Submission by Freeview to Commerce Commission in relation to the clearance application by Sky and Vodafone

12 AUGUST 2016

Table of Contents

1.	SUMMARY	3
2.	FREEVIEW – AN OVERVIEW	4
3.	AGGREGATING SERVICES ON FREEVIEW	7
4.	MARKET DEFINITION	7
5.	NET NEUTRALITY – FREEVIEW'S INTEREST	7
6.	NET NEUTRALITY – THE ISSUES	7
7.	TWO KEY INSIGHTS FROM THAT EXAMPLE	10
8.	FACTUAL – WITH MERGER	10
9.	COUNTERFACTUAL – WITHOUT THE MERGER	10
10.	SLC ASSESSMENT AS TO NET NEUTRALITY	11
11.	AGGREGATING SERVICES ON FREEVIEW PLATFORM	11
12.	FREEVIEW PLATFORM - FACTUAL	11
13.	FREEVIEW PLATFORM - COUNTERFACTUAL	11
14.	CONCLUSION	12
15.	COMMITMENTS TO RESOLVE SLC CONCERNS	12

1. SUMMARY

1.1 Thank you for the opportunity to submit.

1.2 Freeview Ltd is a joint venture of TVNZ, MediaWorks, Maori Television Service and Radio New Zealand. Freeview is a platform for accessing TV and radio services and it is used in 75% of New Zealand households. Freeview and Sky both have user interfaces from which content is accessed. They are the points of entry to TV content.

1.3 Freeview opposes the merger as currently proposed, but would consider any contractual or other commitment to remove substantial lessening of competition, recognising however that behavioural understandings cannot be taken into account. Any such commitment in relation to wholesaling of Sky content should be on the basis that the content is available on the same terms as it is available to other parties, that it can be taken by any provider that seeks it, and that the content can, if sought, be accessed from the Freeview platform. Net neutrality raises different issues.

NET NEUTRALITY

1.4 We deal first with net neutrality. Vodafone/Sky, in the factual, has the ability and the incentive to leverage market power due to the "must have" content and due to its expanded market power and retail footprint, to discriminate against third party OTT providers in favour of Sky's OTT and Pay TV online services (for example, by zero rating the Sky service and/or by having Sky in the "fast lane", leaving OTT content in the "slow lane").

1.5 There are two game changers making this likely, even if it may not have happened before. First, the merger and the "must have" content is a major change. Second, the trend to Pay TV on mobiles, with much lower data caps and other challenges, makes a substantial difference.

1.6 In the counterfactual, the incentives to discriminate in this way are low or nil. In any event, the ability to discriminate is low or nil, as Sky is unlikely to acquire or build an RFP (and it cannot discriminate online without having that capability).

1.7 Therefore the merger leads to a substantial lessening of competition.

FREEVIEW PLATFORM

1.8 We turn now to the Freeview platform.

1.9 Having access to Pay TV content, such as NEON and Fan Pass, over the Freeview user interface, would provide a compelling consumer proposition, and an alternative platform to promote competition.

1.10 If Sky unbundles content (eg Sky Sports' content) that may also open opportunities in the future to have that service accessed by the Freeview platform as well.

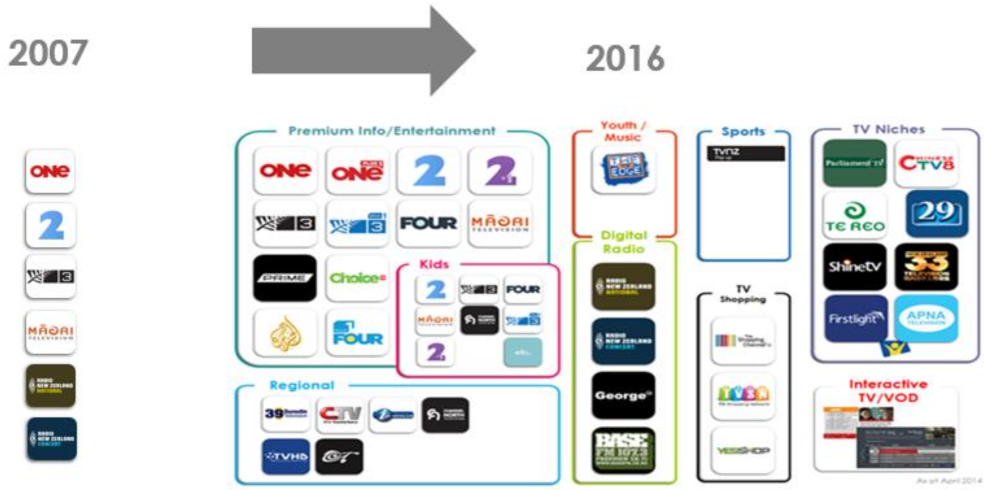
1.11 On our understanding of the "with merger" factual, such pro-competitive outcomes would not occur, as Vodafone/Sky would not have incentives to wholesale and to encourage access via the Freeview platform.

1.12 In the "without merger" counterfactual, in which Sky has incentives to wholesale content, those pro-competitive outcomes would likely occur.

2. FREEVIEW – AN OVERVIEW

2.1 Freeview was established in 2006, in response to the switch over of broadcasting from analogue to digital.

2.2 Freeview is a platform for accessing TV and radio services. The platform has grown from 6 services in 2007 to include 35 TV and radio services today. This includes Sky's Prime FTA channel.

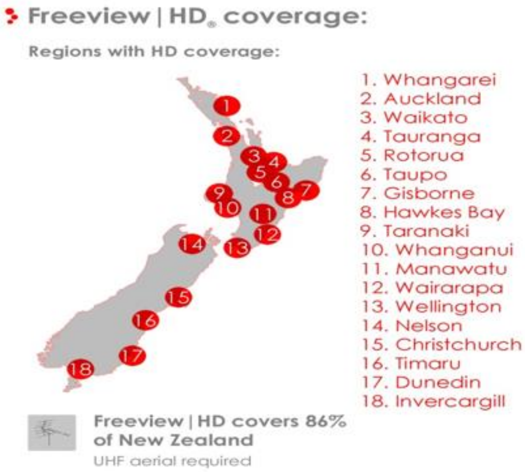


2.3 Freeview continues to operate the platform for the benefit of all FTA broadcasters, managing technical specifications, manufacturer compliance and installer and retailer engagement.

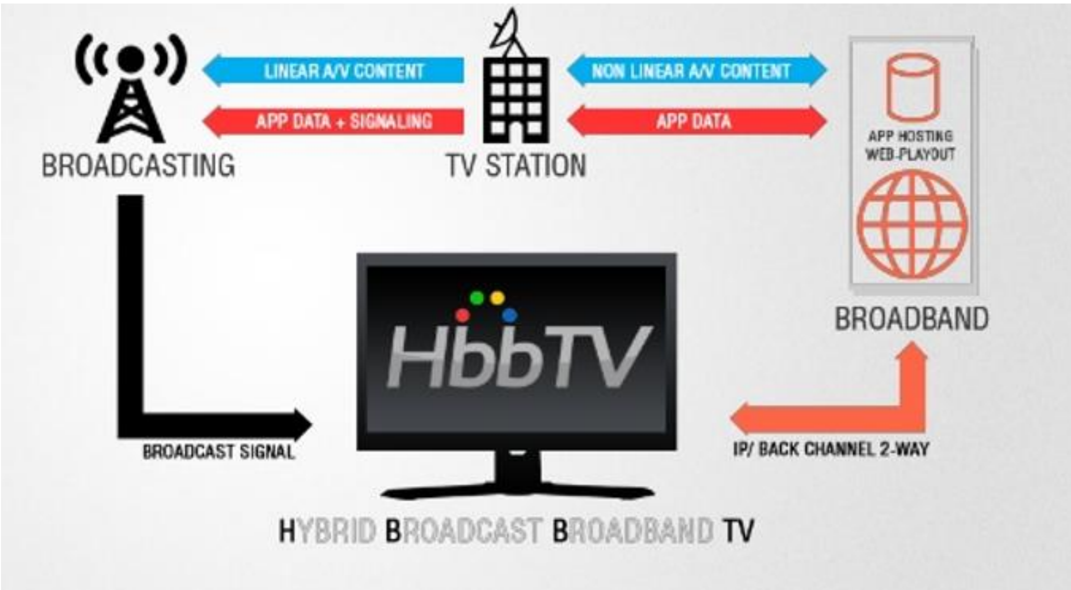
2.4 Freeview does not itself provide broadcasting infrastructure services (for example, the DTT (digital terrestrial) and DTH (satellite) transmissions of FTA content are done under contracts and by providers separate from Freeview). Freeview provides a platform for broadcasters to reach viewers, including, since July 2015, via the internet. Freeview's customers are therefore users of broadcasting and telecommunications distribution infrastructure.

2.5 A central part of broadcasting throughout the world, whether Pay or FTA, is a user interface (UI). From the viewer's perspective, that is the interface they see on the screen via Freeview or Sky which gives programme details, and enables the viewer to choose a programme to watch (and to record if the viewer has that functionality, such as a PVR).

2.6 Before July 2015, Freeview services could only be accessed by either DTT or satellite. Satellite infills areas outside the DTT footprint:



2.7 In July 2015 Freeview launched FreeviewPlus, which is a combined internet and broadcast service, using the world's fastest growing open TV standard, HbbTV (Hybrid Broadcast Broadband TV).



2.8 Broadcasting via DTT or satellite is one-directional. Enabling online, in addition to being a parallel channel for content, allows content and interactive rich features.

2.9 By the FreeviewPlus user interface, viewers can also access on demand content.

2.10 To access content available over Freeview, the viewer needs to have a Freeview-enabled TV or other device, such as a set top box (STB) (which may have digital recording functionality). All new televisions currently sold in New Zealand are Freeview-enabled, and for older TVs, the STBs are relatively inexpensive, ranging from around $60 for broadcast only, and around $120 for FreeviewPlus.

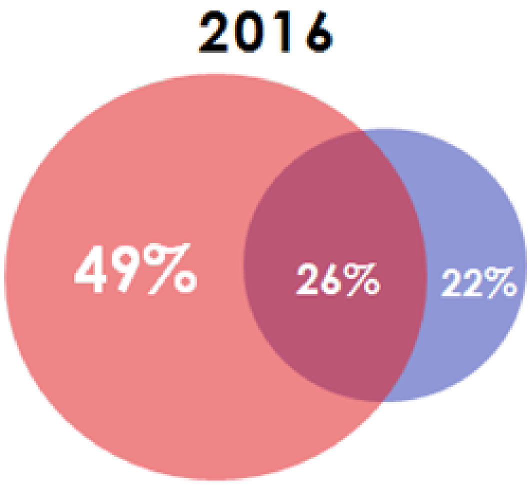
2.11 Freeview has the responsibility for managing the standards and specifications ensuring that manufacturers' TVs and STB's work with the system. This follows internationally accepted DVB (digital video broadcasting) standards and protocols.

2.12 In addition, FreeviewPlus requires internet connectivity functionality.

2.13 The Freeview user interface has the same look and feel from the perspective of the viewer, whether accessed by STB, recorder or TV.

SKY AND FREEVIEW PLATFORMS

2.14 Over 4 million Freeview approved devices have been sold and 75% of New Zealand Homes use at least one Freeview device to access TV in their home. 49% use only Freeview and 26% use Freeview and Sky in the same home.



[49% of NZ homes use Freeview only; 22% use Sky only; 26% have both]

Source: Feb 2016 Neilsen CMI and Freeview research

2.15 The Sky user interface carries FTA channels as well: in fact the major NZ channels are the most viewed channels from the Sky user interface.

THE FUTURE

2.16 Viewers' expectations are changing and to meet these changes Freeview must continue to innovate and improve the content offering and platform features it offers free to air viewers. This could include further VOD services, log in for personalisation of content offering and 4k video. And Broadcasters on the platform will also require improved ways to monetise their content, though targeted advertising and advanced analytics.

3. AGGREGATING SERVICES ON FREEVIEW

3.1 All user interfaces such as Sky's, and including Freeview's, are important because they are the ubiquitous entry point to accessing TV services. That is why Sky has FTA channels on its user interface. For such interfaces to work effectively they need to carry scheduled linear FTA services, as both Sky and Freeview currently do.

4. MARKET DEFINITION

4.1 Relevant markets include:

(a) National market for supply of FTA TV services;

(b) National market for supply of Pay TV services;

(c) A broader national market encompassing supply of TV viewing services including FTA and Pay TV. For example, FTA and Pay TV services can be substitutes and/or in any event, they are a competitive constraint on each other. As part of these markets, the Sky platform and the Freeview platform are constraints on each other;

(d) National market for retail fixed line broadband services;

(e) National market for retail mobile broadband services;

(f) National market for retail broadband services (in light of convergence, and the substitutability between fixed and mobile broadband);

(g) National market for terminating TV content with customers of the merged firm. Alternatively, a market that includes that service. This deals with the price and non-price terms on which the merged firm would accept and transmit content to its customers from third parties such as content providers, ISPs, content distribution networks (CDNs), etc. Like mobile termination, there is a single party that is terminating the traffic, namely the RSP contracted by the end-user. Like mobile termination, the RSP has a monopoly on termination. Hence there is a relevant market only for terminating content with the merged firm's customers, which is the position for mobile termination as well.

5. NET NEUTRALITY – FREEVIEW'S INTEREST

5.1 Net neutrality involves, for example, enabling faster Sky TV online to Sky/Vodafone customers, relative to, say, OTT content accessed via the Freeview platform (eg TVNZ On Demand or 3 Now). This inferior customer experience may lead viewers to move from the Freeview platform, and from the services in the example, to the Sky TV online service. We overview the issues and then link them to the SLC assessment.

6. NET NEUTRALITY – THE ISSUES

6.1 We are using the net neutrality wording in this submission only for convenience, but we note that:

(a) Net neutrality means different things to different people, with some views that are relatively extreme and outside an SLC examination (for example, the concept that all internet traffic should be treated equally);

(b) As a result, some regulators, such as the Canadian telecommunications regulator, CRTC, the FCC and the EU, are carefully using different descriptors; and

(c) In the end, context is everything, and the analysis here revolves around whether there is SLC, not what something is called, so we will bring the analysis back to SLC.

6.2 Net neutrality is in the area of differential treatment of internet traffic in one or more of multiple ways. In this context, there is the prospect of an RSP, such as the merged company, disadvantaging an OTT content provider, such as Netflix, TVNZ On Demand, and Lightbox, relative to a Pay TV provider such as Sky. The focus is only on content sent to and received by the RSP's customer (the viewer of the content).

EXAMPLE TO DEMONSTRATE THE ISSUES

6.3 Assume that the merger goes ahead, so that Vodafone/Sky want to gain market share, and upsell to its combined customer base, off the back of (a) its "must have" content via triple and quad play, and/or (b) its larger customer base. That is a key factor in the factual.

6.4 In those circumstances, Vodafone/Sky has strong incentives to make the viewing experience over its Sky service a superior one, relative to OTT services such as Lightbox. It wants to upsell current customers of the new group, and churn new ones from competitors.

6.5 OTT content such as Lightbox, 3 Now and TVNZ On Demand, destined for the Vodafone/Sky customer, is typically received by Vodafone/Sky via another ISP, or perhaps via the operator of a content delivery network (CDN). There are a number of upstream options which involve opportunities for Vodafone/Sky to advantage itself but for present purposes they can be grouped together as upstream sources of content.

6.6 Vodafone/Sky has the incentives (and the ability) to do the following things (as examples):

(a) It can prioritise its own Sky channels (including its OTT services) ahead of other traffic, or specifically ahead of third party OTT content, in order to give its customers a superior viewing experience (this is often called putting content into the "fast lane" as opposed to the "slow lane").

(b) It can throttle back third party OTT content, with similar relative outcomes in terms of quality of service.

(c) It can charge its downstream customers more to view the third party OTT content. The frequent way this is done is to zero rate, in this example, the Sky Pay TV, so that viewers of the Lightbox service start paying for data beyond the data caps, but Sky TV/NEON/Fan Pass streaming/downloads are free.

(d) It can charge the upstream content provider (or CDN or other associated party) more to accept the third party OTT content and transmit it (more accurately, terminate it) to Vodafone/Sky's customer.

VODAFONE/SKY HAS THE ABILITY AND THE INCENTIVE TO DO THE ABOVE

6.7 The relationship between Lightbox, Vodafone/Sky and the latter's customers is similar to the relationship between Spark, 2degrees, and 2degrees' customers when Spark on behalf of its customer seeks to terminate a mobile call with the 2degrees customer. 2degrees has a **monopoly** on the mobile termination. That is why there is a separate mobile termination market for each mobile network operator, and why mobile termination is regulated.

6.8 Vodafone/Sky has a termination monopoly in relation to third party content such as OTT, sent to its downstream customer. Professor Valletti confirms that view:[1]

> The "termination bottleneck" problem comes from traditional telephony regulation, and there is an analogy when charging for access to eye-balls at the point of termination.

6.9 Whether or not that monopoly applies, Vodafone/Sky has the **ability** to take the actions listed at 6.6(a) to (d) above. None of those actions are currently subject to regulation under the Telecommunications Act. Some are outside the scope of the Act anyway and could not be regulated. But in any event, it would take too long to get regulation for it to be effective within the 2 or so years material for SLC assessment, because the Schedule 3 process followed by the determination process would take too long.

6.10 Vodafone/Sky also has the **incentive** to take that action, subject to some limited constraints. Each of the actions have happened internationally, and in New Zealand as well.

6.11 For example, Vodafone Group's position is to zero rate its TV service ahead of others, and it has firmly supported zero rating and fast lanes for Pay TV generally. An Irish newspaper report in January 2016 gives an example:[2]

> Last week, Vodafone launched a new TV service in Ireland. Called Vodafone TV, the service is a fairly straightforward alternative to both Sky and Virgin.....Vodafone has 'zero-rated' the TV service on its own phones....Given that Vodafone is the most expensive operator for data charges (although also easily the fastest on 4G), this is a very big move.

[1] Valletti, *Neutral Regulation to Net Neutrality*, Competition Policy International, April 2015

[2] Vodafone TV's clever mobile data trick tests net neutrality, Irish Independent 28 January 2016 http://www.independent.ie/business/technology/vodafone-tvs-clever-mobile-data-trick-tests-net-neutrality-34402466.html

Commercially, it is very clever. More and more people are diversifying from a traditional sitting room experience to TV-on-the-go, largely through mobile networks and wifi. So this move will play right into their hands.

But for those who pay close attention to the regulation of the internet, it will also raise some eyebrows.

There is a concept called net neutrality which is being hotly debated in Europe and the US right now. In a nutshell, this is about greater commercialisation of the internet. The basic rule of net neutrality is that internet providers like Vodafone, Eir or Virgin should not be allowed to give priority to some web services over others, especially for commercial consideration.

7. TWO KEY INSIGHTS FROM THAT EXAMPLE

7.1 Some argue that New Zealand does not have and has not had net neutrality issues, and therefore there is no SLC as a consequence. However, it is not what has happened in the past, or what is happening now, that matters. It is what may happen if the merger goes ahead.

7.2 Among other things, there are two major changes confirming the ability and the incentive to discriminate by one or more of the paths noted above.

7.3 First, there is the game changer which is the merger of Sky TV with a large telco. As Vodafone itself has said in numerous statements, those who have the "must have" content can leverage that into adjacent markets such as mobile and fixed line. One of the multiple non-price ways they can do this is to exercise one or more of the actions noted above. Vodafone in fact does that, as the Irish example shows.

7.4 Second is the game changer arising from the move to Pay TV over mobile (which is the Irish Vodafone example). While fixed line is marked by high data caps (currently anyway) data caps for mobile are far lower: a large data cap is say 3Gb, well short of supporting Pay TV or services like Lightbox. Mobile networks have their own sets of financial and technical issues and constraints.

8. FACTUAL – WITH MERGER

8.1 For the reasons above, Vodafone/Sky have the ability and the incentive to leverage their market power, due to the "must have" content via, among other actions – such as higher wholesale pricing – taking one or more of the actions noted above. This involves the anti-competitive leveraging of the market power, via one of the actions at 6.6(a) to (d) above, due to the "must have" content just as foreclosing on wholesaling involves anti-competitive leveraging.

9. COUNTERFACTUAL – WITHOUT THE MERGER

9.1 In the anticipated counterfactual, where Sky does not have an RSP, and encourages wholesaling by RSPs and others, Sky does not have the ability or the incentive to discriminate. It would need to have RSP functionality to do so.

9.2 Even if it starts an RSP or buys one, the impact will be substantially smaller in view of the smaller scale. Therefore, SLC would be reduced relative to the factual.

10. SLC ASSESSMENT AS TO NET NEUTRALITY

10.1 There is substantial lessening of competition in the factual relative to the counterfactual.

11. AGGREGATING SERVICES ON FREEVIEW PLATFORM

11.1 Having access via the Freeview user interface to Pay TV content, such as NEON, Fan Pass and, if it unbundles, Sky Sports content, would provide a compelling consumer proposition, and an alternative platform to promote competition.

11.2 We outline the factual, then the counterfactual, followed by the implications.

12. FREEVIEW PLATFORM - FACTUAL

12.1 If the merger does go ahead, we agree with other submitters, for the reasons they more extensively outline, that the merged company will seek to:

(a) Build its retail customer base by leveraging the "must have" content such as premium live sports across not only the expanded retail footprint of both Vodafone and Sky customers but also by seeking to churn away customers from competitors; and

(b) Continue with its currently restrictive price and non-price terms for wholesaling content, outlined in more detail below, but more likely, make such terms more restrictive, so that wholesaling content from Sky becomes less viable.

12.2 Essentially, if the merger was to proceed it would be more profitable for Vodafone/Sky to sell to retail customers and to leverage the "must have" content via bundles to take customers away from competitors, and to reduce churn, than to encourage wholesaling by competitors. That would be a continuation, and likely deepening, of Sky's current wholesale strategy.

13. FREEVIEW PLATFORM - COUNTERFACTUAL

13.1 While so far Sky has not made access to its OTT content available via Freeview, this is a potential outcome if the merger does not go ahead.

13.2 We are aware that a number of parties are submitting, providing detail which demonstrates that:

(a) Sky's subscriber numbers and retail revenues are declining (a point also confirmed in the applications);

(b) Acquiring or building RSP functionality is not a viable option;

(c) Therefore, if the merger does not proceed, the most viable option for Sky is to proactively expand its footprint by wholesaling on terms that encourage uptake by other companies; and

(d) Such wholesaling may include Sky content being unbundled (for example, a company could take only certain sports programmes and add that to other content that it provides to its customers).

13.3 In that counterfactual, and given the incentives to expand the footprint noted above, we consider it likely that:

(a) Sky would allow (and likely encourage) inclusion of services such as Neon and Fan Pass on the Freeview platform, in order to extend the footprint and marketing of its services to a platform that is already used in 75% of houses. Contrary to the factual, they have incentives to do so, as that would encourage wider distribution via wholesaling and third party platforms such as Freeview.

(b) Sky's less restrictive terms would allow broadcasters (online and/or wireless) to have unbundled Sky content listed on and accessible from the Freeview platform (and/or it might do that itself).

13.4 Having access to Pay TV content, such as NEON and Fan Pass, over the Freeview user interface, provides a compelling consumer proposition, and an alternative platform to promote competition. This is so even if Freeview or its shareholders derive no direct financial benefit (for example, if all revenues go to Sky in the case of its services).

13.5 As Freeview is used in 75% of homes, and given the importance of the user interface as an entry point, the Freeview platform can exert greater competitive options, while providing greater choice to consumers, where it is an entry point to OTT content such as NEON, Fan Pass, and other forms of Sky OTT content developed in the future.

13.6 If Sky unbundles content (eg Sky Sports) that may also open opportunities in the future to have that content accessed by the Freeview platform as well.

14. CONCLUSION

14.1 Our submission thus far is not that there is SLC flowing from the matters we raise in Paras 12 and 13, but rather that one of the consequences of the factual applying rather than the counterfactual is that benefits of the counterfactual, outlined in Paras 13.3 to 13.6, are lost.

15. COMMITMENTS TO RESOLVE SLC CONCERNS

15.1 Freeview would consider any proposal by the parties to deal with its concerns, recognising however that behavioural undertakings cannot be included in the Commission's assessment.

15.2 Any such commitment in relation to wholesaling of Sky content should be on the basis that the content is available on the same terms as it is available to other parties, that it can be taken by any provider that seeks it, and that the content can, if sought, be accessed from the Freeview platform. Net neutrality raises different issues. The net neutrality issues raised are complex, and do not appear to be readily solvable, particularly as behavioural undertakings are not relevant and it is difficult to see how else this can be solved.