

Statement of Preliminary Issues

Spark New Zealand Trading Limited / Craig Wireless New Zealand Spectrum Operations Limited and Woosh Wireless Holdings Limited

11 February 2016

Introduction

1. Spark New Zealand Trading Limited (Spark) is proposing to acquire the management rights to 70MHz of 2300MHz radio spectrum from Craig Wireless New Zealand Spectrum Operations Limited and Woosh Wireless Holdings Limited (together Craig). On 18 December 2015, the Commerce Commission registered an application from Spark seeking clearance for the proposed acquisition.
2. The public version of the application is available on our website at: <http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/detail/901>
3. The Commission will give clearance if it is satisfied that the acquisition will not have or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
4. This Statement of Preliminary Issues outlines the key competition issues we currently consider to be important in deciding whether or not to grant clearance.
5. We invite interested parties to provide comments on the likely competitive effects of the proposed acquisition. We request that parties who wish to make a submission do so by **19 February 2016**.

The parties

6. Spark is part of Spark New Zealand Limited, New Zealand's largest provider of commercial and residential telecommunications products. Spark offers a large variety of residential and commercial broadband, fixed and mobile phone services, system integration and IT services.
7. Craig is a California-based, Canadian company which provides telecommunications services in a number of countries, as well as holding and trading in spectrum. Woosh NZ also owns some telecommunications infrastructure in New Zealand and provides wireless broadband services.

Background to the transaction

8. The management rights Spark is seeking to acquire (management rights 396 and 415) were originally sold by the Crown as part of a large auction of spectrum management rights in 2007.

9. Under the terms of the 2007 auction, the purchaser of the management rights must enter into a management rights deed, which requires them to utilise the management rights to provide either a mobile phone service or a fixed wireless broadband service (the implementation requirements).
10. The owner of the management rights must, by 31 December 2016 utilise the spectrum to provide either:
 - 10.1 a broadband wireless access service in 15 areas, which is available and offered for use on a commercial basis to at least 30% of the resident population of those areas; or
 - 10.2 a mobile phone service which is available and offered for use, on a commercial basis, to at least 50% of the resident population in New Zealand.
11. If these implementation requirements are not met by 31 December 2016, the management rights will revert back to the Crown.

Our framework

12. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.¹ As required by the Commerce Act 1986, we assess mergers and acquisitions using the substantial lessening of competition test.
13. We determine whether an acquisition is likely to substantially lessen competition in a market by comparing the likely state of competition if the acquisition proceeds (the scenario with the acquisition, often referred to as the factual), with the likely state of competition if the acquisition does not proceed (the scenario without the acquisition, often referred to as the counterfactual).²
14. We define markets in the way that we consider best isolates the key competition issues that arise from the acquisition. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Commerce Act, as a matter of fact and commercial common sense.³
15. We compare the extent of competition in each relevant market both with and without the acquisition. This allows us to assess the degree by which the proposed acquisition might lessen competition. If the lessening is likely to be substantial, we will not give clearance to the proposed acquisition. When making that assessment, we consider, among other matters:
 - 15.1 existing competition – the degree to which existing competitors compete;

¹ Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013. Available on our website at www.comcom.govt.nz

² *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

³ Section 3(1A).

- 15.2 potential competition – the extent to which existing competitors would expand their sales or new competitors would enter the market and compete effectively if prices were increased; and
- 15.3 the countervailing market power of buyers – the potential for a business to be sufficiently constrained by purchaser’s ability to exert substantial influence on negotiations.

Preliminary issues

The without the acquisition scenario

- 16. Spark has submitted that with the acquisition, it will utilise the spectrum to provide a fixed wireless broadband access service in line with the implementation requirements outlined in paragraph 10 above. Spark has also submitted that in the without the merger scenario, any alternative bidder for the management rights would also be likely to purchase the management rights to offer a fixed wireless broadband service.
- 17. In assessing the without the merger scenario, the Commission will consider:
 - 17.1 whether the spectrum management rights would be sold to another party, or revert back to the Crown; and
 - 17.2 what any alternative bidder would utilise the spectrum management rights for.

Market definition

- 18. We define markets in the way that we consider best isolates the key competition issues that arise from the acquisition.
- 19. In previous decisions, the Commission has considered the impact of spectrum acquisitions in the national markets for:
 - 19.1 retail mobile services (for residential and business customers); and
 - 19.2 wireless spectrum management rights suitable for mobile services.
- 20. In its application, Spark has considered the impacts of the proposed acquisition on the market for the supply of fixed and fixed wireless broadband services. We will consider whether fixed and fixed wireless broadband services should be considered separately, and whether the impact of the acquisition on other markets (such as for the supply of mobile phone services), should be considered.

Next steps in our investigation

21. The Commission is currently aiming to make a final decision on whether or not to give clearance to the merger by **04 March 2016**. However, this date may change as our investigation progresses.⁴
22. As part of our investigation, we will be identifying and contacting parties we consider will be able to help us assess the preliminary issues identified above.

Making a submission

23. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference 2300MHz in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business **19 February 2016**. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version, if applicable.
24. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA. For example, if disclosure would unreasonably prejudice the supplier or subject of the information. In assessing the confidentiality of information contained in submissions for the purposes of publication on our website, we intend to apply an approach that is consistent with the OIA.

⁴ The Commission maintains a clearance register on our website at <http://www.comcom.govt.nz/clearances-register/> where we update any changes to our deadlines and provide relevant documents.