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Dear Susan

**Vodafone/SKY: Vodafone's interim response to third party submissions**

While Vodafone will respond fully to the third party submissions in due course, it wishes to make the following initial comments.

**1. Third parties make unsubstantiated assumptions about bundling**

- Anticompetitive foreclosure cannot be achieved by the merged firm simply offering an attractive bundle that proves popular with consumers. It is generally accepted in the economic literature that bundling can give rise to significant efficiencies and consumer benefits (and this is why non-horizontal mergers are seen as pro-competitive other than in rare cases).
- Notwithstanding, the third party submissions tend to *assume* that bundling by the merged entity would necessarily be anticompetitive, rather than applying a conventional antitrust framework to assess whether a substantial lessening of competition in a market was likely.

**2. Theories of harm are based on a wholly unrealistic counterfactual**

- When the merger was announced, Spark issued a statement saying that, "*The reality is that Spark has been competing successfully with a tightly integrated partnership between Vodafone NZ and Sky TV for a couple of years now. Vodafone NZ has been bundling and deeply discounting Sky TV products while Sky TV actively resells Vodafone NZ broadband. .... we don't believe a merged Sky TV and Vodafone NZ poses a greater challenge to Spark than the existing partnership has achieved to date.*"
- However, Spark (and others) have now submitted that the transaction is anticompetitive, including because the merged entity will engage in anticompetitive bundling.
- But in doing so they have needed to argue for a wholly unrealistic counterfactual, in which SKY undertakes a massive change in business model to become an "enthusiastic wholesaler" of content – offering bespoke packages at cut-down prices so as to allow third parties to pick and choose what content *they* want to add to their own packages.
- In actual fact, Vodafone has been commercially successful in reselling SKY content over several years on current SKY wholesale terms (which it understands are available to all other RSPs) and it would continue to do so in the counterfactual.

**3. Vodafone submissions in overseas jurisdictions**

- The third party submitters have referred to a number of submissions made by Vodafone entities in other jurisdictions in support for their arguments. For example, submitters have referred to the following statement:

*In several markets, incumbents have sought to gain exclusive access to key content rights. ... We will also encourage regulators to prevent incumbents from using content – in addition to their dominance in fixed access markets – as a lever to reduce competition.<sup>1</sup>*

- However, submitters have not addressed the fact that the New Zealand market context differs from the overseas jurisdictions in which Vodafone has raised these issues.
- For instance, the quote above specifically refers to “incumbents” with “dominance in fixed access markets”. In New Zealand, structural separation of Chorus and other fibre companies means that no RSP has dominance in fixed access markets – which is borne out by presence of some 80+ suppliers of broadband in New Zealand.
- Market conditions in New Zealand mean it is not possible for the merged entity to generate anticompetitive effects of the nature that Vodafone entities have referred to in other jurisdictions.

**4. Net neutrality**

- Certain submitters have raised issues of net neutrality. The concern appears to be that the merged entity will be incentivised to make its content more attractive to subscribers and/or make third party (OTT) content carried over its network less attractive to consumers. These assertions do not stand up to scrutiny.
- Vodafone is committed to offering the best customer experience over its network. It operates in a highly competitive market in which it faces a number of well-resourced competitors. In such circumstances, seeking to degrade the experience of its customers would simply result in those customers switching to alternative providers.
- Quite apart from the commercial incentives, the third party submissions again fail to articulate why any such net neutrality issues (even if they did exist, which is denied) would give rise to a substantial lessening of competition in a market.

Finally, in relation to the request for a conference, Vodafone believes the issues raised and the information received from interested parties can be adequately tested in the course of the investigation. There is no need for the Commission to depart from its usual approach in the current case.

We trust this interim summary has been helpful and Vodafone looks forward to responding more fully in due course.

Kind regards

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<sup>1</sup> From Vodafone Group 2016 Annual Report, as quoted by Trustpower, TUANZ and Blue Reach.