



9 November 2020

Susan Brown
Senior Investigator
Competition and Consumer Branch
Commerce Commission
Wellington

By email: susan.brown@comcom.govt.nz

Dear Susan

NEP/Sky (OSB)

This submission is in response to the Commission's Statement of Preliminary Issues (SOPi) dated 13 October 2020, and the public versions of the two anonymous submissions that the Commission has received to date.

The SOPi

The questions raised by the Commission regarding the definition of the markets, and the state of competition in these markets, have already been addressed in some detail in our application. For this reason, we do not think it would be of assistance for us to repeat that information here. However, we would welcome the opportunity to respond to any further questions you may have on these issues should they arise in the course of your inquiries. Also, if you wish to set up a further video meeting to explore any matters in person, please let us know.

One matter that we can helpfully elaborate upon is the proposed ten-year non-exclusive supply agreement between NEP and Sky. In paragraph 14 of the SOPi you raise two issues:

1. The agreement could affect the ability of other suppliers of outside broadcast services to enter or expand; and
2. The terms of the agreement may make it unviable for parties to compete against Sky for sports broadcasting rights.

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Dependency on Sky

For the following reasons, the first of the concerns identified above does not arise.

1. There is evidence in the application which establishes that entry to and expansion in the outside broadcasting market is not dependent on competitors of NEP acquiring contracts from Sky. With reference to the market segments identified in the application, the only one of these where Sky would be active in securing outside broadcast services is that for local sporting events in HD. The recent award by Spark of the outside broadcasting services contract for NZ Cricket to Whisper/Gravity Media clearly demonstrates that new entry is possible. Gravity Media has entered the market with no dependency on Sky for contracts.
2. Sky has no presence in the other market segments identified in the application as an acquirer of outside broadcast services (i.e. for large one-off internationally significant events and third-party events). Contracts for outside broadcasting services will be awarded by entities other than Sky in these segments, thus supporting potential new entry and expansion for outside broadcasting services.
3. The agreement obliges Sky only to use NEP's outside broadcast services for Sky
specifically excluded from this obligation so that they could explore services
for these from other third-party service providers.
4. Further, the market has materially changed in recent times. Whereas in the past Sky held most of the premium live sports broadcasting rights, this is no longer the case. New technology has seen the emergence of major rivalry for Sky from Spark, as evidenced by the recent contracts for the Rugby World Cup and NZ Cricket broadcast rights. The agreement between NEP and Sky will only extend to such broadcast rights as Sky may secure. It is predictable that the level of competition for securing such broadcasting rights will only increase in the future with the likes of companies such as Amazon and DAZN entering new markets for sports broadcast rights.

Before passing from this issue, it is also important to restate the commercial rationale for this proposed agreement between NEP and Sky. As we outlined at our meeting with you the other week, NEP will need to make a major capital investment decision () in order to provide to Sky the services that it will require under this agreement. There is simply no business case for NEP making this investment decision without this commitment from Sky. Further, this agreement will give Sky the certainty that NEP will be able to provide the services they require.

Viability of Sky's rivals

is of no quantitative competitive significance as it relates to a de minimis component of broadcasting rights costs.

This can be demonstrated in two ways.

Firstly, the insignificance of this component is reflected by the fact that bidders for broadcast rights typically do not have outside broadcast service contracts in place at the time they bid for the broadcast rights. For example, this occurred in the case of the recent contract won by Spark for the NZ Cricket broadcast rights. Spark issued its RFP for production (creative) and outside broadcast services only after it had secured the broadcast rights.

Secondly, the reason for the above approach is because (1) the quantum of the outside broadcast service costs are de minimis in the context of the overall costs of the broadcast rights, and

Broadcast rights fees will vary for different sports. NEP does not have information on these fees for New Zealand sports broadcast rights. However, we can provide an Australian example to give a comparison of broadcast rights fees and outside broadcasting services fees.

The Anonymous Submissions

Both these submissions erroneously suggest that this is a merger-to-monopoly case. This is clearly not the case because:

- In the context of the major sporting segments of the market, the recent entry of Circle-o and Gravity Media is significant. In particular, Gravity Media is about to establish what is likely to be a significant presence in New Zealand supported off the back of Whisper's six-year contract with Spark for NZ Cricket, as previously outlined. The competitiveness of Gravity Media's entry to New Zealand
- There is significant rivalry for third-party events from many competitors, as described in paragraph 166 of the application.

A central concern of the first submission appears to be the suggestion that there is some duty on firms, like NEP, to hire out equipment to others in this sector. NEP has only rented out equipment on rare occasions when it has spare capacity. NEP is not obligated to hire out its equipment and it cannot be assumed that it will do so on any regular basis in the future.

In any event, this submitter's concern would be addressed under the merger. Whereas it is suggested that there is some competitive advantage in being able to hire from one of two entities, NEP and OSB, under the merger the position would be the same (i.e. NEP and Gravity Media).

Further, this submission also incorrectly implies that NEP provides outside broadcast services to TAB NZ. This is not the case, as we have previously outlined. TAB run a large fleet of outside broadcast vans to cover all its racing events.

The second submission significantly understates the competitive significance of Gravity Media. The reality is that Gravity Media has in some respects no less of a presence in New Zealand at the moment than NEP. Gravity Media has the benefit of holding a sub-contract for a major sporting event, which NEP does not.

The second submission also touches upon market definition issues. We do not think it necessary to respond to this in any detail. As we indicated in our application, there are no clear boundaries to the market in this case and nothing really turns on this. We remain of the view that there is one broad market for the supply of outside broadcast rights. We have demonstrated in our application how there will be no substantial lessening of competition in any of the segments of this market.

Finally, we note that the second submitter suggests that one of the participants in the third-party event segment of this market, namely Whitebait Media, is capacity constrained. We understand that Whitebait Media has previously expanded its operations when it took its live children's show on the road. It invested in new equipment and built its own truck. This demonstrates that there are low barriers to expansion for competitors in this segment of the market. If Whitebait Media is capacity constrained at the moment, it will likely have the ability to expand should the opportunity arise.

Please let us know if you would like us to elaborate on any of the matters discussed above.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Chris Strouthos', written in a cursive style.

Chris Strouthos
Director - NEP Broadcast Services New Zealand Limited