

Confidential Submission following the LOUI, for Trustpower, Blue Reach and InternetNZ

PUBLIC VERSION

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1. Summary

Disclosure of the LOUI

1.1 [

] considerable gratitude to the Commission is noted for public disclosure of the LOUI [

] We believe that this gives submitters much greater opportunity to assist the Commission in coming to the most fully informed decision, and also allays a number of the concerns of submitters. In particular, it helps a focus on the main issues, rather shooting in the dark.

1.2 Also welcomed is the relatively streamlined process for submission and cross submission on the LOUI, noting however what is said at the end of this submission, and elsewhere, on other aspects of process, a conference and disclosure of information.

Overview of the structure of this submission

1.3 [

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1.4 [

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(a) [

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(i) NERA focuses on retention of status quo wholesaling and has a strong focus on the status quo continuing; it bases this largely on the status quo telling us what will happen in the future. It largely does not address Covec's forward looking analysis, [

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(ii) [

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(iv) [

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(v) [

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(b) [

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(c) External submitters are also left, [] with the clear implication that the primary concern in Covec’s report – that the merged entity will use Sky’s “must have” content to leverage into Vodafone customers – is wrong and contrary to the facts. [

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(d) [

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(e) [

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(f) [

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(g) [

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(h) [

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- (i) Numerous concerns have been expressed on this application. For example, Spark, in what is for it, an unusually forthright statement, said in its 5 October submission:
 - (i) That submitters' concerns "*go unanswered and unaddressed, other than by way of glib, unsubstantiated and generic statements of principle*";
 - (ii) that Spark considers that submissions are "*deliberately disingenuous*", "*deliberately misleading*", "*incorrect, disingenuous, or deliberately obscure*".
- (j) There are direct issues arising such as:
 - (i) Any claim or statement by the applicants raises credibility issues, absent verification;
 - (ii) Absent reliable evidence, the applicants' assertions should be rejected; to clear this application requires reliable evidence;
 - (iii) []
 - (iv) We cannot see any reliable evidence (or even submission) justifying retention of status quo wholesale pricing in the counterfactual, beyond what is in fact happening in the status quo. []
 - (v) This reinforces that the focus is not on how the applicants model the go forward, but on their **ability** and **incentive** if the merger proceeds;
 - (vi) There will be other information and documents that the Commission can seek;
 - (vii) []
- (k) []
- (l) []

- (m) We deal with disclosure and other process concerns at the end of this submission.
- (n) We also deal with some zero rating considerations.
- (o) We do not have full visibility of the Commission's review of the information and submissions of course. It is quite possible that the Commission is already alert to some of the concerns raised. [

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1.5 We start the body of this submission by dealing with the example of the counterfactual.

2. Sky's position on counterfactuals

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(a) [

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(b) [

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(c) [

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2.2 [

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2.3 [

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(a) [

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(b) []

(c) []

2.4 []

2.5 []

2.6 []

2.7 []

2.8 []

2.9 []

2.10 []

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2.11 []

2.12 []

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2.13 As Trustpower submit today, NERA's reasons for its counterfactual are firmly based upon the status quo: what is happening today tells us what will likely happen tomorrow.

2.14 []

2.15 []

NERA and OTT

2.16 Before leaving NERA and moving to Sky, we address what NERA has to say about OTT, including, at Para 19:

We note the dynamic of increasing demand for non-linear programming and OTT distribution would apply under both the counterfactual and factual, so it is not discerning.

2.17 We do not know what this means (e.g. what "discerning" means). But if the point is to say that the OTT factor is the same in both the factual and counterfactual (i.e. that somehow this is a neutral factor applying in all circumstances), it is submitted that is incorrect:

- (a) The ability and incentives to develop and provide OTT content differ markedly in the counterfactual and the factual.
- (b) In the counterfactual, the incentives are to widely provide OTT and not to favour one RSP such as Vodafone (all of course to the extent that (a) Sky decides to roll out OTT services and (b) it chooses not to provide genuine or other wholesaling);
- (c) In the factual, the incentives are markedly differ, given OTT, applicable to all RSP customers, may erode ARPU from the merged firms bundled customer base;
- (d) A variation on the same theme is that, for the reasons outlined in InternetNZ's first two submissions, the merged company may make its OTT content available on a zero rated basis to its customers, thereby reducing the real price overall payable by its customers. InternetNZ explain the market failure problems that causes. The problem is particularly apparent as to mobile downloads. The applicant, Vodafone Europe BV, is already doing zero rated mobile downloads of Vodafone's own content in Ireland.

What Sky says in submissions on counterfactual after the application

2.18 Sky’s solicitors, Buddle Findlay, also state on their client’s behalf that the counterfactual is wholesaling on the same terms as at present.¹ [

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2.19 Buddle Findlay’s letter of 9 September² states that the third parties’ submissions “rely on...a fanciful counterfactual”, [

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2.20 [

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The Commission’s early draft view on counterfactual

2.21 [

] the Commission’s early view was that the status quo would continue. While the LOUI sees some major moves and more detail, the draft LOUI view remains based in significant measure on retaining current price and non-price wholesale terms in the counterfactual.

2.22 As Trustpower note, it is difficult to see how this conclusion is reached when there is little evidence beyond what happens in the status quo. To the contrary, the markets and technologies will be going through major disruptive change during the counterfactual period. [

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2.23 [

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2.24 We add here a cross-reference to InternetNZ submissions, both today and earlier, where the broader SLC implications of UFB and RBI uptake and innovation are addressed, given video downloads are one of the two major drivers of UFB uptake. There is likely to be a substantial erosion of UFB uptake in the factual relative to the counterfactual (e.g. in the latter, as multiple RSPs, large and small, compete for fibre based customers using content based bundles).

2.25 That change alone from the status quo, with the transition from linear satellite to broadband being added as a transmission platform, can be described as huge, without any exaggeration.

2.26 Yet there are multiple other major changes, including the biggest for Sky: what happens as content rights agreements expire? And there is Covec’s point as to erosion of Sky’s revenues, meaning they must do something else.

2.27 Observations from the status quo in this context are largely irrelevant.

¹ Para 23 Buddle Findlay letter of 9 September 2016

² At Para 3

2.28 The third parties' submissions and reports strongly made those points, yet they are discounted or ignored in response.

2.29 For example, in dispatching Covec's counterfactual that there is likely to be genuine wholesaling in the counterfactual, the only two reasons given by NERA are:

(a) It's not happening in the status quo. Says NERA, if wholesaling by Sky in the counterfactual is profit maximising:³

“... if that was the case, it would have done so already”

(b) [

]

2.30 And that is all that is said by NERA on the point.

2.31 We have seen little [] pointing to the status quo providing particular guidance to the future counterfactual, when so much market and technology change is happening in that counterfactual period. As the Trustpower submission notes, it is a little challenging to submit as the LOUI provides mostly conclusions rather than reasons.

Implications

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2.33 [

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3. Footnote 21 of the NERA report – Revenue synergies

3.1 []

3.2 [

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3.3 [

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³ NERA Report at para 17

3.4 NERA’s Footnote 21, in the public version, notes that

The Covec report builds up its counterfactual from an assumption (at [45]) that Sky-Vodafone intends to gain most revenue synergies through “upselling” Sky to Vodafone’s existing customer base. However this is not correct [REDACTED]....

3.5 This essentially says that the core assumption in the Covec analysis is wrong and its report can be fully discounted.

3.6 In fact, Covec’s [45] does not say that its counterfactual assumes **most** revenues from cross selling to Vodafone customers, but that is just one further issue here in the approach and not an essential point for what we say below.

3.7 NERA in the passage above are addressing the primary issue raised by Covec, namely that “must have” Sky content will be leveraged into telco/Vodafone customers. [

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3.12 [

3.13 [/]

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3.16 []

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3.20 []

3.21 []

3.22 []

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Other information on revenue synergies

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3.24 [

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3.25 [

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3.26 [

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3.27 But in the end, it is for the applicants to show why the application should be cleared, [

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4. The applicants are materially responsible for NERA report

4.1 NERA's report is, rightly, its own and should be independent of the applicants. But the applicants will have reviewed draft reports. [

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(a) [

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(b) [

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4.2 [

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5. Requiring disclosure publicly

5.1 []

(a) [

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(b) [

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(c) [

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5.2 [

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5.3 [

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5.4 [

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5.5 [

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6. Ability and incentive

6.1 In the end, the assessment of course is not about the applicants' modelling. It is about their potential **ability and incentive** to take action after clearance. Absent behavioural undertakings, they are free to depart from their modelling, and can be expected to do so, where that is available.

6.2 [

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6.3 Moreover, as Trustpower points out in its submission today, with the considerable changes in the markets and the technologies, there are multiple non-price levers by which they can discriminate. InternetNZ also give an example in their submission today, of "discounting" by providing services on a zero-rated basis, which the applicant, Vodafone Europe BV, already does with for its Irish mobile customers. As they point out, zero rating is, however, a price lever.

7. Zero rating []

7.1 InternetNZ submitted in its 2nd submission, that when Vodafone Europe BV, which is the applicant, stated in its submission that zero rating is “*entirely speculative*” and “*such strategies fly in the face of commercial sense*”, zero rating content was exactly what Vodafone was doing already in its Irish operation for its mobile customers as to Vodafone content, and elsewhere too. The statement by Vodafone Europe BV appears, it is submitted, to be misleading given zero rating is BAU for Vodafone Europe BV.

7.2 InternetNZ submitted that the Commission should seek information on zero rating from Vodafone Europe BV, the applicant.

7.3 []

7.4 []

7.5 []

7.6 []

7.7 []

8. Applicants’ Credibility

8.1 []

8.2 []

8.3 []

8.4 []

8.5 The quick nature of the process, usually sought particularly by applicants, make thus a key aspect on which the Commission and others heavily rely.

8.6 []

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8.7 [

] Multiple examples have been given. For example, Spark, in what is for it, an unusually forthright statement, said in its 5 October submission:

- (a) That submitters' concerns "go unanswered and unaddressed, other than by way of glib, unsubstantiated and generic statements of principle";
- (b) that Spark considers that submissions are "deliberately disingenuous", "deliberately misleading", "incorrect, disingenuous, or deliberately obscure".

8.8 Those are very serious allegations raised by Spark, and they are not alone among the concerns that have been raised.

Why is this relevant?

8.9 This is most relevant in five ways:

(a) [

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(b) While behavioural undertakings cannot be accepted, the applications and submissions talk of expected behaviours and strategies going forward. None should be accepted. We return to this below when addressing ability and incentive;

(c) [

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(d) [

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(e) [

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8.10 [

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9. Process

9.1 [

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9.2 Beyond what is in the LOUI, the following requests had been made:

- (a) Sufficient information, and grounds for potential decision making, to enable sufficiently cogent submissions by third parties (as the seminal *Wellington International Airport* Court of Appeal decision points out, required disclosure and statement of grounds is limited but must be sufficiently fulsome to enable cogent submission). In our earlier submissions we cited authority confirming that, even if fulfilling natural justice requirements requires additional work, that is necessary.
- (b) A LOUI or equivalent as to the submitters' unresolved issues (for they are different from the applicants unresolved issues). Say for example, the Commission is satisfied as to issues in the LOUI (which are concerns as against the applicants), that still leaves the issues raised by the third parties outside the LOUI. But they will not have had notice, unlike the applicants, as to unresolved issues.
- (c) Copies of information requests of the applicants (not necessarily answers as that is within (a) above;
- (d) Any new information to hand that is relevant as in (a) above [

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9.3 The above requests were declined by the Commission's letter dated 31 October at Para 6, notwithstanding the legal submissions, and the fact that the Commission's Merger and Acquisition guidelines note that the Commission meets natural justice requirements (and all that is sort is bog standard natural justice). However, that decision, having been made, must be accepted, even though we disagree, leaving only judicial review as a remedy.

9.4 As notified earlier, the decision is to reassess the latter point after seeing the applicants' submissions.

- 9.5 It is not intended to be heavy handed, and the approach is driven by the sorts of serious concerns outlined above and in other submissions and reports by parties.
- 9.6 In particular, with a preliminary draft view as to declining the applications, it is not desired to add unnecessary hurdles. But the problem is that there is much at stake, with many identified problems, and the path from this point is not clear. Hence, the position is reserved.
- 9.7 If there was a practical way of dealing with this conundrum, that would be welcomed, but it cannot be clearly seen at this point.
- 9.8 Behind all this is a client desire to assist the Commission in getting to the correct outcomes.

Conference

- 9.9 The 31 October letter from the Commission confirmed that members had not yet finally decided on whether to have a conference but that initial views of members are that one not be held.
- 9.10 The practical position is that none of the above steps including the conference are needed by those opposing the application if it is declined. But the current outcome is unclear despite the initial indications.
- 9.11 In practical terms that leaves something of a conundrum for submitters, who if not necessary won't want time and cost incurred on additional steps whether the conference or more information as above.
- 9.12 We submit that the material available now, including in this submission, points even more firmly to the need for a conference.
- 9.13 Finally, on the conference, the implications for stakeholders including consumers and competitors are considerable (and "enduring and irreversible" as Vodafone materially say). It therefore is important, it is submitted, that opponents get appeal rights, which only occur when a conference is held, so they are not limited to judicial review. In this regard, our earlier observation that appeals are limited to questions of law, does not appear to be correct.
- 9.14 There is time before the drop-dead date faced by the applicants to insert the conference.
- 9.15 [

] So, any delays, which were avoidable, are attributable to them.