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**PUBLIC VERSION**

Dear Susan

### **NEP/SKY: RESPONSE TO SOPI**

- 1 Sky appreciates the opportunity to respond to the Commission's statement of preliminary issues (SOPI).
- 2 In this response we:
  - 2.1 provide further **deal context** to meet the SOPI's factual and counterfactual queries;
  - 2.2 describe the NEP **services agreement** and why it will have no effect on competition, with or without the merger; and
  - 2.3 briefly cover off the SOPI's **other points** under the sub-headings market definition, unilateral effects and coordinated effects.
- 3 This document also contains Sky's reply to the two anonymous submissions on the SOPI.<sup>1</sup>
- 4 Please say if the Commission has any follow-up questions. Sky is happy to assist at any time.

### **DEAL CONTEXT**

- 5 The market – and Sky in particular as the country's largest sports broadcaster – needs someone to invest ~\$50m in new outside broadcasting technology as soon as possible.

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<sup>1</sup> We refer to the 29 October 2020 submission as the "first anonymous submission (submitter)". And the 3 November 2020 submission as the "second anonymous submission (submitter)".



- 6 Sky cannot justify [] that investment. But NEP can.
- 7 Sky will commit some of its outside broadcasting work to NEP under a 10-year services agreement (the **service agreement**) to incentivise NEP to make that investment.<sup>2</sup>
- 8 With much at stake, Sky chose to work with NEP because it's the global leader in outside broadcasting, has a proven track record of delivering high-quality projects around the world and took an early interest in New Zealand.
- 9 Service agreements like this one are commonplace in the outside broadcasting industry because:
  - 9.1 broadcasters need continuous access to quality OB services to meet their contractual obligations to various sporting organisations; and
  - 9.2 outside broadcasting providers need volume commitments to justify making high-fixed cost investments.
- 10 Indeed, [].<sup>3</sup>

#### **Factual**

- 11 To ensure efficient NEP investment under the services agreement, NEP will acquire OSB's six aging trucks in the proposed transaction.
- 12 That acquisition will allow NEP to cost-effectively retrofit OSB's trucks as necessary to meet its service agreement obligations.
- 13 The deal benefits Sky by allowing it to immediately focus all of its resources on its core business offering – sport and entertainment programmes – under a modern variable cost-based business model.

#### **Counterfactual**

- 14 If the Commission declines this transaction, Sky would:
  - 14.1 [];

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<sup>2</sup> The services agreement only covers Sky's events that require six cameras or more.

<sup>3</sup> Application Schedule E, [].



14.2 []; and

14.3 [].<sup>4</sup>

15 [].<sup>5</sup>

16 Against that counterfactual, there's no difference between the factual and counterfactual. [].

**Sky would not sell to a third-party**

17 The SOPI asks whether Sky would sell to a third-party.

18 The answer to that question is no, that's not a likely counterfactual.

19 But before explaining why that's the case, Sky queries the question's relevance given that NEP is not materially different to other New Zealand market participants.

19.1 Other global players like Gravity, Circle-o, Telegenic and Zoom are all able to enter and invest in New Zealand by building trucks and/or using flypack systems. For instance, []:<sup>6</sup>

(a) [];

(b) [];

(c) []; and

(d) [].

19.2 Unlike Gravity Media with cricket, NEP does not hold a major New Zealand sporting contract.

19.3 NEP's NZ-based outside broadcasting assets (just one HD truck and one HD van) are of comparable size to the OB assets owned by TAB, Image NZ, Whitebait Media, Kiwi Outside Broadcast and others.

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<sup>4</sup> [].

<sup>5</sup> [].

<sup>6</sup> Application Schedule E, [].



- 20 It follows that the affected markets would see the same or less competitive tension if Sky sold OSB to a third party.
- 21 But with that said, we turn back to Sky's answer to the SOPI's question. Sky won't sell OSB to someone else in the counterfactual because:
- 21.1 []; and
- 21.2 []. We say that because:
- (a) []; and
- (b) [].
- 22 And, on point (b), Sky acknowledges that it might be that New Zealand's outside broadcasting market is too small for another third party to match NEP's investment. But if that's the case, then third-party investment would be constrained by market dynamics that are unrelated to the proposed transaction and services agreement.

#### **THE SERVICES AGREEMENT**

- 23 The SOPI asks whether the services agreement may "give rise to any potential effects on competition" by:
- 23.1 "[affecting] the ability of other suppliers of outside broadcasting services to enter or expand, if it means that they are unable to compete for Sky's business"; and/or
- 23.2 "[making] it unviable for parties to compete against Sky [for sports broadcasting rights]"

#### **Sky is not an "essential customer" that unlocks OB competition**

- 24 There are no grounds to support a theory of harm that Sky is an essential customer that competitors must access to compete in the market:
- 24.1 NZ Live, NEP, TAB, Image NZ, Whitebait Media, Kiwi Outside Broadcast, Multicam Television and others all compete in New Zealand's outside



broadcasting market without access to much of Sky's broadcasting business (given it has been vertically integrated to date);<sup>7</sup>

- 24.2 Gravity Media entered the New Zealand market on the back of Spark's – not Sky's – domestic cricket rights;
  - 24.3 Circle-o productions will do the same with the America's Cup; and
  - 24.4 there's no guarantee that Sky will acquire future sports rights that are increasingly sought after by Spark Sport, TVNZ,<sup>8</sup> new entrants like Discovery and global tech companies like Amazon.
- 25 Even if Sky were an "essential" outside broadcasting customer, then competition in the market would be dictated by Sky's *choice* of who films its current 5-6 year sports rights, and not the service agreement's terms. And, of course, all else equal, unregulated companies like Sky are entitled to choose their trading partners. Sky is not obliged to shop its services around certain players in the market.
- 26 Past that 5-6 year point, it's unknown who will own the sports rights that Sky currently holds. Those rights could be won by Spark Sport, Amazon or some other entrant who might team up with Gravity Media, for instance. But that's a commercial risk that NEP is apparently willing to take.
- 27 The simple fact is the service agreement incentivises NEP to make the significant investment that the market needs right now. And Sky chose NEP to make that investment because NEP is currently the best in the business.

**The services agreement is non-exclusive: it doesn't affect others from accessing NEP's services**

- 28 The services agreement is non-exclusive.
- 29 There are no terms in the agreement that prevent or restrict other buyers – including Spark Sport – from buying NEP's services on the same (or better) terms as Sky.

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<sup>7</sup> Indeed, the proposed transaction and services agreement might increase these smaller broadcasters' businesses given that Sky can use them for events requiring five cameras or less.

<sup>8</sup> Australian free-to-air channel Nine has recently confirmed a three-year \$100m broadcast deal with Rugby Australia: <https://www.stuff.co.nz/sport/rugby/300153977/rugby-australias-groundbreaking-100m-freetoair-broadcast-deal>.



30 Indeed, Sky expects that global production companies used by Spark, such as Whisper, Sunset + Vine and IMG, could negotiate better deals than Sky given they:

30.1 deal with NEP on a worldwide scale;

30.2 can play off other competitors in the market, like Gravity Media; and/or

30.3 can sponsor new entry to the New Zealand market (just like Sunset + Vine did with Gravity Media).

31 In addition to the agreement being non-exclusive:

31.1 NEP is incentivised to increase competition in the sports rights market because the more competition for sports rights means the more work for NEP;

31.2 []; and

31.3 [].

32 Sky sees no grounds to support this Commission theory for those reasons.

#### **OTHER POINTS IN SOPI**

33 Factual and counterfactual assessment alone shows that the proposed transaction does not, and is not likely to, substantially lessen competition.

34 But for completeness, this section covers off three other questions raised in the SOPI:

34.1 should there be one broad market for the supply of outside broadcasting services, or more narrowly defined markets based on the types of events and/or customer types?

34.2 would the merged entity be able to profitably raise prices by itself because of unilateral effects?

34.3 does proposed acquisition make market coordination more likely?

#### ***Market definition***

35 Sky thinks that the market is most appropriately defined as one broad market for the supply of outside broadcasting services. Sky's reasons are in the application.



36 That said, nothing should turn on market definition given that:

36.1 []; and

36.2 in any event, the deal won't materially change the competitive options for customers wanting to broadcast:

- (a) events in 4K because OSB does not have 4K cameras;<sup>9</sup>
- (b) large scale "internationally significant" events because OSB's assets are unable to service that segment and, in any event, those events now almost certainly demand 4K;
- (c) local sporting events that Sky bids for because those customers have never had Sky as an option and they can still chose from:
  - (i) NEP;
  - (ii) Gravity;
  - (iii) global production companies like Sunset + Vine, IMG and Whisper who contract international broadcasters like Telegenic, Zoom, Circle-o on the customer's behalf; and/or
  - (iv) the smaller New Zealand broadcasters listed below; and
- (d) "entertainment events"<sup>10</sup> can still use at least:
  - (i) NEP;
  - (ii) Gravity Media;
  - (iii) Image NZ;
  - (iv) Whitebait Media;

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<sup>9</sup> The second anonymous submitter refers to Sky having no 4K product offering and refers to an old *Stuff* article. But it's not Sky's call whether future broadcasts are in 4K or not. That's a decision for sporting organisations. Sky understands, for instance, that Spark's cricket rights specified 4K. And, given that reality, a more up-to-date *Stuff* article reports on Sky possibly rolling out a new 4K set-up box: <https://www.stuff.co.nz/business/122513280/sky-tvs-next-settop-box-could-stream-netflix-and-play-sky-movies-in-4k--but-there-may-be-a-199-charge>.

<sup>10</sup> The Commission's term at [6] of the SOPI.



- (v) Multicam television;
- (vi) Kiwi-outside broadcasters; and
- (vii) local-IP broadcasters.

37 On point (d), it's not clear why the first anonymous submitter ignores that Gravity Media and other New Zealand-based OB providers can serve "New Zealand made productions and content". Indeed, the second anonymous submitter seems to count seven competitors that can service entertainment events (albeit that submitter classifies them as "partial" competitors because they may need to subcontract additional equipment for some shows).

38 The second anonymous submitter is right that there are plainly a number of players that compete – fully or "partially" through subcontracts – for entertainment events. For example:

38.1 Whitebait Media's "facilities provide an ideal location for broadcast, live, corporate and commercial projects, offering high quality facilities and production services".<sup>11</sup> And its OB truck specifically "can be used an entirely self-contained production unit on location". Whitebait broadcasts TVNZ's weekly live TV audience children's show, *What Now*.<sup>12</sup>

38.2 Image NZ's OB Truck is "very versatile, equipped with the latest high definition video and audio technology and special features. It provides Fibre linking equipment, live streaming, graphic and replay systems and is capable of 6+ cameras".<sup>13</sup> Examples of ImageNZ's work include:<sup>14</sup>

- (a) 2020 Speedworks Motorsport NZ & TRS Championships that was broadcast on Sky Sport 5;
- (b) 2019/20 Western Springs Speedway;

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<sup>11</sup> To the extent that the second anonymous submitter is right that Whitebait is "heavily committed to the production of their own content, and is essentially unavailable for third parties", then [ ].

<sup>12</sup> <https://www.whitebaitmedia.com/programmes/current-programmes/>.

<sup>13</sup> <http://imagenz.com/obtruck/>.

<sup>14</sup> As set out in the application, Sky understands that Image NZ was selected/approached to film *Dancing with the Stars*. But after further enquiries [ ]. That said, the application's point remains: third-parties look to OB providers beyond OSB to broadcast their entertainment events.



- (c) Vodafone's live "Vodafone NZ Goes 5G" announcement;
- (d) live seven-camera coverage of Drax Project's 2019 concert; and
- (e) the 2019 NZ Badminton Open.<sup>15</sup>

38.3 TAB has four HD trucks. [].

38.4 Multicam Television says: "being versatile is the key to the Multicam Television OB Van, from NZ Racing Board Greyhound Live TV Coverage to Elton John Stadium Concerts, TV Quiz shows to sombre Earthquake Memorial Services and everything in-between. Multicam has the ability and resources to cover these".<sup>16</sup>

38.5 Kiwi Outside Broadcast says: "All our equipment is Broadcast Quality. Our cameras are the same as Sky use. Our vision mixer is the same as most of the privately owned OB Vans in New Zealand. There is really no difference between streaming and broadcasting on a TV channel as far as our equipment is concerned. We record your program in Apple ProRes on SSD drives which we can copy onto your portable drive as soon as the event finishes."<sup>17</sup>

38.6 And, as set out in the application, local IP broadcasters have worked for: New Zealand Hockey; NBL Basketball; Ford Ranger Rural Games; Kathmandu Coast-to-Coast; World School Rugby Sevens; Anchor AIMS Games; New Zealand Winter Games; New Zealand triathlons; the All Blacks; Les Mills; New Zealand Waterpolo; Touch NZ; Swimming NZ; and Athletics NZ.

39 Moreover, if the Commission is minded to define the market narrowly from a demand-side perspective, then it cannot ignore the commercial supply-side reality.

40 OSB has only provided services to third-parties as an adjunct to its core purpose of filming Sky's sporting events. OSB has never, and would never, operate OSB just to service third-parties like the first anonymous submitter hopes for. Indeed, [].

41 The first anonymous submitter is right that the market has been "fortunate" that OSB has been able to provide its services to the market. But good fortune is not

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<sup>15</sup> <http://imagenz.com/news/>.

<sup>16</sup> <https://www.multicam.co.nz/our-facilities/>.

<sup>17</sup> <https://www.kiwiob.tv/services>.



enough. OSB can't justify [] the significant capital outlays involved in outside broadcasting that the first anonymous submitter accurately identifies. And that means that the second anonymous submitter's wish for OSB to continue to compete for "top tier broadcasts" won't come true either.

- 42 To the extent that the first anonymous submitter needs to hire cables in the future, then they can get those from: NEP; Gravity ([]); other specialist hardware companies; and/or New Zealand's other outside broadcasting companies listed in this submission.

***Unilateral effects***

- 43 Sky notes that the deal won't substantially lessen competition for the reasons set out above, in the application and in Sky's interview with the Commission.

***Coordinated effects***

- 44 In addition to the points above, the outside broadcasting market is clearly not one that's prone to coordination because:

- 44.1 outside broadcasting is not a homogenous product;
- 44.2 there are a range of competitors that can provide varying qualities of outside broadcasting services;
- 44.3 outside broadcasting customers are of all different shapes and sizes; and
- 44.4 outside broadcasting prices are typically negotiated behind closed doors.