25 November 2005

The Registrar
Business Acquisitions and Authorisations
Commerce Commission
PO Box 2351
WELLINGTON

Pursuant to section 66(1) of the Commerce Act 1986, notice is hereby given seeking **clearance** of a proposed business acquisition.

SUMMARY OF KEY POINTS

The key points made in this application for clearance under the Commerce Act of SKY's acquisition of the television broadcasting business and assets of Prime New Zealand are:

Markets

(a) SKY considers the relevant markets for determining the competition effects of its acquisition under the Commerce Act remain those as defined by the Commerce Commission in its 1995 Decision No. 276 namely:

- Television transmission vehicles (e.g. terrestrial, cable, satellite);
- Television transmission services (which incorporates the service of sending television signals between transmission points (i.e. the linking service) or from a transmission point to a viewer); and
- Retail television broadcasting (which covers both free-to-air television (**FTA**) and pay-TV).

(b) The Commission may also wish to consider a market for television advertising services in the light of Decisions 557 and 286.

Television Transmission Vehicles Market

(c) The proposed acquisition results in the horizontal aggregation of SKY's and Prime New Zealand's terrestrial analogue spectrum licences and of the rights of both companies in respect of those licences from 2010 to 2020. This is only a small increase in SKY's rights. Moreover, a substantial number and range of terrestrial and satellite television transmission vehicles are held by, or are available for, existing and potential television broadcasters. The rights available include radio spectrum rights in various forms including an additional two management rights and four nationwide sets of UHF-TV licences for commercial operators, the allocation of which is a matter for government discretion. Digital compression technology is available to increase terrestrial channel availability by five times.

Other vehicles such as telecommunications networks using mature DSL line and broadband technologies are available or rapidly emerging.

Television Transmission Services

(d) Neither SKY nor Prime New Zealand provide transmission services but purchase these from BCL/THL, and, in the case of SKY and TVNZ, SingTel Optus also. BCL/THL and SingTel Optus provide substantial countervailing power against a combined SKY Prime New Zealand entity and against other television broadcasters.

Retail Television Broadcasting Market

(e) A range of possible measures of market concentration may be considered – notably audience share, share of advertising revenue and share of revenue from all sources (including both advertising and subscription revenue). On any measure of concentration, SKY's acquisition of Prime New Zealand results in only a modest increase in concentration. TVNZ and CanWest between them continue to take over 73% of audience share. SKY's and Prime New Zealand's combined audience share is approximately 26%. SKY and Prime New Zealand continue to have relatively small shares in advertising revenues (combined revenue share of around 11% compared to around 89% for TVNZ and CanWest) in what has been, in recent past, an expanding television advertising market. SKY's recent total gross revenues are in the order of 45% of the revenues of the major broadcasters. Prime New Zealand's total revenue remains very much the lowest of all the nationwide television broadcasters (at about 2%-3% of total revenues).

(f) The *retail television broadcasting market* is already competitive. Of the key factors for competition, there are substantial television transmission vehicles available and ready access to radio spectrum at the Government's discretion. No single company or combination of companies would be able to control acquisition of television programming, as programming is in the hands of overseas suppliers. Competition is further illustrated in the acquisition of advertising. The proposed acquisition will introduce additional competition into the *retail television broadcasting market* resulting in the provision of more appealing programming for Prime New Zealand and, consequently, increased audience and advertising revenues to underpin Prime New Zealand's business.

Counterfactual scenarios

(g) The counterfactual scenarios (if the acquisition did not proceed) would not provide an outcome that would suggest the factual (if the acquisition did proceed) would result in a substantial lessening of competition. The most likely scenarios are:

- *Prime New Zealand continuing to operate in the short term*. However, Prime New Zealand's audited annual financial statements in recent years have been qualified by the statement that Prime New Zealand has experienced significant losses and the going concern assumption in the annual reports is valid only on the basis of continued financial support. [

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- *Prime New Zealand is purchased by TVNZ or CanWest as a going concern*. This is unlikely because both TVNZ and CanWest have a free-to-air ("FTA") business, and other UHF-TV networks that they can utilise. Either acquirer is likely to shut down Prime New Zealand's current business.

- *The possible purchase* of *Prime New Zealand by Nine Network or another overseas acquirer*. This is a very unlikely counterfactual scenario. Nine Network has cancelled its option to acquire 50% of Prime New Zealand and [ ].

Compared to these counterfactuals, SKY's proposed acquisition is for Prime New Zealand's business, including its assets, rights and benefits, as a going concern, as it presently stands. This would enhance competition as Prime New Zealand would be financially stronger, better able to compete with TVNZ and CanWest for higher rating FTA programmes and advertising. In the longer term, it would allow for the retention on a sustainable basis of a third FTA channel capable of growth that will continue to compete with TVNZ and CanWest.

Possible separate pay-TV and FTA markets

(h) If the Commission were to consider the existence of a separate pay-TV market, which SKY does not consider appropriate, the obvious consequence is that SKY's acquisition of Prime New Zealand could not result in SKY strengthening any market power in a pay-TV market. The acquisition would not, for example, raise entry barriers to any would be pay-TV operators. SKY's acquisition of Prime New Zealand would promote the competitive conditions in any separately defined FTA market.

Conclusion

(i) For these reasons SKY considers that the Commission should be satisfied that the acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in any market in New Zealand.

PART I: TRANSACTION DETAILS

1. Business acquisition for which clearance is sought

1.1 The acquisition for which clearance is sought is the proposed acquisition by SKY Network Television Limited (**SKY**) of the television broadcasting business of Prime Television New Zealand Limited (**Prime New Zealand**) and the various assets, rights, and benefits comprising that business.

1.2 A sale and purchase agreement has been executed, but is conditional upon clearance being granted by the Commerce Commission. We **attach** a copy of this sale and purchase agreement, and ask under paragraph 3.2 that it be kept confidential.

PERSON GIVING NOTICE

2. **The person giving notice**

2.1 This notice is given by:

SKY Network Television Ltd
10 Panorama Road
Mt Wellington
Auckland

Attention: Jason Hollingworth, Chief Financial Officer

Telephone: (09) 525 8318
Facsimile: (09) 525 8324
Email: jhollingworth@skytv.co.nz

2.2 Correspondence and enquiries should in the first instance be addressed to:

Buddle Findlay
Law Offices
State Insurance Tower
BNZ Centre
1 Willis Street
PO Box 2694
DX SP20201
Wellington

Attention: Jim Stevenson/Nick Crang

Telephone: +64-4-498 7311/462 0863
Facsimile: +64-4-499 4141
Email: jim.stevenson@buddlefindlay.com / nick.crang@buddlefindlay.com

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CONFIDENTIALITY

3. **Requests for confidentiality**

3.1 SKY does not request a confidentiality order for the fact of the proposed acquisition.

3.2 Confidentiality for specific information is requested as follows:

3.2.1 SKY seeks confidentiality for the sale and purchase agreement provided with this application and for specific information in this notice included in square brackets and highlighted. A copy of this notice with the confidential information deleted is provided to assist the Commission.

3.2.2 SKY requests that the Commission make a confidentiality order under section 100 of the Commerce Act 1986 in respect of this information, and that, on the expiry of any confidentiality order that the Commission makes, the information continues to be withheld under section 9 of the Official Information Act 1982.

3.2.3 SKY also requests that it be notified of any request made under the Official Information Act 1982 for the information, and be given the opportunity to be consulted as to whether the information remains commercially sensitive at the time that the request is made.

3.2.4 These requests for confidentiality are made because the information is commercially sensitive and disclosure would be likely to unreasonably prejudice the commercial position of SKY. [ ]

DETAILS OF THE PARTICIPANTS

4. **The participants**

4.1 The acquirer is SKY Network Television Limited. Contact details are provided in paragraph 2.

4.2 The business, assets, rights and benefits are being acquired from Prime Television New Zealand Limited. The contact details for Prime New Zealand are:

Warwick Syphers, Chief Executive Officer, Prime Television Limited (Aust.)
PO Box 878
ACT, 602
Australia

4.3 Correspondence and inquiries in relation to Prime New Zealand should in the first instance be addressed to:

Bell Gully
Vero Centre
48 Shortland Street
PO Box 4199
Auckland

Attention: Phil Taylor/Torrin Crowther

Telephone: DDI (09) 916 8940 or (09) 916 8621
Facsimile: (09) 916 8801
Email: phil.taylor@bellgully.com/torrin.crowther@bellgully.com

5. Interconnected or associated parties

SKY

5.1 SKY is a publicly listed company, listed on the NZX and ASX. The present company is a result of restructuring completed in July 2005 involving the merger of the former SKY business with its major shareholder, INL. As at 21 November 2005, only three entities held shareholdings of more than 10%: Nationwide News Pty Limited (43.65%), Commonwealth Bank of Australia (12.2%), and Todd Communications Limited (11.11%). Commonwealth Bank of Australia is a provider of banking and financial services with businesses in Australia, New Zealand, Asia and the United Kingdom, Todd Communications invests in various communication assets and is part of the Todd Corporation group of companies. As a listed company, SKY has numerous shareholders with shareholdings less than 10%.

5.2 Nationwide News Pty Limited is a limited liability company registered in Australia, and is a wholly owned subsidiary of News Corporation. News Corporation is registered in Delaware, USA, and listed on a number of stock exchanges. News Corporation is a diversified international media and entertainment company with operations in: filmed entertainment; television; magazines and inserts; newspapers; book publishing; and other media. The activities of News Corporation are conducted principally in the United States, Continental Europe, the United Kingdom, Australia, Asia and the Pacific Basin. SKY is News Corporation’s only interest in the New Zealand broadcasting industry.

5.3 SKY has a number of subsidiaries. Its only currently trading subsidiary is SKY DMX Music Limited.

Prime New Zealand

5.4 Prime New Zealand is wholly owned by Prime Television (Holdings) Pty Limited, an Australian limited liability company wholly owned by Prime Television Limited. Prime Television Limited is registered in Australia. The Prime group of companies operates 12 television broadcasting stations in Australia, in addition to Prime New Zealand. Under an agreement dated February 2002 (the Nine Agreement) between Prime Television Limited and the Nine Network in Australia, Prime New Zealand received programming, marketing and managerial support from Nine Network. The Nine Agreement also provided for an option for Nine Network to acquire 50% of Prime New Zealand. The Nine Agreement (including the option), has now been terminated and will not be reinstated, regardless of whether this acquisition proceeds.

6. Participants' interests in each other

6.1 Neither SKY, nor any of its interconnected bodies corporate, have any beneficial interest in, or is beneficially entitled to, any shares or other pecuniary interest in Prime New Zealand.

7. Links between participants and their existing competitors in each market

7.1 Prime New Zealand leases a number of individual UHF-TV spectrum licences from SKY (see paragraph 16.1 below). Prime New Zealand has acquired, from time to time, delayed sports programming from SKY under SKY's sublicence rights. SKY and Prime New Zealand, along with TVNZ and CanWest, acquire services from AC Nielsen for the provision of viewer audience data.

7.2 Prime Australia's largest shareholder, Paul Ramsay Holdings Pty Ltd, has an approximate 20% interest in Becker Group Limited (which is listed on the ASX). It has a New Zealand subsidiary which holds an "outside broadcast" contract (i.e. production from mobile vans) with SKY.

8. Directors

8.1 The following directors of SKY also hold directorships on the boards of companies, or are officers of, in the television transmission vehicles market (see paragraph 11):

8.1.1 Robert Bryden – Woosh Wireless Limited (Robert Bryden is a director of Todd Communications Limited (see paragraph 5.1 above). Todd Wireless Limited, which is also a member of the Todd Corporation group of companies, holds a shareholding in Woosh Wireless);

8.1.2 Marko Bogoievski – CFO of Telecom New Zealand Limited and director of various subsidiaries of Telecom New Zealand Limited. Telecom New Zealand has no shareholding in SKY. Marko Bogoievski is an independent director of SKY.

8.2 For a full list of disclosures of interest by SKY's directors, see SKY's 2005 Annual Report (available at www.skytv.co.nz).

9. Business activities of each participant

SKY

9.1 SKY began broadcasting as a pay television service in May 1990. SKY currently broadcasts more than 80 channels on its digital satellite platform and five channels over an analogue terrestrial UHF platform. As of 30 June 2005, SKY had a total subscriber base of 619,168.

9.2 SKY's digital service is transmitted through the Optus B1 satellite. The five UHF channels are transmitted over four UHF frequencies owned by SKY and a fifth frequency leased from the New Zealand Racing Board (when not used for the Trackside channel).

9.3 Subscribers to SKY's basic digital package receive a total of 37 channels including news, sports, documentaries, family programmes, general entertainment and music videos. Other digital packages offer subscribers the choice of additional sports and movie programming such as Rialto, the Arts Channel, and the Rugby Channel, or other subscription services such as games.

9.4 SKY also offers selected content to satellite subscribers on a pay-per-view basis. This service is used primarily for blockbuster premier movies, boxing and wrestling matches and adult content. It is offered over a number of dedicated channels.

9.5 SKY also rebroadcasts a range of terrestrial FTA TV channels and radio stations (TV One, TV2, TV3, C4, Prime New Zealand, Trackside and radio stations like National Radio, Concert FM, George FM, Kiwi FM, Calvary Chapel Radio, Tahu FM, Mai FM and Nui FM). These radio and FTA TV services are also available as a separate package via a SKY digital decoder and satellite dish that can be rented from SKY.

9.6 Sky also provides a limited linking service for some radio channels (e.g. National Radio, Concert FM) and to the Fire Service via its satellite.

9.7 SKY receives its programming from both foreign and New Zealand programme suppliers and also creates its own programming, such as live sports broadcasts, SKY Digital Music and studio-based programmes. These include SKY Sport's daily news service, Sport 365, Reunion, Courtside, Trackchat and Deaker Live.

9.8 In addition to subscription revenue, SKY receives revenue principally from advertising as well as a number of other sources. This includes revenues from the supply of programmes for hotels via the Movielink service. SKY also operates a mailorder DVD rental service under the name DVD Unlimited.

9.9 SKY's head office is in Mount Wellington, Auckland from which SKY also operates its services. As at 30 June 2005, SKY employed 591 staff.

Prime New Zealand

9.10 Prime Television New Zealand Ltd, which operates an FTA network, began broadcasting in New Zealand on 30 August 1998.

9.11 Prime New Zealand broadcasts on a set of nationwide UHF frequencies, and is also available on SKY Satellite. Prime New Zealand offers a broad mix of general entertainment, lifestyle, drama and comedy, sourced overseas, primarily from Australia and America. It also provides its own news and current affairs programmes.

9.12 As noted in paragraph 5.4, Prime New Zealand previously received programming, marketing and managerial support from Nine Network under an agreement, which has now been terminated.

9.13 Prime New Zealand's head offices are based in a purpose-built broadcasting facility in Albany, North Auckland. It also has four small leased offices in Hamilton, Tauranga, Wellington and Christchurch used for regional advertising sales.

9.14 Prime New Zealand employs about 97 people in New Zealand.

REASONS FOR THE PROPOSAL AND INTENTIONS IN RESPECT OF THE ACQUIRED BUSINESS

10. SKY's reasons and intentions in respect of Prime New Zealand

10.1 SKY believes that Prime New Zealand will provide it with the opportunity to diversify its revenue base providing it with greater advertising revenue. It intends to retain the Prime New Zealand business as an FTA network.

10.2 In addition:

10.2.1 SKY will be able to compete with the FTA broadcasters for major studio output programming deals for first run television series which come packaged with other programming that can only be used on an FTA channel.

10.2.2 SKY's acquisition of Prime New Zealand will help ensure that delayed sports rights, especially cricket, rugby league and certain forms of rugby, will be available on FTA.

10.2.3 SKY will be able to grow a FTA channel from an established business and brand, thereby avoiding the losses associated with starting a new FTA channel.

10.2.4 There are synergies available to SKY from integrating with Prime New Zealand's business such as some operational savings, programming synergies and increased "tune-in" benefits that SKY programming can bring to Prime New Zealand. These synergies will enhance the businesses of SKY and Prime New Zealand.

10.2.5 SKY will advertise its own pay-TV services on Prime New Zealand. At present, TVNZ does not allow SKY to advertise, and CanWest has allowed limited advertising.

PART II: IDENTIFICATION OF MARKET AFFECTED

HORIZONTAL AGGREGATION

11. **Markets in which there would be an aggregation of business activities**

11.1 SKY has analysed the effects of the proposed acquisition on the following markets:

11.1.1 the market for television transmission vehicles (e.g. terrestrial, cable, satellite);

11.1.2 the market for television transmission services;

11.1.3 the market for retail television broadcasting (which covers both FTA and pay-TV); and

11.1.4 the market for television advertising services.

11.2 The first three markets were identified by the Commission in its 1995 decision on the acquisition by Telecom New Zealand Limited of shares in SKY (Decision No. 276).

11.3 As noted in Decision No. 276, an important component of a broadcaster’s business is television programmes. Although SKY produces some sports and current affairs programmes and Prime New Zealand produces news and current affairs programmes, neither SKY nor Prime New Zealand are significant producers of television programmes. As in Decision No. 276, the supply of programmes is considered in the context of the market for retail television broadcasting.

11.4 SKY queries whether television transmission vehicles form a stand-alone market or are simply an input into the market for retail television broadcasting. However, for the purposes of this application, SKY has treated these transmission vehicles as being in a separate market.

11.5 SKY considers that these market definitions remain appropriate, for the reasons set out below.

11.6 The Commerce Commission has also recognised that advertising services provided by different media are in different markets (e.g. see Decisions 557 and 286). For this reason, SKY has identified for discussion a market for television advertising services in this application.

Market for television transmission vehicles

11.7 Television transmission vehicles are the means by which television signals are transmitted to viewers. They include uses of the radio spectrum (e.g. by terrestrial transmission from transmission towers to aerials and satellite transmission to viewer’s satellite dishes), cable television, telephone lines and 3G mobile.

11.8 In its 1995 decision, the Commission placed all the various mechanisms for transmitting television signals within a single market. SKY considers that this is appropriate, as all the various mechanisms achieve the same result of delivering television signals. In deciding how to transmit, a broadcaster has all the various mechanisms available.

11.9 The mechanisms identified by the Commission in 1995 included the VHF-TV and UHF-TV bands, cable, microwave multi-point distribution service (**MDS**) frequencies, and satellite. The use of telephone lines to transmit television was considered by the Commission, but rejected as not a feasible option at that time.

11.10 Most of these television transmission vehicles are still available. Other options have become available or are likely to be available in the near future. In particular, broadband technology, using IPTV protocols or 3G mobile services, is now being used to transmit television programmes (e.g. see paragraph 11.20 below).

11.11 Most television broadcasters in New Zealand currently transmit their programmes using the radio spectrum. Use of the radio spectrum is regulated by the Radiocommunications Act 1989. The Act created a system of management rights and spectrum licences. Management rights give the holder the right to manage the frequencies specified in the management right for a period of up to 20 years. The owners of management rights can sell those rights to other parties, or can issue spectrum licences to other parties to use part or all of the frequencies specified in the management right.

11.12 In addition to spectrum licences, the Radiocommunications Act provides for the issue of radio licences by the Secretary of Commerce. These are not property rights and are issued in accordance with separate administrative criteria under the Radio Regulations 2001. For example, radio licences are granted in respect of satellite uplink frequencies.

11.13 In New Zealand, television signals are transmitted terrestrially on radio frequencies known as the VHF-TV and UHF-TV bands. It is also possible to transmit television signals on frequencies reserved for satellite communication and on frequencies in the microwave band. The spectrum rights or radio licences necessary to transmit television signals vary according to the part of the spectrum those signals are being transmitted on.

11.14 In relation to the VHF-TV and UHF-TV bands:

11.14.1 The Crown holds most of the management rights in the UHF-TV band. Four nationwide sets of UHF-TV spectrum licences and a number of individual UHF-TV spectrum licences are held by SKY. TVNZ also holds a nationwide UHF-TV spectrum licence set and a number of individual licences (through its wholly owned subsidiaries Horizon Pacific Television Ltd and Freesat Television Ltd). Prime New Zealand and NZ Racing Board (formerly the TAB) each hold a nationwide set, and Prime New Zealand holds a number of individual spectrum licences. BCL also holds some individual spectrum licences. By statutory mandate (under the Maori Television Service (Te Aratuku Whakaata Irirangi Maori) Act 2003), the Maori Television Service (**MTS**) holds another nationwide set of licences under a management right safeguarded by Te Putahi Paoho until 2013 (SKY has an agreement with MTS that MTS will not use its allocated frequencies so as to cause interference to SKY's decoders, VCRs or other equipment, in return for which the MTS programme is transmitted over one of the SKY UHF-TV nationwide sets). There are also a number of regional UHF-TV spectrum licences. The UHF-TV spectrum licences other than MTS' licences are due to expire on 12 March 2010. Most of these are to be renewed for a further 10 years, again under Crown management rights, as a result of a Government offer process completed earlier this year.

11.14.2 While the UHF-TV licences are currently used for analogue TV, Government policy from August 2003 has been that both the existing and renewed licences can be converted from analogue use to digital.

11.14.3 Two VHF-TV nationwide sets of spectrum licences are held by TVNZ and used for TV One and TV2. CanWest also uses a nationwide set of VHF-TV spectrum licences for TV3 and a set of VHF-TV spectrum licences with more limited coverage for C4. These networks are supplemented by individual VHF-TV licences, and in CanWest's case, individual UHF-TV licences. There are also some individual VHF-TV licences held by others (e.g. Prime New Zealand holds 2 such licences). The VHF-TV spectrum licences are due to expire in 2015, but the Government has signalled that these licences will also be able to be renewed. Although these renewals are subject to a case-by-case review, the Government has already received consultancy advice on possible renewal prices.

11.14.4 Within the UHF-TV band, the Government has identified 6 further digital capable nationwide licence sets for allocation to commercial TV broadcasters for digital TV, under Government decisions announced on 28 August 2003 (see www.med.govt.nz under Broadcasting). Ministry of Economic Development (**MED**) engineering planning has identified that 33 licences can be created in each nationwide licence set, totalling 198 UHF-TV spectrum licences. With compression technology, 5 channels can be broadcast in the spectrum formerly occupied by one analogue channel. Two of the nation-wide sets are in currently unused bands, and are intended to be allocated as management rights. The other 4 licence sets will be interleaved with the existing UHF-TV spectrum licences. Changes to the engineering parameters of some of these other licences are necessary, and this has been taken into account by MED in the modification of the technical parameters of the renewed UHF-TV licences (from 2010). Although the auction initially planned for late-2004 to allocate these licences has been postponed, these UHF-TV management rights and spectrum licences are available for allocation by the Crown/MED when commercial demand is manifested through expressions of interest.

11.15 Satellite television broadcasting has become a reality. The main satellite used for broadcasting satellite services to New Zealand is Optus B1, owned by Singtel-Optus, which has down-links in the bands 12.2-12.5GHz (four transponders) and 12.5-12.75GHz bands (four transponders). SKY has obtained rights from Optus to three transponders on this satellite for its digital TV service. In addition, SKY leases a transponder from TelstraClear. As originally agreed, SKY's rights to all these transponders expire at the earlier of 31 March 2006 or when the Optus B1 satellite is no longer able to hold its geosynchronous position.

11.16 In addition to the transponders leased by SKY from Optus, there are five other transponders on the Optus B1 satellite capable of DTH (direct-to-home) use in New Zealand. TVNZ has rights to two of these transponders (one of which is subleased to TelstraClear and then on to SKY). The other three transponders on the Optus B1 satellite are available for DTH uses in New Zealand. Their utility is currently restricted by terrestrial licensing in the 12.2-12.375GHz band, but the MED is clearing terrestrial uses from the 11.7-12.75 Ghz bands within the next 18 months in accordance with Government policy decisions in 2002 (see paragraph 16.2.5 below). All existing (temporary) terrestrial licences are conditioned on non-interference with satellite services.

11.17 To replace the B1 satellite, SKY has secured rights to 5 transponders on the proposed Optus D1 satellite, and an option, and a first right of refusal, over 2 additional transponders. There are five other New Zealand capable transponders available on Optus D1. Optus intends to have this D1 satellite launched in the first half of 2006 and in operation by June 2006, with a back-up Optus D2 satellite covering New Zealand scheduled for launch in 2007. D2 will have 32 transponders capable of broadcasting DTH broadcasts to New Zealand. TVNZ and others are also likely to seek access to these satellites.

11.18 There are other satellites also available. Intelsat 804 at 176° East GSO has a "spot beam" which could readily be used for satellite broadcasting, provided consumer satellite dishes were correctly adjusted. Other satellite operators, such as PanAmSat, SES Americom and iPSTAR, also cover New Zealand. iPSTAR has recently launched a satellite with broadcast channel capabilities covering New Zealand, with an uplink in Sydney. Depending upon antenna size, satellite location and other technical parameters, it is possible to access two or more satellites at different orbital locations within the same frequency band.

11.19 Additional satellite transmission capacity though the MED's assignment of New Zealand's international satellite assignments at 152° and 158° East to new satellite operators is likely. The MED has received an application from NZLSAT Limited to use allocations in the 12.2-12.5 and 12.5-12.75 bands, which could be used for television broadcasting. MED's decision on whether that application will proceed is expected to be announced very soon. Another possibility is use of frequencies in the 11.75-12.25 GHz bands (see www.med.govt.nz under Broadcasting).

11.20 Although the cable network service providers in New Zealand have reduced to only one (TelstraClear), this remains a viable means of providing television services. The capacity of the withdrawn operators such as Telecom remains available. Moreover, telephone lines have emerged as a transmission vehicle, through the use of mature technologies (e.g. DSL line technology, broadband wireless and broadband cable). According to the Government's Digital Strategy, released on 16 May 2005, broadband services will be available for 60% of residential and SME subscribers by 2007 and 90% by 2010. Telecom has continued to investigate the use of telephone lines to provide television services (e.g. see Stuff article *"SKY – Telecom TV set-top box now in the lab"* 12 September 2005). The use of broadband for special interest television services was recently further highlighted with the BBC's trialling of internet programme services (see interview of Ashley Highfield, head of New Media and Technology at the BBC, National Radio 12 November 2005). Mobile 3G services can also be used to transmit television programmes (e.g. see www.orange.co.uk/entertainment/tv/).

11.21 The MDS management rights referred to in the 1995 decision (which would each permit five nationwide digital channels) have not yet been utilised for television, but are available for that use. These rights, which expire in 2010, will not automatically be renewed by the Government for the present incumbents which include SKY. Any re-allocation of these rights is likely to follow an MED consultation on the type and scope of demand for this spectrum. However, there is no reason to suggest that the MDS rights would not be released for either broadcasting or telecommunications services, if there was demand for these rights for these purposes.

11.22 All the above terrestrial and satellite television transmission vehicles, with the possible exception of VHF (which it is likely will not be used for digital television), are already or will be digital capable. Under pro-digital conversion Government policies, terrestrial broadcasters will implement digital television services in the near future. TVNZ has stated in its 6 month 2005/06 Interim Report that it is working with Government officials and other broadcasters (SKY understands that these are the other FTA broadcasters) on its own digital terrestrial distribution systems for additional FTA services. This is repeated in its 2005 Annual Report. A recent newspaper article reports that TVNZ is currently testing a digital terrestrial service and that BCL/THL was commissioned by the former Government to report on this later this year. (The Dominion Post, 27 September 2005, p C3). The post-election briefing from the Ministry of Culture & Heritage to the Minister of Broadcasting records that a number of technical and commercial/policy matters have been resolved at an industry level (see www.mch.govt.nz). It also states that TVNZ has been invited to prepare a business plan for an FTA digital package.

11.23 There is also a possibility of Government support for the development of digital capability for FTA television broadcasting (see the post election briefing from the Ministry of Culture & Heritage (**MCH**) to the Minster of Broadcasting, and the post election briefing by the MED to the Minister of Communications and Information Technology, October 2005 www.med.govt.nz). MCH's post-election briefing to the Minister of Broadcasting records that a suite of policy decisions relating to digital TV will likely be needed in early 2006.

The market for television transmission services

11.24 The market for television transmission services incorporates the service of sending television signals between transmission points (i.e. the linking service) or from a transmission point to a viewer.

11.25 In 1995 Broadcast Communication Limited (**BCL**) was the major provider of terrestrial transmission services. This continues to be the case.

11.26 BCL is now a subsidiary of the new state-owned enterprise, Transmission Holdings Limited (**THL**), separated out from TVNZ. It continues to provide terrestrial transmission services over UHF and VHF to TVNZ, CanWest, Prime New Zealand and SKY (for its UHF pay-TV service) as well as Trackside and the Maori Television Service).

11.27 BCL/THL also provides transmission links under a nationwide digital microwave radio (**DMR**) network. On 10 October 2005, BCL/THL and Prime New Zealand jointly announced that Prime New Zealand had entered into a new distribution linking contract with BCL/THL to connect Prime New Zealand's Albany studio to BCL's television transmission sites throughout New Zealand. These digital links replace TVNZ's satellite link used by Prime New Zealand.

11.28 In its 1995 decision, the Commission noted that other providers of transmission services included Telecom and, at that stage, Clear. SKY's understanding is that Clear's services are now provided by TelstraClear (principally to itself for telecommunications). TelstraClear transmits its pay-TV services itself, through coaxial cable in Christchurch and Wellington. Other possible providers of transmission services include Woosh Wireless Limited, Vector Communications Limited, Vodafone and Telecom 3G and Telecom ADSL.

11.29 SKY uplinks SKY's satellite service channels from its Mt Wellington site to the Optus B1 satellite. The Optus B1 satellite transmits the signals to viewers. Although SKY receives data streams from other broadcasters including FTA broadcasters and uplinks these to Optus B1, it does not provide a linking and transmission service to these other television broadcasters. SKY multiplexes the separate feeds from the FTA broadcasters into streams for transmission to its own customers. SKY does not consider that it provides services in the market for television transmission vehicles. (As noted in paragraph 9.6, SKY provides limited linking services for radio but no aggregation occurs in respect of these services as a result of the transaction).

11.30 TVNZ also uplinks two regional versions of both TV One and TV2, as well as the Maori Television Service, directly to Optus B1 from its Avalon uplink. TVNZ uses its own transponder capacity on the Optus B1 satellite. These regional programmes allow it to provide regional advertising breakout options beyond those available through SKY. These services (as well as TV3, C4 and Prime New Zealand) may be viewed either through SKY's STBs, or, in the case of TV One, TV2 and MTS, through alternative STBs available at retail shops.

The market for retail television broadcasting

11.31 An issue in the 1995 decision was whether FTA and pay-TV television should be in two markets.

11.32 The question of whether FTA and pay-TV services are in the same market turns on whether the services are substitutable.

Viewing and churn data

11.33 In its 1995 decision based on AGB McNair surveys and churn data from SKY, the Commission found that viewers were substituting pay-TV and FTA services. The AGB McNair data indicated that the average household subscribing to SKY did not watch significantly more television than other households. It also showed a general decline in television viewing, notwithstanding SKY's entry.

11.34 For the period from 2002 – October 2005, AGB Nielsen data on average audience time spent viewing per day is:

Table 1: Average Audience Analysis – time spent viewing (hours and minutes per day): All viewers age 5+

	2002	**2003**	**2004**	**2005 Jan-Oct**
TV One	01:02	00:58	00:57	00:52
TV2	00:41	00:41	00:35	00:35
TV3	00:34	00:32	00:33	00:33
C4	00.04	00:03	00:02	00:03
Prime New Zealand TV	00:05	00:08	00:09	00:09
Other TV Channels	00:01	00:01	00:01	00:01
SKY Network	00:24	00:29	00:35	00:34

Table 1: Average Audience Analysis – time spent viewing (hours and minutes per day): All viewers age 5+				
	2002	**2003**	**2004**	**2005 Jan-Oct**
Total	02:51	02:50	02:52	02:48

Source: AGB Nielsen Media Research: Dataline Service.

11.35 This data indicates that in general more FTA channels are watched than SKY. AC Nielsen data on viewing hours within homes that subscribe to SKY, for the period from January-October 2005, records an average of 2 hours and 46 minutes FTA viewing per day compared to 1 hour and 19 minutes pay-TV viewing. This data indicates that an average household with SKY watches more FTA services than SKY. This has occurred despite there having been an increase in average SKY viewing hours since 1995.

11.36 Further, SKY has only 20% of the share of viewing for the June 2005 year (SKY 2005 Annual Report). This figure lags considerably behind SKY's household penetration of 39.7% of households (see SKY 2005 Annual Report), indicating that a considerable number of SKY subscribers continue to watch FTA services. Indeed, approximately 20,000 SKY subscribers subscribe only to re-broadcast FTA services.

11.37 While SKY's subscriber base has grown since 1995, the rate of growth of digital satellite services has slowed in recent years. SKY also notes that the New Zealand pay-TV household penetration rate is significantly lower than other countries, which can exceed 70%. Some of the growth in subscriptions to SKY's digital satellite services has also arisen from the on-going transfer of SKY's subscribers from its analogue services.

11.38 For comparison purposes, TV One, TV2 and TV3 have virtually 100% penetration of households in New Zealand and remain accessible to virtually any New Zealand viewer through both terrestrial delivery via BCL/THL and supplementary satellite delivery through SKY.

11.39 Gross churn of both UHF and satellite subscribers has reduced to 15.8% in the year to 30 June 2005, from 17.1% the year before and 18% in the 2002 year (churn is the percentage of subscribers who disconnect their service either voluntary or due to failure to pay their account, and is measured on an annual basis as a percentage against the total number of subscribers). Nevertheless, while the rate of reduction of churn has slowed as a percentage of overall subscribers, it remains significant in absolute terms (SKY has lost, and replaced, over 90,000 subscribers in each of the past 5 years). This indicates the continued substitutability of FTA services for pay-TV services, and therefore the existence of a combined retail television broadcasting market.

Programming and advertising constraints

11.40 Overall, the Commission accepted in 1995 that FTA and pay-TV placed competitive constraints on each other in programming, and to a limited degree, in advertising. It also noted that the FTA broadcasters restricted advertising of SKY's television services. We discuss below the continuing competitive market for the acquisition of programmes. In respect of advertising, SKY continues to compete for advertising revenue with FTA broadcasters, even though its share, while increasing, is still modest.

11.41 Further, in 1995 the Commission noted the inter-changeability of programming genre between FTA and SKY, notably in programming more typical of narrow-casting (e.g. music programmes). If anything, this inter-changeability has become more pronounced. A current example would be ALT TV, Juice TV and CanWest's C4.

11.42 The FTA channels offer a wide range of programmes, including news, sport, movies, children's programmes, documentaries, and drama programmes. SKY also has a wide range of programmes as discussed in paragraph 9 of this application. This includes movies, sports, news, documentary and children's programmes. SKY also offers general drama programmes on SKY 1 and UK TV.

11.43 While SKY has a number of specialist channels on its digital satellite service, FTA television channels themselves now also offer a wide range of specialist programmes. This is particularly the case for TVNZ, under its Charter funding, and additional channels are planned.

Television advertising services

11.44 As noted above, the Commission has also recognised separate advertising services markets for different media in previous decisions. The market for television advertising services covers all television advertising on both FTA and pay-TV channels.

DIFFERENTIATED PRODUCT MARKETS

12. Differentiated or standardised product markets

12.1 The products in the markets referred to above are differentiated.

13. Characteristics of differentiation

Television Transmission Vehicles Market

13.1 The different transmission vehicles have different technical characteristics, but all have the purpose of delivering television signals to viewers.

Television Transmission Services Market

13.2 The transmission services have different characteristics, but all have the purpose of delivering television signals to homes.

Retail Television Broadcasting Market

13.3 The obvious difference in this market is that a subscription fee is paid for pay-TV and not for FTA services, while all services are also funded by advertising and other revenues (sponsorship and, for some broadcasters, subsidies).

13.4 Otherwise, the principal characteristics of differentiation are the different kinds of programmes offered by broadcasters, their timing, and sequencing with other programmes. However, the broadcasters all offer a generally similar range of genres of programmes and programmes within the genres. There are also some similarities in timing of programming with news, drama and entertainment programmes that have broad appeal timed to occur in the peak viewing hours.

13.5 Paragraph 11 above discusses the extent to which the products offered by the main broadcasters are substitutes for each other and in particular, substitutability between FTA and pay-TV programmes. We discuss in paragraph 16 below the extent to which the merged SKY/Prime New Zealand entity would be constrained in its actions by the other broadcasters.

Television Advertising Services Market

13.6 In this market, advertisers make their choices on the basis of price, audience reach and ratings.

VERTICAL INTEGRATION

14. Vertical integration between firms involved at different functional levels

14.1 The proposed acquisition will not result in vertical integration between firms involved at different functional levels of the markets referred to in paragraph 11.

PREVIOUS INVOLVEMENT IN ACQUISITIONS

15. Previous involvement by SKY and Prime New Zealand in acquisitions

15.1 The only acquisitions that SKY has been involved in over the last three years that would be relevant to this application are the acquisition of a few individual spectrum licences, the renewed rights to its UHF-TV licences from 2010 and its acquisition of the business of DVD Unlimited in September 2004. The renewal rights were offered by MED to the current holders of UHF-TV spectrum licences on 31 March

2005. SKY obtained the renewal rights when it accepted the terms of MED's 31 March 2005 Offer Documents. As with the offers to other holders of spectrum licences, the renewal is subject to SKY certifying that a Commerce Commission clearance is not required, or obtaining a clearance, immediately prior to settlement (which must be no later than 11 September 2009).

15.2 The terms of the offer also included a stipulation that any transfer of rights and obligations under the Offer Document may only take place with MED's consent.

15.3 Prime New Zealand has also obtained rights from MED to renewed UHF-TV spectrum licences from 2010. Apart from this, SKY is not aware of any other acquisitions relevant to this application that Prime New Zealand has been involved in over the last three years.

PART III: CONSTRAINTS ON MARKET POWER BY EXISTING COMPETITION

EXISTING COMPETITORS

16. **Existing competitors**

Market for television transmission vehicles

16.1 SKY presently owns 4 nationwide sets of UHF-TV spectrum licences, and leases downtime on 1 nationwide set of UHF-TV licences from the New Zealand Racing Board. Its nationwide UHF-TV spectrum licences give it approximately 80% population coverage. It also owns a number of other individual UHF-TV licences that support its nationwide UHF channels and an unutilised management right over MDS spectrum. Prime New Zealand currently owns 1 nationwide set of UHF-TV licences (the UCB licences it purchased in 1995) and a number of supporting individual licences, including two individual VHF-TV licences to provide additional coverage. It has 91% population coverage. It also leases some UHF-TV licences from SKY.

16.2 The proposed acquisition will result in the aggregation of the rights to these television transmission vehicles and the related rights of renewal held by SKY and Prime New Zealand. However, this is only a small aggregation in SKY's rights. In the context of all the available transmission vehicles, it will not substantially lessen competition. In that respect, SKY notes that:

16.2.1 TVNZ holds a dormant UHF-TV nationwide set with broadly similar coverage to SKY's UHF-TV nationwide spectrum licence sets and also 2 VHF-TV nationwide sets with virtually 100% coverage. The UHF-TV nationwide set already has a history of use for FTA broadcasting, i.e. the former Horizon TV network. The Government has agreed to renew this UHF-TV nationwide set, and signalled that it could be renewed without charge in the event that TVNZ proposed to use it for new public broadcasting services (see Cabinet Minute: Min (04) 41/24,13 December 2004, www.med.govt.nz).

16.2.2 CanWest holds 1 VHF-TV nationwide set with virtually 100% population coverage and a VHF-TV set (for C4) with 80% coverage.

16.2.3 As outlined above, the Government intends to offer 2 new management rights and 4 new nationwide sets of UHF-TV spectrum licences for allocation to commercial operators for digital television. This could total up to 198 new licences. Although the intended auction of the licences in 2004 has been postponed, these management rights and licences are available for allocation when commercial demand is manifested through expressions of interest. This is a significant resource available, if needed.

16.2.4 Digital compression technology is available to increase channel availability by five times in the UHF-TV channels over analogue transmission (digital compression is also technically possible in the VHF-TV bands). As noted above, the existing UHF-TV spectrum licences can be converted to digital and the six new UHF-TV licence sets will be digital.

16.2.5 There is significant satellite capacity available. Additional Optus transponder capacity on Singtel-Optus' satellites will be available, starting in 2006. Beyond SKY's and TVNZ's options there are at least 4 additional transponders capable of covering New Zealand as discussed in paragraph 11. There is also capacity available on other satellites, and the MED is expected to decide in December 2005 on whether to proceed with an application from NZLSAT Limited for a new satellite allocation. TVNZ has uplink facilities at Avalon and Auckland. Telecom has uplink facilities at Warkworth. There are satellite uplink and downlink linking frequencies readily available for these satellites, and the MED is currently implementing a 2003 decision to migrate terrestrial telecommunications services from the downlink frequencies over the next 18 months (see www.med.govt.nz under Broadcasting).

16.2.6 The delivery of television services over the internet, mobile 3G and other media using IPTV protocols is likely to expand significantly (e.g. BBC is trialling the provision of programmes via the internet to a computer or an integrated media player (see paragraph 11 above). Also see www.tv4all.com). It is likely that this will become a significant alternative to both more traditional and more recent forms of television transmission.

16.2.7 As outlined in paragraph 11 above, there are other television transmission vehicles also available.

16.3 As noted above, the VHF networks used by TV One, TV2 and TV3 have virtually 100% coverage. This is due to Government policy and directions to NZ On Air over time to financially support coverage to those levels for those channels. In contrast, as noted, coverage of SKY's UHF networks is approximately 80% and Prime New Zealand's UHF network is 91%. Adding SKY's UHF-TV licences to those held by Prime New Zealand will not provide a higher level of coverage than that currently held by Prime New Zealand. It would not be economically feasible for Prime New Zealand's network to reach virtually 100% coverage without financial support, such as that provided to TVNZ and CanWest.

16.4 As noted in paragraph 15 above, the grant of renewed UHF-TV licences from 2010 is subject to the holders certifying, immediately prior to settlement (which must be on later than 11 September 2009), that a Commerce Commission clearance is not required, or obtaining a clearance.

16.5 TVNZ and THL are also working on the development of a digital platform, as discussed in paragraph 11 above. As noted above, TVNZ is providing a business plan to Ministers this year, and decisions on policy issues are likely early next year.

The market for television transmission services

16.6 Neither SKY nor Prime New Zealand provide television linking and transmission services. Prime New Zealand and SKY both purchase television transmission services from BCL/THL and, in the case of SKY and TVNZ, Singtel-Optus. Both SKY and Prime New Zealand are on the demand side of this market.

16.7 The aggregation of the services purchased by SKY and Prime New Zealand from BCL/THL is very modest.

16.8 The principal suppliers of services in this market, BCL/THL and Optus, have substantial countervailing power against the television broadcasters. The proposed acquisition will not lead to a substantial lessening of competition in this market. Moreover, SKY intends to maintain the FTA network and the related digital linking arrangements for Prime New Zealand's business.

The retail television services market

Market shares

16.9 In its 1995 decision, the Commission measured concentration by reference to the market shares of broadcasters in the retail television services market using the commonly used audience share measurement and revenue, predominantly represented by advertising spend as well as subscription (pay-TV) revenue. Applying these measurements today, the market shares of TVNZ, CanWest, SKY and Prime New Zealand are approximately:

Table 2: Audience share by channel (%); All viewers age 5+: By calendar year

	2002	2003	2004	2005 Jan-Sep
TVNZ	60.1	57.8	53.4	51.8
TV One	36.2	33.8	32.9	30.9
TV2	23.9	24	20.5	20.9
CanWest	20	19.2	20.4	21.3
TV3	20	18.8	19	19.8
C4	-	0.4	1.4	1.5
Prime New Zealand	3.1	4.4	5.3	5.4
SKY	14	16.6	20.1	20.5
Other TV Channels	2.8	2	0.8	1

Source: AGB Nielsen Media Research: Dataline Service

Table 3: Total Advertising Revenue by financial year ($ million)					
	2001	**2002**	**2003**	**2004**	**2005**
TVNZ[1]	284.7	285.7	304.8	335	344.1
CanWest[2]	91.6	95.2	114.4	121.3	136
Prime New Zealand[3]	5.9	5.6	10.4	17.6	25.4
SKY[4]	12.6	16.5	19.6	26.6	35.6
Total	394.8	403	449.2	500.5	541.1

***Note:** TVNZ, Prime New Zealand, and SKY's financial statements are for years ending 30 June. CanWest's financial statements are for years ending 31 August. **Total amounts do not take account of other broadcasters such as MTS and regional services so are slightly understated**.

Table 4: Total Advertising Revenue (%): By financial year (calculated from Table 3)					
	2001	**2002**	**2003**	**2004**	**2005**
TVNZ	72.1	70.9	67.9	66.9	63.6
CanWest	23.2	23.6	25.5	24.2	25
Prime New Zealand	1.5	1.4	2.3	3.5	4.7
SKY	3.2	4.1	4.4	5.3	6.6
Total	100	100	100	100	100

***Note:** TVNZ, Prime New Zealand, and SKY's financial statements are for years ending 30 June. CanWest's financial statements are for years ending 31 August. **Percentages do not take account of other broadcasters such as MTS and regional services so are slightly overstated**.

[1] Source: TVNZ Annual Reports.

[2] CanWest TVWorks Audited Financial Statements 2001-2004, 2005 estimated, as advertising revenue not separately disclosed.

[3] Source: Audited Financial Statements 2001-2004, un-audited financial statements 2005.

[4] Source: SKY Annual Reports.

Table 5: Annual Revenues from all Sources ($ million): By financial year					
	2001	**2002**	**2003**	**2004**	**2005**
TVNZ[5]	481	477	492	470	437
CanWest[6]	93.1	101	124	127	142
Prime New Zealand[7]	6	5.8	10.5	17.9	25.6
SKY[8]	300	345	391	441	489
Total	880.1	928.8	1017.5	1,055.9	1,093.6

***Note:** TVNZ, Prime New Zealand, and SKY's financial statements are for years ending 30 June. CanWest's financial statements are for years ending 31 August. **Total amounts do not take account of other broadcasters such as MTS and regional services**.

Table 6: Annual Revenues from all Sources (%): By financial year (calculated from Table 5)					
	2001	**2002**	**2003**	**2004**	**2005**
TVNZ	54.7	51.4	48.4	44.5	40
CanWest	10.6	10.9	12.1	12	13
Prime New Zealand	0.7	0.6	1	1.7	2.3
SKY	34.1	37.1	38.4	41.8	44.7
Total	100	100	100	100	100

***Note:** TVNZ, Prime New Zealand, and SKY's financial statements are for years ending 30 June. CanWest's financial statements are for years ending 31 August. **Percentages do not take account of other broadcasters such as MTS and regional services so are slightly overstated**.

16.10 In regard to Tables 3, 4, 5 and 6:

16.10.1 SKY's revenues of $489.4m in the June 2005 year comprised residential subscriptions of 79.1%, commercial subscriptions of 5.7% and advertising of 7.3% (the remainder is made up of other revenue) (SKY Annual Report 2005);

16.10.2 For the full year to June 2005, TVNZ's total revenues from television of $436m, included $344m in advertising revenue (TVNZ Annual Report

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5 Source: TVNZ Annual Reports.

6 Source: Audited Financial Statements 2001-2004, 2005 figures from a presentation from CanWest MediaWorks on 17 October 2005.

7 Source: Audited Financial Statements 2001-2004, un-audited financial statements 2005.

8 Source: SKY Annual Reports.

2005). It also receives significant levels of Charter and NZ On Air funding. The financial support provided by Charter and NZ on Air subsidies to TVNZ may be understated in its Annual Report as TVNZ's practice is not to recognise the subsidies as revenue until they are allocated to a programme.

16.10.3 The CanWest revenue figures are for CanWest TV Works Limited. In addition, CanWest earns significant revenues in radio from CanWest RadioWorks Limited. For example, CanWest RadioWorks earned $107.9m in the last financial year and $101.6m in the year to August 2004 (source: CanWest MediaWorks presentation, 17 October 2005).

16.10.4 The advertising and television revenues of regional broadcasters (such as Southland TV, WTV, CTV) are not readily available. On the basis of the data on audience share, these revenues are not expected to be large, but as a result the percentages in the table are slightly overstated. The same point also applies to the table showing total advertising revenue as a percentage.

16.11 Taking the television audience share data (Table 3) for 2005, the combined market share of SKY and Prime New Zealand would be 25.9%. This would involve only a moderate increase in SKY's market share. The merged SKY/Prime New Zealand entity would have an audience share of approximately half that of TVNZ.

16.12 TVNZ has the major share of the New Zealand retail television broadcasting market, as measured by viewership. A combined SKY/Prime New Zealand would remain substantially smaller than TVNZ on audience share. Also the merged entity would have an audience share only slightly higher than CanWest.

16.13 Taking the advertising revenue data (Tables 3 and 4), the combined entity would have a market share of only around 11%. This is only a small market share.

16.14 Taking the total revenue data (Tables 5 and 6) there would only be a very small increase in SKY's market share as a result of the acquisition.

Conclusion on market concentration

16.15 Accordingly, SKY does not consider that the acquisition would result in any significant market concentration increase.

16.16 Nevertheless, SKY has also considered the constraints on the merged entity from competitors and other competition factors below.

Constraints from competitors

16.17 SKY's principal competitors are TVNZ and CanWest. As set out in Table 2, TVNZ currently has 51.8% audience share and TV3 has 21.3%. In advertising, TVNZ has over 60% of total advertising revenue.

16.18 TVNZ's current and future position is underpinned by the virtual 100% terrestrial transmission coverage of its TV One and TV2 FTA services nationally. It also receives substantial programme subsidies from NZ on Air and exclusive Government Charter funding. For the year ending 30 June 2005, TVNZ received $25.6 million in Charter funding and, directly or indirectly, 74% of all NZ on Air television funding (sources: TVNZ Annual Report 2005, NZ on Air Annual Report 2005). In total, TVNZ received $71.9m from these sources in the 2005 financial year.

16.19 The Broadcasting "Programme of Action", released on 3 February 2005, is focused on public broadcasting (see also summary in the post election briefing to the Minister of Broadcasting: www.mch.govt.nz). SKY's understanding from 2005 Budget Papers released by Treasury is that implementation of this plan will cost $10 million rising to $50 million each year over the next 6 years, most of which will go to TVNZ (excluding any expenditure on digital terrestrial transmission facilities).

16.20 This existing and increased public funding will principally benefit TVNZ.

16.21 CanWest (TV3, C4) also has a significant market share and is financially strong, with growing profits. In August 2005, CanWest said it was the leading television broadcaster in all key audience demographics. CanWest said that C4 was also seen as now "making a positive EBITDA contribution" and is "seeking more mainstream format television in its schedule" (17 October 2005 Press Release from CanWest MediaWorks).

16.22 SKY rebroadcasts FTA services of a range of broadcasters, notably TVNZ, CanWest and Prime New Zealand, which enhances the national penetration (and advertising reach) of those services.

16.23 As we discuss above, viewer switching between pay-TV and FTA channels by SKY subscribers remains at a significant level. In addition, SKY's customer base is susceptible to significant "churn".

16.24 TelstraClear transmits SKY programming content to its cable network under an agreement expiring in 2009. SKY also has a reselling and retransmission agreement with Telecom that expires in 2008, under which it provides SKY's pay-TV content.

16.25 The regulatory framework does not create any competitive constraints, as discussed in paragraph 17 below.

16.26 SKY considers that its acquisition of Prime New Zealand, which has only a modest market share on any measure, would not impair the ability of TVNZ and CanWest to compete with it or reduce competitive conditions generally. To the contrary, SKY considers that the acquisition will allow Prime New Zealand to compete more strongly for viewers and advertising spending.

Programme rights

16.27 As noted in paragraph 17 below, SKY has acquired rights to overseas sourced movies, sports, news, documentary and other programmes in competitive situations. In addition, it holds rights for defined terms to certain major sporting events, including Super 14, NPC, Tri Nations and Bledisloe Cup rugby matches, rugby league matches and cricket, acquired competitively. SKY also produces many of its own programmes (e.g. Sport 365, Reunion, Courtside, Trackchat) and live New Zealand sports broadcasts.

16.28 Prime New Zealand currently sources its programmes from local and overseas producers and licensors, as well as producing a small amount of programming in-house. The top rating programmes on Prime in terms of viewership, consistently rate significantly below the top 20 rating programmes on TVNZ and the top 20 rating programmes on CanWest. Its most attractive programme is "Who Wants to be a Millionaire", but this programme competes with a range of alternative programmes. [ ] but thereafter the merged SKY/Prime New Zealand entity will need to secure rights to these programmes itself, if it wished to show them.

16.29 As discussed in paragraph 17 below, the market for programmes is largely in the hands of suppliers. Generally, the programme rights are held for short terms, and regularly renegotiated. The bidding for these rights is competitive as discussed in paragraph 18 below. To the extent that SKY does hold longer term rights, these are generally for movies and some sports in the pay-TV window. The proposed acquisition will have no impact on these rights.

16.30 SKY has the opportunity to use the Prime New Zealand channel post-acquisition for secondary (i.e. delayed) broadcast rights to SANZAR and other rugby and international cricket events. SKY does not consider, however, that the commercial position in relation to these rights would be changed. These secondary rights are currently held by SKY under its contracts with the relevant sport organisations. The FTA broadcasters have shown only an interest in the delayed rights for international, Super 14 and NPC rugby events. They have not been able to secure an FTA partner to broadcast cricket and rugby league.

16.31 Even for international rugby, Super 14, and NPC rugby, the interest of FTA broadcasters in delayed retransmission has reduced. TVNZ currently does not broadcast these sports. Also, CanWest is reported in the media as saying that Super 14 and NPC rugby broadcasts would lose their prime time FTA slot next season and it was not certain that the channel would buy rights to delayed rugby broadcasts (NZ Herald, Sport Section, 18 October 2005). CanWest were also reported as saying that it could make more money from broadcasting a movie in prime time than from showing delayed Super 14 and NPC matches.

16.32 At present SKY decides whether or not to sell secondary rugby broadcast rights to FTA broadcasters by balancing the prices tendered by the interested FTA broadcasters against the effect of a delayed FTA broadcast on its subscriber base. Post-acquisition, SKY will have an alternative option being that it could transmit the FTA rights on the Prime New Zealand FTA network. The decision for it to make will involve balancing the revenue that could be earned from advertising on the Prime New Zealand network or the potential fees from another FTA broadcaster against the effect on its subscriber base.

16.33 TVNZ and TV3 have substantial resources, such that they could purchase the FTA rights to sports events directly if they wished (e.g. see paragraph 17.8 below). The acquisition of Prime New Zealand by SKY does not change this possibility.

16.34 SKY therefore considers that rights to these sports programmes should not be seen as a significant barrier to expansion.

Acquisition of Prime New Zealand would not eliminate a "vigorous competitor"

16.35 Prime New Zealand is not a "maverick" in the sense that it "punches above" its market share weight. Prime New Zealand has not been particularly successful in increasing audience share through its own programmes. SKY aims to improve this situation as it has accomplished with its own differentiated sports and political news and current affairs programmes and it will provide attractive sports and other programming from its own programming resources.

Television advertising services market

16.36 The market share of each nationwide television network, calculated on the basis of the actual advertising revenues disclosed by each network, is set out Tables 3 and 4 above.

16.37 Both SKY's and Prime New Zealand's combined share of the television advertising services market are small. Their combined market share is only 11.3%, based on 2005 advertising revenues.

16.38 SKY therefore considers that the proposed acquisition would not lead to a substantial lessening of competition in this market. As a result, SKY does not discuss this market again, in the remaining paragraphs of this notice.

Possible separate pay-TV and FTA markets

16.39 While SKY has identified a retail television broadcasting market as an appropriate relevant market, it has also considered the implications of the proposed acquisition for a pay-TV market and an FTA market, in case the Commission were to consider these were separate markets. The proposed acquisition would not result in any horizontal aggregation in either of these separate markets. It would not strengthen any market power SKY may have in a pay-TV market by, for example, raising entry barriers to that market. Another pay-TV operator would not need to operate its own FTA channel in order to commence as a pay-TV operator. Furthermore, it is extremely unlikely that Prime New Zealand would start its own pay-TV operation in New Zealand. There are no conglomerate effects of the kind described in the Commission's *"Mergers and Acquisitions Guidelines".* The acquisition would promote the competitive conditions in any separately defined FTA TV market.

Possible Counterfactual Scenarios For All Identified Markets

16.40 SKY considers that, for the purposes of competition analysis for all the markets identified in this application, the most likely counterfactual scenarios are set out below.

16.41 As background to these scenarios, we note that while Prime New Zealand has earned revenues of between $5.7m – $17.9m in the years between 2001 - 2004, it has had net operating deficits of 14.7m, $16m, $10.2m, and $6.7m in each of those financial years (source: Prime New Zealand audited financial statements 2001, 2002, 2003, 2004). These audited financial statements have been qualified by the statement that Prime New Zealand has experienced significant losses and the going concern assumption in the annual reports is valid on the basis of continued financial support from the company's shareholders. The Annual Reports state, if this financial support does not continue, that the going concern assumption may not be valid. For the 2005 financial year, its net operating deficit is $4m (sourced: unaudited financial statements 2005). The unaudited financial statements for 2005 also repeat the qualifying statements from the earlier financial statements.

16.42 Prime New Zealand continues to suffer significant losses. SKY understands that Prime New Zealand has accumulated losses of around NZ$76m. [ ]

16.43 [ ]

16.44 The second scenario involves the purchase of Prime New Zealand by TVNZ or CanWest as a going concern. This is unlikely because both TVNZ and CanWest have an FTA business, and other UHF-TV networks that they can utilise. Further, CanWest were unable to sustain C4 as a full channel, and changed it to a music entertainment channel. Either acquirer is likely to shut down Prime New Zealand's current business.

16.45 SKY notes that, nevertheless, the increases to each company's market shares and any other market aggregations would be the same as under the proposed acquisition. Accordingly, the proposed acquisition will not result in any less market concentration in comparison to an acquisition by TVNZ or CanWest (indeed, if acquired by TVNZ, market concentration ratios could be higher). In terms of FTA businesses, the Prime New Zealand FTA business would also act as a more effective competitive spur to existing competitors, particularly by maintaining a third nationwide FTA channel on a sustainable basis that would compete for viewers and for advertising.

16.46 The third scenario involves the possible purchase of Prime New Zealand by Nine Network or another overseas acquirer. This is a very unlikely counterfactual scenario. There are two reasons for this. First, the Nine Agreement, including its option to acquire 50% of Prime New Zealand (see paragraph 5.4 above) has been terminated and will not be reinstated regardless of whether this acquisition proceeds. [ ] Nine Network is a significant Australian broadcaster, which has put major resources, including management resources, into Prime New Zealand. Prime New Zealand's Australian parent has also put major resources into Prime New Zealand.

16.47 Compared to these counterfactuals, SKY's proposed acquisition is for Prime New Zealand's business, including its assets, rights and benefits, as a going concern, as it presently stands. This would enhance competition as Prime New Zealand would be financially stronger, better able to compete with TVNZ and CanWest for higher rating FTA programmes and advertising. In the longer term, it would allow for the retention on a sustainable basis of a third FTA channel capable of growth that will continue to compete with TVNZ and CanWest.

CONDITIONS OF EXPANSION

17. Market conditions relevant to the ability of existing firms to expand

Television Transmission Vehicles Market

17.1 As discussed above, there are a wide range of television transmission vehicles available. SKY considers that there are no significant barriers in the television transmission vehicles market likely to prevent expansion by existing competitors.

Television Transmission Services Market

17.2 Given its conclusion in paragraphs 16.7 and 16.8 above, SKY does not consider it necessary to consider whether other competitors are likely to expand in the television transmission services market.

Retail Television Broadcasting Market

17.3 There are no significant regulatory barriers to expansion in the retail television broadcasting market. Relative to other developed countries the New Zealand broadcasting industry is regarded as being lightly regulated for the following reasons:

17.3.1 there is no broadcasting warrant or licensing system independent of the regulation of radio spectrum use;

17.3.2 there are no specific foreign or cross-media ownership restrictions;

17.3.3 there are no compulsory programming obligations imposed upon television broadcasters other than TVNZ's Charter obligation (see below);

17.3.4 there is no anti-siphoning legislation which requires certain programming content to be broadcast on FTA television;

17.3.5 there are no pricing regulations in respect of pay television operators; and

17.3.6 there is ready access to television transmission vehicles at market prices.

17.4 In the Commission's 1995 decision, the two most important market conditions relevant to the ability of existing firms to expand were considered to be access to programmes and access to transmission vehicles.

17.5 Many programmes are purchased from overseas. In SKY's case:

17.5.1 apart from broadcasting rights to major sports events, content is purchased from international brokers;

17.5.2 movie rights are acquired from the major US studios;

17.5.3 most content on SKY's entertainment, news and documentary channels are acquired from US studios; and

Some of these rights are purchased as a non-exclusive basis, and sometimes only in the pay-TV window.

17.6 In its 1995 decision, the Commission acknowledged that the supply of these programmes is in the hands of the overseas suppliers. This continues to be the case. The acquisition will not affect competition for these programmes.

17.7 Locally produced programming is a significant factor in attracting New Zealand audiences. Many of these programmes are funded by NZ on Air. TVNZ receives the largest share, directly or indirectly, of NZ on Air programme funding. This is followed by CanWest, Prime New Zealand (but only to a very limited extent) and, recently, regional broadcasters over SKY, which receives nothing from NZ on Air. TVNZ also receives, exclusively, a significant and increasing amount of charter funding for producing programmes.

17.8 In its 1995 decision, the Commission said that in the short term there may be difficulty for a new pay-TV operator obtaining movie and sports programmes. While SKY accepts this is partly correct, it points out that many movie rights remain available for purchase, its own contracts with programme providers are regularly renegotiated, and significant sporting events (e.g. end of year All Black tours, Rugby World Cup, America's Cup, Soccer World Cup, Commonwealth and Olympic Games) are regularly made available to the highest bidder. There are a wide range of programmes available (sufficient, for example, for over 300 pay-TV channels in the United States). SKY's main competitors have demonstrated they have the resources and interest in bidding for the primary rights for sports events and programmes. They actively participate in bidding for rights. For sports rights, while SKY has rights to Super 14, NPC, Tri Nations and Bledisloe Cup matches, TVNZ held the rights to the 2003 Rugby World Cup, and Sky understands that the FTA and pay rights for the 2007 Rugby World Cup have been purchased by a New Zealand FTA broadcaster. Also, TVNZ covered the Soccer World Cup in 2002, the Olympics in 2004 and has the rights to the 2007 Commonwealth Games, World Seven's rugby, the America's Cup and all New Zealand netball. Sky also notes that when TVNZ and TelstraClear were proposing to launch a pay-TV service in 2000/1, they acquired a number of rights to sports programmes and dedicated pay-TV channels.

17.9 In any case, the proposed acquisition of Prime New Zealand would not itself have the effect of restricting access to sports rights.

17.10 On the basis of the discussion in paragraph 16 above, access to transmission vehicles would not be a hindrance to the expansion of existing operators onto new channels. In any case, TVNZ's and TV3's main focus is on increasing market share using their existing channels.

17.11 Looking to the medium and longer-term, broadcasters will move from analogue to digital broadcasting. SKY acknowledges that establishing digital broadcasting would involve a significant level of investment. However, both TVNZ and CanWest have significant financial resources to be able to fund this. There is also a strong signal from Government that the Government may assist with the development of digital capability by TVNZ (e.g. see paragraph 11.23 above).

17.12 SKY notes that TVNZ has been exploring the prospect of developing digital television with other FTA broadcasters. SKY does not consider its acquisition of Prime New Zealand should affect this. [ ]. The acquisition does not impact on the possible development of digital television by TVNZ or even CanWest.

18. **Existing business which could expand**

18.1 Both TVNZ and CanWest are effective competitors and could seek to expand market share through their acquisition of local and overseas programme rights, changes to news and current affairs programming and the acquisition of new transmission vehicles (if needed). Indeed, both businesses are constantly seeking new programmes and TVNZ, in particular, has significant transmission vehicle capability available. There are also a number of additional transmission vehicles available if needed, including new management rights and spectrum licences in the UHF-TV spectrum.

19. **Conditions influencing expansion**

19.1 The principal conditions influencing a business decision to expand in the retail television broadcasting market are discussed in paragraph 17 above.

20. **Time frame for supply to increase**

20.1 In the television transmission vehicles market, a wide range of vehicles are readily available and could be acquired and used by SKY's competitors in a short time frame.

20.2 Both TVNZ and TV3 would be able to respond competitively in the retail television broadcasting market to any actions by the combined SKY /Prime New Zealand entity in a very short timeframe.

21. **Extent to which the possible competitive response of existing competitors would constrain SKY**

21.1 The competitive response of TVNZ and CanWest would place a significant constraint on the combined SKY/Prime New Zealand entity, as at present, for the reasons discussed above.

22. **Summary: extent that SKY would be constrained in its actions by the conduct of existing competitors**

22.1 The combined SKY/Prime New Zealand entity would be significantly constrained in its actions by existing competitors.

CO-ORDINATED MARKET POWER

23. **Market characteristics facilitating or impeding co-ordinated behaviour**

Television Transmission Vehicles Market

23.1 In the television transmission vehicles market, allocation of new rights to radio spectrum is controlled by the Government, under the Radiocommunications Act. This includes the uplink frequencies for satellite transmissions controlled under administrative licensing and coordination, and allocation of satellite transmission services.

23.2 Under the Radiocommunications Act, the Government has the discretion to allocate and grant spectrum rights and radio licences.

Television Transmission Services Market

23.3 In the television transmission services market, both BCL/THL and Singtel-Optus have significant countervailing power that would frustrate any attempts at collusion.

Retail Television Broadcasting Market

23.4 SKY does not consider that there are any market characteristics that would facilitate co-ordinated behaviour in the retail television broadcasting market. While there are a relatively small number of television broadcasters, TVNZ, TV3 and SKY in particular compete very strongly for viewer patronage and advertising revenue. This is particularly evident in relation to prime time news and current affairs. Prime New Zealand will remain under SKY's ownership, a competitor for advertising on FTA television.

23.5 There is a wide variation in advertising rates across the channels on account of their different shares of total viewers, making it difficult to tacitly agree. The proposed acquisition will not affect this.

23.6 The acquisition also involves only a modest increase in concentration in any relevant market.

24. Market characteristics facilitating or impeding monitoring and enforcement of co-ordinated behaviour

24.1 The markets in which broadcasters operate are transparent, both to viewers and advertisers (including advertising agencies).

25. Details of any price co-ordination, price matching or price following by market participants

25.1 SKY is not aware of any price co-ordination, price matching or price following by market participants.

26. Acquisition will not increase the risk of co-ordinated behaviour in the relevant market(s)

26.1 There is no increased risk of coordinated behaviour in the market for television transmission vehicles or retail television broadcasting or the other markets identified, as a result of the proposed acquisition. This is particularly due to the modest increase in concentration in any relevant market, rivalry of the television broadcasters and ready access to frequencies still under Government control. Also the Government can release already planned additional radio frequencies.

PART IV: CONSTRAINTS ON MARKET POWER BY POTENTIAL COMPETITION

CONDITIONS OF ENTRY

27. **Market conditions relevant to the ability of new firms to enter the market**

27.1 As discussed in paragraph 11 above, there are a wide range of television transmission vehicles available. There are no significant barriers to entry into this market.

27.2 Given the conclusion in paragraphs 16.7 and 16.8 above, SKY does not consider it necessary to consider the likelihood of new entry into the market for television transmission services.

27.3 The principal market conditions affecting new entry into the retail television broadcasting market are the same as for expansion of existing competitors: access to transmission vehicles, and access to programmes. These are discussed in paragraph 17 above.

28. **Identity of businesses not currently supplying the market, but able to supply the relevant market**

28.1 The different television transmission vehicles are discussed in paragraph 11 above.

28.2 The threat of entry to the retail television broadcasting market is most likely to arise through the potential acquisition of existing broadcasters by companies from overseas or by the establishment of new broadcasters. It could also occur through new niche operators.

28.3 For the other markets discussed in this application, this question is not considered relevant.

29. **Influential conditions of entry**

29.1 See paragraph 27 above.

LIKELIHOOD, SUFFICIENCY AND TIMELINESS OF ENTRY

30. **Timeframe for entry to occur, and for market supply to increase, in respect of each of the potential entrants**

30.1 New entry in the television transmission vehicles market could come from a number of sources.

30.2 It is possible, but not likely, that new entry could occur in the retail television broadcasting market within the near future, as illustrated by the experience of previous new entrants in trying to compete with TVNZ. Small niche operators could enter the market.

30.3 For the other markets discussed in this application, this question is not considered relevant.

31. The degree of likelihood a potential entrant would consider entry at pre-acquisition prices

31.1 A potential entrant in the retail television broadcasting market would not be deterred by current prices. TVNZ, CanWest and SKY are all earning good levels of revenue and are profitable. This could be seen as an incentive for a new entrant.

32. The degree the threat of entry is likely to cause market participants to react in a significant manner

32.1 The threat of new entry in the retail television broadcasting market does not currently pose as significant a constraint as competition from existing competitors due to the limited size of the market, except for niche operators, but would still provide an additional constraint on the actions of the merged SKY/Prime New Zealand entity. New entry in the form of a new television channel would be of a significant scale.

33. Conditions of entry considered influential on de novo entry

33.1 See paragraph 30 above.

34. Timeframe for de novo entry

34.1 See paragraph 30 above.

35. Extent of the possibility of de novo entrant constraining the merged entity

35.1 See paragraph 32 above.

PART V: OTHER POTENTIAL CONSTRAINTS

CONSTRAINTS ON MARKET POWER BY THE CONDUCT OF SUPPLIERS

36. **Suppliers of goods or services to the merged entity in each identified market**

Television Transmission Vehicles Market

36.1 In the market for television transmission vehicles, the principal suppliers to the merged entity will be:

- the Crown under the Radiocommunications Act in granting spectrum rights and radio licences; and
- Singtel-Optus (in respect of satellite services to SKY).

Television Transmission Services Market

36.2 In relation to the market for television transmission services, the main suppliers of goods and services will be BCL/THL and Singtel-Optus.

Retail Television Broadcasting Market

36.3 The principal suppliers of goods or services to the combined SKY/Prime New Zealand entity in the market for retail television broadcasting will be programme suppliers. This will include movie, documentary, drama programmes and providers of sport programmes and rights to broadcast sporting events.

37. **Owners of suppliers**

37.1 The ownership arrangements of programme suppliers are varied. Some programme suppliers are based overseas, and some programme suppliers are based in New Zealand.

37.2 As noted earlier, THL is a state-owned enterprise and BCL is a wholly owned subsidiary.

37.3 Singtel-Optus is owned by Singapore Telecommunications Limited, a publicly-owned company based in Singapore.

38. **Extent the conduct of suppliers of goods or services to the merged entity could constrain the merged entity in each relevant market**

Television Transmission Vehicles Market

38.1 As discussed in paragraph 23 above, the Crown has control over the grant of new rights and radio licences to radio spectrum including holding the existing UHF-TV management rights (except for the right under which MTS operates).

Television Transmission Services Market

38.2 Both THL and Singtel-Optus have considerable countervailing power, and would place a significant constraint on the merged SKY-Prime New Zealand entity. THL is the largest provider of linking and transmission services in New Zealand. All of Prime New Zealand's services and SKY's terrestrial UHF broadcasts are transmitted from THL transmission sites. For satellite services, SKY has secured rights under commercial contracts negotiated with Singtel-Optus but Singtel-Optus has the discretion to supply services to other persons (present and future capacity). Other satellite transmission capacity is either available or planned.

Retail Television Broadcasting Market

38.3 In relation to programming, the Commission in 1995 found that SKY, or Telecom and SKY combined, would not be able to control the supply of television programming, including the availability of popular programmes. Any market is in the hands of overseas suppliers of movies and sports programmes and not New Zealand broadcasters. SKY has experienced this in its negotiations over movie rights and for sporting rights, particularly for rugby. There is no good reason for the Commission to change its conclusions in its 1995 decision.

CONSTRAINTS ON MARKET POWER BY THE CONDUCT OF ACQUIRERS

39. **Acquirers of goods or services who will be supplied by the merged entity in each market identified**

39.1 This question is not relevant to the markets for television transmission vehicles or television transmission services, in which the combined SKY/Prime New Zealand entity are acquirers.

39.2 The acquirers of goods and services in the television broadcasting market are television viewers, which includes SKY's subscribers, advertisers, sponsors and Crown funding agencies (e.g. NZ on Air, Ministry of Culture and Heritage (Charter funding)).

40. **Owners of acquirers**

40.1 The acquirers in this market have a variety of ownership arrangements.

41. **Extent the conduct of acquirers would constrain the merged entity in each affected market**

41.1 The conduct of acquirers in these markets would constrain SKY/Prime New Zealand in terms of their choices, based on the pricing and content of the services offered by SKY/Prime New Zealand.

This notice is given by Jason Hollingworth, Chief Financial Officer, SKY Network Television Limited. I confirm that:

- all information specified by the Commission has been supplied;
- all information known to the applicant which is relevant to the consideration and determination of this application has been supplied; and
- all information supplied is correct as at the date of this application.

I undertake to advise the Commission immediately of any material change in the circumstances relating to this application.

DATED this day of November 2005

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Jason Hollingworth
Chief Financial Officer
SKY Network Television Limited