive in either case.

269. As discussed earlier, the presence of BCL is likely to act as an important constraint. BCL regards itself as a strong competitor in the transmission market, and would be well-placed to respond to any attempt by the merged entity to raise prices.

270. There are a number of industry associations that meet from time to time, but the Commission understands that these tend to relate to technical issues such as number portability.

271. Overall, there appear to be sufficient safeguards present in the market to ensure that the proposed acquisition would not materially enhance the possibility of collusion.

Discipline

Table 10: Testing the Potential for 'Discipline' in the Transmission Market

Factors conducive to discipline	Presence of factors in the market
High seller concentration	Yes
Sales small and frequent	Yes
Absence of vertical integration	No
Demand slow growing	No
Firms have similar costs	No
Price transparency	Uncertain

272. The assessment of conditions in the transmission market set out in Table 10 suggests that it may be difficult to maintain discipline in the market, should a collusive understanding or arrangement be attained.

Conclusion on Co-ordinated Market Power

273. The transmission market contains some characteristics that may facilitate collusive behaviour. However, there are additional factors present which are not conducive to collusion. On balance, it appears that it is unlikely that the proposed acquisition will materially enhance the likelihood of co-ordinated power. It may also be difficult to maintain discipline in the market, in the event that a collusive arrangement was attained.

Conclusion on Existing Competition

274. The Commission considers that existing competition will alleviate any concerns of unilateral power being exercised by the merged entity.

275. Furthermore, the Commission considers that the scope for the exercise of co-ordinated market power would not be enhanced by the acquisition.

Constraints from Market Entry

Barriers to Entry

276. In order to enter the transmission market, a new entrant would have to incur the considerable sunk costs associated with laying a fibre network. These include trenching costs, as well as possible consent-related costs. For example, TSL has noted that its submarine cable cost approximately [ ] to lay, and that approximately [ ] of that cost was related to the Resource Management Act.

277. Alternatively, an entrant wishing to develop wireless transmission capacity could avoid a lot of these trenching costs. For example, a possible strategy would be to seek co-location of transmission equipment at sites owned by BCL.

278. The level of surplus transmission capacity in New Zealand may serve to deter any new entry in the foreseeable future. However, [

]

The "LET" Test

Likelihood of Entry

279. A number of parties spoken to have suggested that new entry is unlikely in the next few years. TSL itself has commented that entry conditions are such that no new backbone operator is likely to emerge in the foreseeable future.

280. Given the degree of spare transmission capacity, and the low marginal cost of carrying additional traffic, new entrants may expect an aggressive response from the incumbent carriers. Again this serves to diminish the likelihood of new entry.

Extent of Entry

281. If new entry into the transmission market were to take place, such entry is likely to involve substantial new capacity, particularly if it is based on a new fibre optic backbone. As noted earlier, new capacity is usually built in advance of current demand in order to avoid having to re-incur provisioning costs. In addition, once new fibre is laid, the capacity can be ramped up at little incremental cost, through the deployment of electronics at either end of the cable.

282. Therefore, any new entry into this market is likely to be of a significant scale.

Timeliness of New Entry

283. The Commission understands that the physical roll-out of a new fibre optic backbone could be completed within a two-year time frame, based on the experience of TSL with its Auckland-Wellington-Christchurch cable. TSL commenced the roll-out

around June 2000, and it has recently been completed. However, there is also a significant pre-build phase, for example relating to the gaining of resource consents. TSL has indicated that such consents are a major barrier to entry.

284. New transmission covering only part of the TSL route, for example from Auckland to Wellington, could presumably be built in a shorter timeframe. However, it remains unclear as to how long the entire process would take. The Commission has therefore concluded that new entry would unlikely be forthcoming in a timely manner.

Conclusion on the LET Test

285. The Commission concludes that not all of the components of the LET test would be satisfied with respect to the transmission market.

Conclusion on Constraints from Market Entry

286. The Commission concludes that market entry is unlikely to constrain the merged entity.

Conclusion on the Wholesale Market for Backbone Transmission in New Zealand

287. The Commission has considered the probable nature and extent of competition that would exist in the backbone transmission market but for the acquisition.

288. The proposed acquisition would result in the merged entity obtaining a market share that may fall outside the Commission's safe harbour guidelines. However, considerable care must be taken in interpreting market shares for the transmission market.

289. The Commission has considered the nature and extent of the contemplated lessening, in terms of the competitive constraints that would exist following the merger from:

- existing competition; and
- potential entry from competition.

290. On balance, the Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the wholesale market for backbone transmission in New Zealand.

THE AUCKLAND CBD BUSINESS RETAIL MARKET

Analysis of Existing Competition

Scope for Unilateral Market Power

<u>Existing Competitors</u>

291. Only three companies operate in this market – Telecom, TSL and CLEAR. Table 11 shows the estimated market shares of these operators.

Table 11: Market Shares in Auckland CBD Business Retail Market

	Number (000)	Market Share
Telecom	[ ]	[ ]%
CLEAR	[ ]	[ ]%
TSL	[ ]	[ ]%
Total	**[ ]**	**100%**

292. According to Table 11, the merged entity would account for around [ ]% of the total Auckland business retail market. This falls within the Commission's second safe harbour discussed above.

293. As with the Auckland CBD business local access wholesale market, in the Auckland CBD business retail market considered here, and each of the Wellington and Christchurch CBD business retail markets below, Telecom appears to have a market share in excess of [ ]%. In all three cases, it appears that the merger would only slightly increase the level of market concentration. Telecom has agreed with the applicant's contention that the proposed acquisition is unlikely to result in an aggregation of market share sufficient to raise any concerns over unilateral market power.

<u>Conclusion on Unilateral Market Power</u>

294. The Commission concludes that the merged entity will be constrained by existing competition in any attempt to exercise unilateral market power.

Scope for the Exercise of Co-ordinated Market Power

<u>Collusion</u>

Table 12: Testing the Potential for 'Collusion' in the Business Retail Market

Factors conducive to collusion	Presence of factors in the market
High seller concentration	Yes, but large disparity in size
Undifferentiated product/service	Yes
New entry slow	Yes – although this may change as a result of the wholesaling regime in the Telecommunications Bill
Lack of fringe competitors	Yes – although alternative platforms for providing local calls are emerging (such as VoIP)
Price inelastic demand curve	Uncertain
Industry's poor competition record	No – not in terms of collusive behaviour
Presence of excess capacity	Uncertain

Factors conducive to collusion	Presence of factors in the market
Presence of industry associations/fora	Yes – some industry bodies

295. As with the wholesale market, a number of factors in Table 12 suggest that there may be an increased potential for collusion in this market. However, the increase in seller concentration is only marginal compared to the counterfactual. In addition, the significant disparity in size between Telecom and the merged entity may lessen this potential.

Discipline

Table 13: Testing the Potential for 'Discipline' in the Business Retail Market

Factors conducive to collusion	Presence of factors in the market
High seller concentration	Yes
Sales small and frequent	Yes
Absence of vertical integration	No
Demand slow growing	Probably
Firms have similar costs	No
Price transparency	Yes

296. There are a number of factors in Table 13 that indicate that discipline may be effective. However, the high degree of vertical integration and the likely asymmetry of costs suggest that it would be difficult to maintain any collusive behaviour that did take place.

Conclusion on Co-ordinated Market Power

297. On balance, it appears unlikely that the proposed acquisition will materially enhance the likelihood of co-ordinated market power.

Conclusion on Existing Competition

298. The Commission considers that existing competition will alleviate any concerns of unilateral power being exercised by the merged entity.

299. Furthermore, the Commission considers that the scope for the exercise of co-ordinated market power would not be enhanced by the acquisition.

Constraints from Market Entry

300. The intended regulation of the telecommunications industry will potentially ease entry into this business retail markets though this will depend on how the regulatory structure is administered. In the past, the main barrier to entering these markets was that any new entrant had to build its own network, but under the new regulatory framework, any retail service provided under Telecom's fixed network must be wholesaled. This will allow companies to enter the business retail markets without having to develop a network infrastructure.

Conclusion on Constraints from Market Entry

301. The Commission considers that although the barriers to entry may be reduced under the new regulatory framework, it is not possible to conclude at this time whether market entry will constrain the merged entity in the business retail markets.

Conclusion on the Auckland CBD Business Retail Market

302. The Commission has considered the probable nature and extent of competition that would that would exist in the Auckland CBD business retail market but for the acquisition.

303. The Commission has considered the nature and extent of the contemplated lessening, in terms of the competitive constraints that would exist following the merger from:

- existing competition; and
- potential entry from competition.

304. The Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in Auckland CBD business retail market.

THE WELLINGTON CBD BUSINESS RETAIL MARKET

305. The above comments in relation to the Auckland CBD business retail market apply to the Wellington CBD business retail market. The only difference is in relation to the estimated market shares, which are summarised in the following table.

Table 14: Market Shares in Wellington CBD Retail Market

	Number (000)	**Share**
Telecom	[ ]	[ ]%
CLEAR	[ ]	[ ]%
TSL	[ ]	[ ]%
Total	**[ ]**	**100%**

306. According to Table 14, the merged entity would account for around [ ]% of the Wellington CBD business retail market. This falls within the Commission's second safe harbour discussed above.

Conclusion on the Wellington CBD Business Retail Market

307. The comments made in relation to the Auckland CBD business retail market also apply to the Wellington CBD. Given the aggregation summarised in Table 14 above, the Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the Wellington CBD business retail market.

THE CHRISTCHURCH BUSINESS RETAIL MARKET

308. The above comments in relation to the Auckland CBD business retail market apply to the Christchurch CBD business retail market. The only difference is in relation to the estimated market shares, which are summarised in the following table.

Table 15: Market Shares in Christchurch Business Retail Market

	Number (000)	**Market Share**
Telecom	[ ]	[ ]%
CLEAR	[ ]	[ ]%
TSL	[ ]	[ ]%
Total	**[ ]**	**100%**

309. According to Table 15, the merged entity would account for around [ ]% of the Christchurch CBD business retail market. This falls within the Commission's second safe harbour discussed above.

Conclusion on the Christchurch Business Retail Market

310. The comments made in relation to the supply of business local access in the Auckland CBD also apply to the Christchurch CBD. Given the aggregation summarised in Table 15 above, the Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the wholesale market for the supply of business local access in the Christchurch CBD.

THE NATIONAL TOLL RETAIL MARKET

Analysis of Existing Competition

Scope for Unilateral Market Power

<u>Existing Competition</u>

311. There are a number of competitors in the national toll retail market. These include Telecom, CLEAR, TSL, WorldxChange, Compass CallPlus, Ihug, and Global One. Some set up their own facilities and purchase backbone capacity. WorldxChange, for

example, has a fully functioning switching site in Auckland with links to several other carriers. Others such as CallPlus purchase another carrier's product and rebrand it.

312. The market shares in the national toll retail market are set out in Table 16.

Table 16: Market Shares in National Toll Retail Market

	Turnover $ million	**Market Share**
Telecom	[ ]	[ ]
CLEAR	[ ]	[ ]
TSL	[ ]	[ ]
CallPlus	[ ]	[ ]
WorldxChange	[ ]	[ ]
Compass	[ ]	[ ]
Global One	[ ]	[ ]
Ihug	[ ]	[ ]
Other	[ ]	[ ]
Total	**[ ]**	**100%**

313. The three firm concentration would become [ ]% and the merged entity would have a market share of [ ]% which is inside the Commission's safe harbours.

314. Furthermore, industry participants stated that they believed the national toll retail market would not be affected by the proposed acquisition as there is very strong competition in the market.

<u>Conclusion on Unilateral Market Power</u>

315. The Commission has concluded that the merged entity will continue to be constrained by existing competition within the market.

Scope for the Exercise of Co-ordinated Market Power

<u>Collusion and Discipline</u>

316. There appear to be a number of factors that suggest that collusion is unlikely to occur, and that if it does, it is unlikely to be successful. In particular, there are several smaller network operators who could easily accommodate additional demand in the face of any collusive behaviour.

<u>Conclusion on Co-ordinated Market Power</u>

317. The national toll retail market exhibits a number of characteristics that are not conducive to collusive behaviour. This suggests that the proposed acquisition is unlikely to materially enhance the likelihood of co-ordinated power in this market.

Conclusion on Existing Competition

318. The Commission considers that existing competition will alleviate any concerns of unilateral power being exercised by the merged entity.

319. Furthermore, the Commission considers that the scope for the exercise of co-ordinated market power would not be enhanced by the acquisition.

Constraint from Market Entry

Barriers to Entry

320. Market participants advised that the barriers to entry are low. Although a new entrant may wish to set up its own facilities, this is not necessary as evidenced by CallPlus which [ ]. IHUG uses VoIP to get around New Zealand and uses the traditional networks for the local loops. It advised that it was possible to enter [ ].

321. CLEAR and WorldxChange both advised that a new entrant usually starts in international tolls and then migrates to national tolls. WorldxChange stated that this is because the profit margins for national tolls are considerable less than for international tolls. The barriers for entry into international tolls are, however even lower than for national tolls and there is only a small increment in costs for migration to national tolls.

Conclusion on Constraint from Market Entry

322. The Commission concludes that the barriers to entry are not likely to deter expansion or new entry in the national toll retail market. Potential new entry is likely to provide some constraint on the merged entity.

Conclusion on the National Toll Retail Market

323. The Commission has considered the probable nature and extent of competition that would that would exist in the national toll retail market but for the acquisition.

324. The Commission has considered the nature and extent of the contemplated lessening, in terms of the competitive constraints that would exist following the merger from:

- existing competition; and
- potential entry from competition.

325. The Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the national tolls retail market.

THE INTERNATIONAL TOLL RETAIL MARKET

Analysis of Existing Competition

Scope for Unilateral Market Power

Existing Competition

326. There are a number of competitors in the international toll retail market. These include Telecom, CLEAR, TSL, WorldxChange, Compass CallPlus, Ihug, and Global One.

327. The market shares in the international toll retail market are set out in Table 17.

Table 17: Market Shares in International Toll Retail Market

	Turnover $ million	**Market Share**
Telecom	[ ]	[ ]
CLEAR	[ ]	[ ]
TSL	[ ]	[ ]
CallPlus	[ ]	[ ]
WorldxChange	[ ]	[ ]
Compass	[ ]	[ ]
Global One	[ ]	[ ]
Ihug	[ ]	[ ]
Other	[ ]	[ ]
Total	**283.0**	**100%**

328. The three firm concentration ratio would become [ ]% and the merged entity would have a market share of [ ]%, which is just outside the Commission's safe harbours.

329. Industry participants stated that they believed the international toll retail market would not be affected by the proposed acquisition as there is very strong competition in the market. They pointed out that the considerable competition is due to the low entry barriers. As with national tolls, a participant can become viable simply by purchasing product from another carrier and rebranding it as its own.

330. Furthermore, any increase in price by the merged entity is likely to result in loss of business to Telecom with its considerably greater market share as well as to the smaller participants.

<u>Conclusion on Unilateral Market Power</u>

331. The Commission has concluded that the merged entity will continue to be constrained by existing competition within the market.

Scope for the Exercise of Co-ordinated Market Power

<u>Collusion and Discipline</u>

332. As with the national toll market, there appear to be a number of factors that suggest that collusion is unlikely to occur, and that if it does, it is unlikely to be successful. In particular, there are several smaller network operators who could easily accommodate additional demand in the face of any collusive behaviour.

<u>Conclusion on Co-ordinated Market Power</u>

333. The international toll retail market exhibits a number of characteristics that are not conducive to collusive behaviour. This suggests that the proposed acquisition is unlikely to materially enhance the likelihood of co-ordinated power in this market.

Conclusion on Existing Competition

334. The Commission considers that existing competition will alleviate any concerns of unilateral power being exercised by the merged entity.

335. Furthermore, the Commission considers that the scope for the exercise of co-ordinated market power would not be enhanced by the acquisition.

Constraint from Market Entry

Barriers to Entry

336. Market Participants advised that the barriers to entry are low. As with the national toll market, although a new entrant may wish to set up its own facilities, this is not necessary as evidenced by CallPlus which [ ]

337. Industry participants advised that the barriers for entry into international tolls are, if not even lower, at least as low as for national tolls, particularly as the profit margins are considerable greater than for national tolls.

338. A significant number of companies have entered this market over the last few years.

Conclusion on Constraint from Market Entry

339. The Commission concludes that the barriers to entry are not likely to deter expansion or new entry in the international tolls retail market. Potential new entry is likely to provide some constraint on the merged entity.

Conclusion on the International Tolls Retail Market

340. The Commission has considered the probable nature and extent of competition that would that would exist in the international tolls retail market but for the acquisition.

341. The Commission has considered the nature and extent of the contemplated lessening, in terms of the competitive constraints that would exist following the merger from:

- existing competition; and
- potential entry from competition.

342. The Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the international tolls retail market.

THE FIXED-TO-MOBILE RETAIL MARKET

Analysis of Existing Competition

Scope for Unilateral Market Power

<u>Existing Competition</u>

343. The participants in the fixed-to-mobile retail market are the same as in the national toll and international toll markets.

344. The market shares in the fixed-to-mobile retail market are set out in Table 18.

Table 18: Market Shares in Fixed-to-Mobile Retail Market

	Turnover $ million	**Market Share**
Telecom	[ ]	[ ]
CLEAR	[ ]	[ ]
TSL	[ ]	[ ]
CallPlus	[ ]	[ ]
WorldxChange	[ ]	[ ]
Compass	[ ]	[ ]
Global One	[ ]	[ ]
Ihug	[ ]	[ ]
Other	[ ]	[ ]
Total	**[ ]**	**100%**

345. The three firm concentration would become [ ]% and the merged entity would have a market share of [ ]% which is inside the Commission's safe harbours.

346. Furthermore, industry participants stated that they believed that the fixed-to-mobile retail market as with the national and international toll markets would not be affected by the proposed acquisition as there is very strong competition in the market.

<u>Conclusion on Unilateral Market Power</u>

347. The Commission has concluded that the merged entity will continue to be constrained by existing competition within the market.

Scope for the Exercise of Co-ordinated Market Power

<u>Collusion and Discipline</u>

348. As with the national and international toll markets, there appear to be a number of factors that suggest that collusion is unlikely to occur, and that if it does, it is unlikely to be successful. In particular, there are several smaller network operators who could easily accommodate additional demand in the face of any collusive behaviour.

<u>Conclusion on Co-ordinated Market Power</u>

349. The fixed-to-mobile retail market exhibits a number of characteristics that are not conducive to collusive behaviour. This suggests that the proposed acquisition is unlikely to materially enhance the likelihood of co-ordinated power in this market.

Conclusion on Existing Competition

350. The Commission considers that existing competition will alleviate any concerns of unilateral power being exercised by the merged entity.

351. Furthermore, the Commission considers that the scope for the exercise of co-ordinated market power would not be enhanced by the acquisition.

Constraint from Market Entry

Barriers to Entry

352. Market participants advised that the barriers to entry in this market, like those to the national and international toll markets, are low. CLEAR advised that it had negotiated a carrier preselection agreement with Telecom in September 2000 and that these agreements were now available to all toll carriers thus lowering the barriers to this market. Furthermore, this will be a designated service under the new regulatory framework

Conclusion on Constraint from Market Entry

353. The Commission concludes that the barriers to entry are not likely to deter expansion or new entry in the fixed-to-mobile retail market. Potential new entry is likely to provide some constraint on the merged entity.

Conclusion on the Fixed-to-Mobile Retail Market

354. The Commission has considered the probable nature and extent of competition that would that would exist in the fixed-to-mobile retail market but for the acquisition.

355. The Commission has considered the nature and extent of the contemplated lessening, in terms of the competitive constraints that would exist following the merger from:

- existing competition; and
- potential entry from competition.

356. The Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the fixed-to-mobile market.

THE TOLL-FREE RETAIL MARKET

Analysis of Existing Competition

Scope for Unilateral Market Power

<u>Existing Competition</u>

357. The participants in the toll-free retail market are the same as in the national toll and international toll markets.

358. The market shares in the toll-free retail market are set out in Table 19.

Table 19: Market Shares in Toll-Free Retail Market

	Turnover $ million	Market Share
Telecom	[ ]	[ ]
CLEAR	[ ]	[ ]
TSL	[ ]	[ ]
CallPlus	[ ]	[ ]
WorldxChange	[ ]	[ ]
Compass	[ ]	[ ]
Ihug	[ ]	[ ]
Other	[ ]	[ ]
Total	**[ ]**	**100%**

359. The three firm concentration would become [ ]% and the merged entity would have a market share of [ ]% which is inside the Commission's safe harbours.

360. Furthermore, industry participants stated that they believed that the fixed-to-mobile retail market as with the national and international toll markets would not be affected by the proposed acquisition.

Conclusion on Unilateral Market Power

361. The Commission has concluded that the merged entity will continue to be constrained by existing competition within the market.

Scope for the Exercise of Co-ordinated Market Power

Collusion and Discipline

362. As with the national and international toll markets, there appear to be a number of factors that suggest that collusion is unlikely to occur, and that if it does, it is unlikely to be successful. In particular, there are several smaller network operators who could easily accommodate additional demand in the face of any collusive behaviour.

Conclusion on Co-ordinated Market Power

363. The toll-free retail market exhibits a number of characteristics that are not conducive to collusive behaviour. This suggests that the proposed acquisition is unlikely to materially enhance the likelihood of co-ordinated power in this market.

Conclusion on Existing Competition

364. The Commission considers that existing competition will alleviate any concerns of unilateral power being exercised by the merged entity.

365. Furthermore, the Commission considers that the scope for the exercise of co-ordinated market power would not be enhanced by the acquisition.

Constraint from Market Entry

Barriers to Entry

366. Market participants advised that the barriers to entry in this market, like those to the national and international toll markets, are low. New entrants can be facilities based and invest in the equipment described above which can involve considerable investment, or can resell existing toll-free services.

367. Telecom advised that it currently wholesales its toll-free numbers to other carriers and that customers can switch carrier without cost.

Conclusion on Constraint from Market Entry

368. The Commission concludes that the barriers to entry are not likely to deter expansion or new entry in the toll-free retail market. Potential new entry is likely to provide some constraint on the merged entity.

Conclusion on the Toll-Free Retail Market

369. The Commission has considered the probable nature and extent of competition that would that would exist in the toll-free retail market but for the acquisition.

370. The Commission has considered the nature and extent of the contemplated lessening, in terms of the competitive constraints that would exist following the merger from:

- existing competition; and
- potential entry from competition.

371. The Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the toll-free retail market.

THE HIGH-SPEED DATA RETAIL MARKET

Analysis of Existing Competition

Scope for Unilateral Market Power

Existing Competition

372. As with the wholesale market for data access in the Auckland, Wellington and Christchurch CBDs, there are a number of competing operators in this market. These include both fibre-based local networks as well as wireless local networks.

373. Telecom, CLEAR and TSL each run fibre optic, wireless and copper-based connections to customers. Tangent, UNL, CLEAR, Telecom, and TSL own fibre-based networks in Auckland. CLEAR, Telecom, CityLink, UNL and TSL own networks in Wellington. Telecom, CLEAR and TSL own networks in Christchurch. BCL also has some retail customers.

374. The market shares of operators in the high-speed data retail market are set out in Table 20.

Table 20: Market Shares in the High-Speed Data Retail Market

Operator	**Turnover ($ Million)**	**Market Share**
Telecom	[ ]	[ ]
CLEAR	[ ]	[ ]
TSL	[ ]	[ ]
BCL	[ ]	[ ]
CityLink	[ ]	[ ]
Tangent	[ ]	[ ]
UNL	[ ]	[ ]
Total	**[ ]**	**100**

375. The three firm concentration ratio would become [ ]%. The merged entity would have a market share of [ ]%, which is outside the Commission's safe harbours. However, as already noted, market shares are insufficient in themselves to establish whether the competition in a market has been lessened.

376. Industry participants advised that there is increasing competition from systems integration and facilities management companies which integrate their customers' IT and telephony needs. These companies do not build their own networks but buy backbone and bundle it with their own data products.

377. Several of the parties spoken to regarded the high-speed data retail market as being very competitive, and that the proposed acquisition would not result in a substantial lessening of competition in that market. UNL pointed out that in the CBDs, which account for approximately of 70% of data traffic, customers have an abundance of choice.

Conclusion on Unilateral Market Power

378. The Commission has concluded that the merged entity will continue to be constrained by existing competition within the retail market for high-speed data services in New Zealand.

Scope for the Exercise of Co-ordinated Market Power

Collusion and Discipline

379. There appear to be a number of factors that suggest that collusion is unlikely to occur, and that if it does, it is unlikely to be successful. In particular, there are several smaller network operators who could easily accommodate additional demand in the face of any collusive behaviour. In addition, both the merged entity and Telecom are vertically integrated companies; technology is advancing rapidly; and the merged

entity and Telecom have asymmetric costs.[41] These factors all suggest that collusion will be unlikely.

Conclusion on Co-ordinated Market Power

380. The high-speed data retail market exhibits a number of characteristics that are not conducive to collusive behaviour. This suggests that the proposed acquisition is unlikely to materially enhance the likelihood of co-ordinated power in this market.

Conclusion on Existing Competition

381. The Commission considers that existing competition will alleviate any concerns of unilateral power being exercised by the merged entity.

382. Furthermore, the Commission considers that the scope for the exercise of co-ordinated market power would not be enhanced by the acquisition.

Constraints from Market Entry

Barriers to Entry

383. As explained above in paragraphs 172 to 174, there are significant sunk costs associated with building an underground fibre local network. However, as explained in paragraph 175, these levels of sunk costs are being reduced in a number of ways. Furthermore, fixed wireless technologies have relatively low sunk costs, as the assets can be easily redeployed.

384. Despite the high levels of irrecoverable construction costs that may be associated with installing underground fibre (noting exceptions such as UNL), the high density of high-value customers within CBDs has attracted significant new entry into these areas.

Conclusion on the Constraint from Market Entry

385. The Commission concludes that the barriers to entry are not likely to deter expansion or new entry in the high-speed data retail market. Potential new entry is likely to provide some constraint on the merged entity.

Conclusion on the High-Speed Data Retail Market

386. The Commission has considered the probable nature and extent of competition that would that would exist in the high-speed data retail market but for the acquisition.

387. The Commission has considered the nature and extent of the contemplated lessening, in terms of the competitive constraints that would exist following the merger from:

- existing competition; and
- potential entry from competition.

[41] See letter from D Knight (Assistant General Counsel, Telecom) to Commerce Commission (30 November 2001).

388. The Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the high-speed data retail market.

THE NARROWBAND INTERNET RETAIL MARKET

Analysis of Existing Competition

Scope for Unilateral Market Power

Existing Competition

389. There are over 70 competitors in the narrowband internet retail market. The market shares in this market, measured by number of subscribers, are set out in Table 21.

Table 21: Market Shares in Narrowband Internet Retail Market

	Subscribers 000s	Market Share
Telecom	[ ]	[ ]
CLEAR	[ ]	[ ]
TSL	[ ]	[ ]
Ihug	[ ]	[ ]
Voyager	[ ]	[ ]
Compass	[ ]	[ ]
CallPlus	[ ]	[ ]
Other	[ ]	[ ]
Total	**[ ]**	**100%**

390. The three-firm concentration ratio would become [ ]% and the merged entity would have a market share of [ ]%, which is outside the Commission's safe harbours.

391. Industry participants noted that some rationalisation is likely in this market. A number of parties also questioned the sustainability of free internet services (which have been excluded from the above table). However, all industry participants spoken to stated that the narrowband internet market is very competitive and that the proposed acquisition would not affect this competitiveness.

Conclusion on Unilateral Market Power

392. The Commission has concluded that the merged entity will continue to be constrained by existing competition within the narrowband internet market.

Scope for the Exercise of Co-ordinated Market Power

Collusion and Discipline

393. As with the other retail markets, there appear to be a number of factors that suggest that collusion is unlikely to occur, and that if it does, it is unlikely to be successful. In particular, there are several smaller network operators who could easily accommodate

additional demand in the face of any collusive behaviour. In addition, new entry can be achieved quickly.

Conclusion on Co-ordinated Market Power

394. The narrowband internet market exhibits a number of characteristics that are not conducive to collusive behaviour. This suggests that the proposed acquisition is unlikely to materially enhance the likelihood of co-ordinated power in this market.

Conclusion on Existing Competition

395. The Commission considers that existing competition will alleviate any concerns of unilateral power being exercised by the merged entity.

396. Furthermore, the Commission considers that the scope for the exercise of co-ordinated market power would not be enhanced by the acquisition.

Constraint from Market Entry

Barriers to Entry

397. Market participants advised that the barriers to entry in this market, like those to the other retail markets, are low. Telecom advised that participants in this market have a choice of suppliers to offer them international backbone networks, dial-up aggregation services and international bandwidth.

Conclusion on Constraint from Market Entry

398. The Commission concludes that the barriers to entry are not likely to deter expansion or new entry in the narrowband internet retail market. Potential new entry is likely to provide some constraint on the merged entity.

Conclusion on the Narrowband Internet Retail Market

399. The Commission has considered the probable nature and extent of competition that would that would exist in the narrowband internet retail market but for the acquisition.

400. The Commission has considered the nature and extent of the contemplated lessening, in terms of the competitive constraints that would exist following the merger from:

- existing competition; and
- potential entry from competition.

401. The Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the narrowband internet retail market.

THE BROADBAND INTERNET RETAIL MARKET

Analysis of Existing Competition

Scope for Unilateral Market Power

Existing Competition

402. As with the narrowband retail market, there are a considerable number of competitors in the broadband internet retail market. The market shares in this market measured by number of subscribers are set out in Table 22.

Table 22: Market Shares in Broadband Internet Retail Market

	Subscribers 000s	**Market Share**
Telecom	[ ]	[ ]
CLEAR	[ ]	[ ]
TSL	[ ]	[ ]
Walker	[ ]	[ ]
Radionet	[ ]	[ ]
Ihug	[ ]	[ ]
Voyager	[ ]	[ ]
Other	[ ]	[ ]
Total	**[ ]**	**100%**

403. The three firm concentration would become [ ]% and the merged entity would have a market share of [ ]% which is well within the Commission’s safe harbours.

404. Further constraint is provided by some large corporates that do not use an ISP but buy bandwidth and carry out the role of an ISP themselves.

405. All industry participants spoken to stated that the broadband internet market is very competitive and that the proposed acquisition would not affect this competitiveness.

Conclusion on Unilateral Market Power

406. The Commission has concluded that the merged entity will continue to be constrained by existing competition within the broadband internet market.

Scope for the Exercise of Co-ordinated Market Power

Collusion and Discipline

407. As with the other retail markets, there appear to be a number of factors that suggest that collusion is unlikely to occur, and that if it does, it is unlikely to be successful. In particular, there are several smaller network operators who could easily accommodate additional demand in the face of any collusive behaviour.

Conclusion on Co-ordinated Market Power

408. The broadband internet market exhibits a number of characteristics that are not conducive to collusive behaviour. This suggests that the proposed acquisition is unlikely to materially enhance the likelihood of co-ordinated power in this market.

Conclusion on Existing Competition

409. The Commission considers that existing competition will alleviate any concerns of unilateral power being exercised by the merged entity.

410. Furthermore, the Commission considers that the scope for the exercise of co-ordinated market power would not be enhanced by the acquisition.

Constraint from Market Entry

Barriers to Entry

411. Market participants advised that the barriers to entry in this market, like those to the other retail markets, are low. They advised that a narrowband ISP can fairly easily switch to broadband with some capital expenditure. Retail broadband services are being introduced using wireless local access platforms, and it appears that this can be achieved without incurring the significant costs associated with fixed connections. Parties also advised that considerable growth is expected in this market and that this will provide opportunities for new entrants. TUANZ advised that there is an increasing number of regional initiatives considering entering the broadband market.

Conclusion on Constraint from Market Entry

412. The Commission concludes that the barriers to entry are not likely to deter expansion or new entry in the broadband internet retail market. Potential new entry is likely to provide some constraint on the merged entity.

Conclusion on the Broadband Internet Retail Market

413. The Commission has considered the probable nature and extent of competition that would that would exist in the broadband internet retail market but for the acquisition.

414. The Commission has considered the nature and extent of the contemplated lessening, in terms of the competitive constraints that would exist following the merger from:

- existing competition; and
- potential entry from competition.

415. The Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the broadband internet retail market.

OTHER COMPETITION FACTORS

Elimination of a Vigorous and Effective Competitor

416. Sometimes an industry contains a firm that is in some way non-typical, or has different characteristics, or is an innovator, or is regarded as a maverick. The independent or less predictable behaviour of such a firm may be an important source of competition in the market, and may undermine efforts by other firms to engage in coordination. Such a firm need not be large to have an impact on competition out of proportion to its relative market size. Should it become the target of a business acquisition, the resulting elimination of a vigorous and effective competitor could have the effect of substantially lessening competition in the market (especially if there are barriers preventing the entry of new, effective competitors).

417. The Commission's *Practice Note 4* lists a number of features that might be associated with a vigorous competitor. This include:

- a history of aggressive, independent pricing behaviour (rather than of following the lead of other firms);
- a record of superior innovative behaviour or low costs;
- a growth rate exceeding that of the market (or the firm having realistic expansion plans exceeding likely market growth); and
- a history of independent behaviour generally.

418. As the first new entrant in the New Zealand telecommunications industry, CLEAR initially appeared to be a vigorous and effective competitor to Telecom in a number of markets. For example, in the area of domestic tolls, CLEAR's market share increased from around 9% in 1992 to 22% by 1995, and Budde attributes this growth to aggressive pricing.[42] In 1995, CLEAR had secured around 25% of the international tolls market.

419. However, more recently, there may be less evidence to suggest that CLEAR is non-typical or markedly different from any other firm in the industry. A number of parties have commented that the entry of WorldxChange into the tolls market in 1996/97 led to significant reductions in tolls prices. For example, WorldxChange has noted that it started offering tolls to the United Kingdom in late 1997 at a price of $0.65/minute, compared to the price prevailing at the time of $1.90/minute. Such strong competition has eroded CLEAR's market share to around [ ]% in national tolls, and [ ]% in international tolls.

420. Compared to the likely counterfactual, the acquisition of CLEAR by TSL is unlikely to have a disproportionate effect on competition.

[42] Budde P., "Telecommunications and Superhighways in New Zealand" (1998), page 38.

Pro-Competitive Effects

421. The applicant has argued that the proposed acquisition will have a pro-competitive effect in all of the relevant markets. The acquisition will result in a stronger competitor with greater critical mass and who will be able to compete more effectively with the incumbent. The applicant concludes that: [43]

> "neither the second nor the third largest player could be described as having been or as even having the potential to be a particularly vigorous and effective competitor, post-merger market shares will be far from equal and it is readily demonstrable that competitors need greater critical mass to achieve this status."

422. Several parties have expressed a similar view. For example, Telecom has said that the proposed acquisition will increase the level of competition in telecommunications markets.

423. In framing the likely counterfactual, the Commission has taken into account the position of the merged entity relative to the position of the two parties to the acquisition remaining independent. Therefore no further consideration is given here to any pro-competitive effects of the proposed acquisition.

OVERALL CONCLUSION

424. The Commission has considered the probable nature and extent of competition that would exist in the relevant markets but for the acquisition. The Commission considers that the appropriate benchmark is the two parties continuing to have a presence in the New Zealand telecommunications industry, although that presence is likely to be constrained in terms of future network build. The Commission has considered the nature and extent of the contemplated lessening in terms of the competitive constraints that would exist following the merger from:

- existing competition; and
- potential competition from entry.

425. The Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the following markets:

- the wholesale market for the supply of originating and terminating access in New Zealand;
- the wholesale market for the supply of business local access in the Auckland CBD;
- the wholesale market for the supply of business local access in the Wellington CBD;
- the wholesale market for the supply of business local access in the Christchurch CBD;

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[43] Application, page 29.

- the wholesale market for data access in the Auckland CBD;
- the wholesale market for data access in the Wellington CBD;
- the wholesale market for data access in the Christchurch CBD;
- the wholesale market for backbone transmission in New Zealand;
- the retail market for the supply of business local access in the Auckland CBD (excluding mobile);
- the retail market for the supply of business local access in the Wellington CBD (excluding mobile);
- the retail market for the supply of business local access in the Christchurch CBD (excluding mobile);
- the retail market for the supply of national toll call services in New Zealand;
- the retail market for the supply of international toll call services in New Zealand;
- the retail market for the supply of fixed-to-mobile call services in New Zealand;
- the retail market for the supply of toll-free services in New Zealand;
- the retail market for the supply of high-speed data services in New Zealand;
- the retail market for the supply of narrowband internet services in New Zealand; and
- the retail market for the supply of broadband internet services in New Zealand.

DETERMINATION ON NOTICE OF CLEARANCE

426. Accordingly, pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the acquisition by Telstra Corporation Limited, TelstraSaturn Limited, or a subsidiary company of either Telstra Corporation or TelstraSaturn Limited of the entire issued share capital of CLEAR Communications Limited or the business conducted by CLEAR Communications Limited.

Dated this 7th Day of December 2001

Paula Rebstock
Acting Chair