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

This submission comprises Vodafone's response to the third party submissions on clearance applications from Vodafone Europe B.V. and SKY Network Television Limited in respect of the proposed merger of Vodafone and SKY in New Zealand (the **Proposed Transaction**). This response is accompanied by a report prepared by NERA for both Vodafone and SKY, which reviews the economics reports accompanying various third party submissions (the **NERA Report**).[1]

1. Introduction and summary

1.1 Many aspects of the third party submissions are concerned with matters that have no connection at all with any potential competitive effects that the Proposed Transaction may have on relevant markets (such as comments on New Zealand's regulatory regime, net neutrality generally and prior transactions).

1.2 To the extent that third party submissions do comment on the competitive effects of the Proposed Transaction, none do so by applying an accepted framework for assessing competition theories of harm. Rather, the submissions assume that bundling by Vodafone and SKY (the **Combined Entity**) following the Proposed Transaction would be anticompetitive *per se* and therefore result in a range of detriments to consumers. This is not correct. Indeed, the Proposed Transaction will be highly beneficial for consumers.

1.3 In addition, the third party submissions are largely premised on a wholly unrealistic counterfactual of SKY becoming an "enthusiastic wholesaler" of content in New Zealand, offering bespoke packages of content selected entirely at the option of third parties, at cut-down prices for them to use to build their own pay TV offerings.

1.4 Even if this unrealistic counterfactual was accepted, the framework for analysis of the Proposed Transaction suggested by the third party submissions and their supporting economist reports simply does not demonstrate that the Combined Entity would be able to adversely affect competition in the relevant telecommunications markets in New Zealand.

1.5 When objectively analysed, the submissions against the Proposed Transaction are not founded on a sound premise of reduced competition to the detriment of consumers. Rather, they reflect the commercial concerns of the submitters about the improved competitive offering that the Combined Entity will have. Submitters are therefore actually asking the Commerce Commission (the **Commission**) for relief from features of the market that constitute the very essence of well-functioning competition.

1.6 Much of the content of submissions against the Proposed Transaction refers to the prospect of bundling as an undesirable strategy that the Combined Entity would pursue in order to eliminate or distort competition. It is acknowledged in Vodafone's application for clearance (the **Clearance Application**) that the Combined Entity will offer bundled packages of pay-TV and other services alongside standalone pay-TV and telecommunication services, as part of its wider efforts to retain and attract customers. However, content bundles represent just one of a multitude of means of competing for customers, which includes competing on price, flexibility, network coverage, speed and customer services to name a few.[2] Third parties' philosophical objection to bundling is inconsistent with the accepted view that bundling of products is, in all but exceptional circumstances, pro-competitive and of benefit to consumers.[3]

1.7 Applying a proper competition law framework for assessing bundling issues demonstrates that the Proposed Transaction does not raise any competition issues, and if anything reflects a pro-competitive response in a highly competitive market. It will incentivise the Combined Entity's competitors to offer more attractive products to their customers.

[1] NERA "SKY/Vodafone – review of economics reports", 9 September 2016.
[2] Vodafone Europe B.V. and SKY Network Television Ltd, Clearance Application, 29 June 2016 (the **Clearance Application**) at 11.19.
[3] NERA Report at 2.

1.8 In this regard we reiterate the **[REDACTED]**[4]

1.9 Given the similarities of the arguments and themes presented in most of the third party submissions, we do not seek to address all aspects of the submissions made by each submitter. Rather, we address below each of the key themes raised by third parties.

1.10 In addition, for completeness, in **Appendix 1** we rebut a number of other assertions made by third parties that Vodafone does not consider accurate but which are not material to the issues at hand.

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

No basis for "enthusiastic wholesaler" counterfactual

2.1 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. From a competition perspective, Spark competes hard with Vodafone NZ every day. But we don't really see ourselves as competing head-to-head with SKY TV. The real competition in the future of media is with global over-the-top players like Netflix, YouTube and Apple or with direct-to-consumer premium sports content owners."*

2.2 However, Spark (and others) have now submitted a contrary view that the Proposed Transaction is anticompetitive, including because the Combined Entity will engage in anticompetitive bundling. Arguments made against the Proposed Transaction are premised on a wholly unrealistic counterfactual, in which SKY fundamentally alters its 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.

2.3 Spark and others offer no objective evidence as to why SKY would make this change. In particular, it does not address the commercial implications of this change for SKY and why such a material amendment to SKY's current approach should be seen as likely (or even rational).

2.4 Currently SKY makes content available to Vodafone on wholesale terms that are significantly different to those envisaged by the third party submitters. Vodafone is an arm's length willing taker of these wholesale terms and that has provided SKY with the opportunity to distribute its content to more customers. Vodafone has no reason to expect that SKY would depart from this model, not least because it would facilitate a disaggregation of content that SKY has to date not needed to consider **[REDACTED]** Vodafone's view of the likely counterfactual remains as set out in the Clearance Application.

2.5 None of the economics reports supporting the third party submissions explain why SKY would need to rely on resellers delivering SKY's content via their fixed or mobile networks, as opposed to SKY selling its own "Over the Top" (**OTT**) proposition. SKY already offers OTT products, such as Neon and FanPass, which offer attractive alternatives for customers who do not wish to take the full satellite service.

2.6 OTT offerings (whether Neon, FanPass or any new products that SKY might develop to deliver its content) can be delivered directly to a customer over the internet using any broadband provider's network. As set out in more detail in the "Net Neutrality" section below, the principle supporting the OTT distribution model is that it does not matter what telecommunications network customers use to access the internet, they can stream their content over that network. The end user customer streaming experience is the same – regardless of whether the customer is buying an OTT service from the customer's own RSP or buying an OTT service from elsewhere. Accordingly, there is no reason to believe that customer demand would force SKY to depart from what is not only its current behaviour, but also an entirely standard business model for streaming services.

---

4 As set out in the Clearance Application at 11.14.

2.7 We understand that SKY's submission will address this counterfactual point and its approach to wholesaling in more detail. The NERA Report also sets out from an economic perspective why such a counterfactual is unrealistic. In essence, if it were profit maximising for SKY to drop its wholesale prices and expand its wholesale business in the manner suggested it would have done so already.

Axiom counterfactual

2.8 The Axiom report on behalf of Fetch TV[5] introduces a different counterfactual where SKY and Vodafone compete against each other in the broadband and pay TV markets.

2.9 Axiom offers no objective evidence to support this as a likely counterfactual in New Zealand. However, assuming that its counterfactual were plausible, even if SKY did begin providing broadband services, there is no evidence that Vodafone would cease its wholesale/resale relationship with SKY and seek to establish itself as a competing pay TV operator in New Zealand. It has a reseller agreement with SKY for the medium term **[REDACTED]**. In addition, it has had this relationship over a number of years, including while SKY also had various wholesale arrangements with Vodafone's competitors (including Spark and CallPlus).

2.10 Axiom itself spends a great deal of time setting out why it believes there are high barriers to entry in the pay TV market (and Sky's submission sets out why this is not the case). However, it does not explain why in its counterfactual, Vodafone would be better able or more incentivised to enter pay TV than the likes of Fetch TV, Spark or others (particularly in light of Vodafone's on-going wholesale/resale relationship with SKY).[6] In any event, if SKY were to commence providing broadband services there is every prospect that it might seek to do so, at least in first instance, through resale of Vodafone services. In this form, Axiom's counterfactual would not be a significant extension of the existing partnership between Vodafone and SKY, and would not indicate any meaningfully different competitive outcome.

2.11 In relation to the broadband market, as the Axiom Report itself sets out in detail (and is set out in Vodafone's and SKY's clearance applications), the New Zealand broadband market is highly competitive (see below at 4.3).[7] Accordingly, the addition of one further provider (amongst the 80+ existing providers) to that market in the form of SKY would make no material difference to the level of competition in that market.

No competition issues against status quo counterfactual

2.12 Finally, the submissions generally argue that SKY's current conduct does not allow RSPs to develop a commercial pay TV offering in competition with SKY. Accordingly, the third party submitters argue, even if the Combined Entity was to cease providing the current wholesale offer post-Transaction (which there are no plans to do) this would not change the competitive landscape. As explained below, this is consistent with the view that no competition issues arise against a status quo counterfactual.

3. No SLC in sports content rights acquisition or pay TV markets

3.1 Third parties do not require any wholesale offer from SKY to compete in the downstream pay TV and upstream content rights acquisition markets in New Zealand. As set out in the Clearance Application and expanded upon in SKY's submission, these markets are increasingly competitive. **[REDACTED]**

3.2 In particular, **[REDACTED]**. The Proposed Transaction does nothing to change this. Rather, it will make for a more dynamic and innovative market, which will benefit consumers by encouraging greater product innovation and differentiation across a range of different elements of competition. This includes elements that take advantage of the greater availability of and competition for content.

---

[5] Axiom "Economic Analysis of Proposed SKY/Vodafone Merger", August 2016 (the **Axiom Report**).
[6] Axiom Report at 3.1.1.
[7] Axiom Report at section 2.1.

3.3 Vodafone understands that SKY's submission provides more detail on these points.

4. No SLC in telecommunications markets

4.1 Third party submitters have argued that the Proposed Transaction will substantially lessen competition (an **SLC**) in fixed and mobile telecommunications markets. For the most part, they have done so on the basis that, if an "enthusiastic wholesaler" counterfactual is assumed, any outcome that does not encompass this reality must necessarily be uncompetitive. However, some submissions have also suggested (without providing any evidential basis) that the Proposed Transaction would result in an SLC when compared against a status quo counterfactual.

Telecommunications markets are highly competitive

4.2 It is commonly accepted that the New Zealand telecommunications markets are highly competitive, both in respect of broadband and mobile. This is clear from the Commission's own reports on the state of the telecommunications market in New Zealand. For example, the Commission's 2015 report stated that "Mobile pricing continues to be competitive across all bundle sizes", and that fixed broadband pricing, while more dispersed, was such that a 100GB data and voice bundle can be purchased for $75 a month, 5% below the OECD average.[8] In the 2014 report the Commission also described the telecommunications market as "a fast-moving competitive market, where providers need to constantly innovate and reshape their services and plans to deliver what consumers and business see as the best value."[9] In addition, IDC's latest report says "overall competitive rivalry is high"[10] and "the mobile industry in 2016 is very competitive"[11].

4.3 In addition, the third party submissions generally acknowledge that the telecommunications markets are highly competitive:

(a) Spark describes the broadband and mobile markets as "currently highly competitive with low margins";[12]

(b) Castalia describes the level of competition between the 80+ telecommunications providers as "significant.";[13]

(c) Plum refers to "dozens of retailer service providers in fixed broadband";[14]

(d) the Telecommunications Users Association of New Zealand refers to the development of a large number of small players in the retail service provider space"[15] over the last five years (indicative of low barriers to entry); and

(e) Axiom states the following[16]:

> An inflection point in the competitive dynamics has been reached whereby firms are decreasingly competing for new customers and are instead striving to gain market share by winning existing customers. This is a much less hospitable competitive environment, since firms must typically incur greater acquisition costs per new customer. Meanwhile, churn rates within the subscriber base tend to increase due to the rising percentage of off-contract customers and increased competitive activity. Also, **margins are compressed due to competitive pressure arising from lower pricing and increased inclusions** (e.g., higher bandwidth allowances, faster speeds, more free calls, etc.) the overall effect is strong pressures on portfolio profitability.) *[Emphasis added]*

---

[8] Commerce Commission "Annual Telecommunications Monitoring Report 2015" at page 22.

[9] Commerce Commission "Annual Telecommunications Monitoring Report 2014"at page 34.

[10] IDC "New Zealand Telecommunications Competitive Landscape 2015/2016" at page 26. **[REDACTED]**.

[11] At page 25.

[12] Spark Submission "SKY TV / Vodafone merger clearance", 12 August 2016 at [80].

[13] Castalia "Analysis of the Competition Effects of the Proposed SKY-Vodafone Merger", August 2016 at page 16.

[14] Plum "Assessing the proposed merger between SKY and Vodafone NZ, a report for 2degrees and TVNZ", August 2016, at page 37.

[15] Telecommunications Users Association of New Zealand Inc. "Submission to the Commerce Commission in regards to the proposed merger of Vodafone Europe B.V. and SKY Network Television Limited", 12 August 2016 at [14].

[16] The Axiom Report at page 5.

4.4 The competitiveness of the market is largely attributable to the low barriers to entry and expansion, including (in the case of broadband) due to structural separation in the fixed market. This has manifested in an increasing number of operators competing on a number of differentiating factors. The intensity of competition has driven innovation in the individual services and bundles offered to consumers, and this dimension is expected to continue. The Combined Entity will continue to face strong competition from a number of large, well-resourced competitors, including:

(a) **Spark**, one of New Zealand's largest listed companies and the largest broadband supplier. In June 2015, Spark reported a mobile market share of 41% (revenue), and a broadband market share of 48% (connections). It has recently announced that it is making Lightbox available at no cost to all of its ≈ 680,000+ residential subscribers and includes Lightbox for free as part of pay monthly mobile plans. It is also leveraging its nationwide footprint of 1,000+ payphones (which it secured as part of Telecom's separation) to offer over 1,000 free Wi-Fi zones to Spark customers. More recently, Spark has announced substantial (50%) increases in data caps for its broadband users and increased mobile data caps. **[REDACTED]**;

(b) **Vocus** Communications Ltd, listed on the ASX with a market cap of close to NZ $4.8 billion. After the merger with M2 Group Ltd, Vocus became the third largest telecommunications company in New Zealand, operating under the leading brands of **CallPlus**, **Slingshot**, **Orcon**, **2Talk** and **Flip**. It is also a leading telecommunications provider of data centres, dark fibre and international internet connectivity across Australia, New Zealand, Singapore and America;

(c) NZX-listed **Trustpower** (NZ$ 2.4 billion market cap), which is leveraging its substantial electricity and gas business to offer aggressively priced broadband to its customer base. In its May 2016 submission to the Commission on the Section 30 Review of the UBA Standard Terms Determination, Trustpower said that, "*Trustpower has grown from [a] small reseller of under 1,000 telecommunications services in 2004 to its current position providing close to 100,000 services to over 50,000 customers. Trustpower provides over 15,000 fibre broadband connections on the Chorus and Ultrafast fibre networks, and over 35,000 XDSL services nationwide.* Trustpower further stated that, "*Trustpower's growth has been largely organic, **achieved through its unique ability to bundle telecommunications and energy services, creating unique propositions and a superior service model**. We are New Zealand's fourth-largest telco, and potentially the fastest growing*." [Emphasis added];

(d) **2Degrees**, which has a substantial mobile base and, according to recent reports, is considering a trans-Tasman share market listing. In a recent *Herald* article, 2Degrees spokesperson Mat Bolland said 2Degrees was a growth company, and its board was constantly assessing ways in which it could grow even faster.

4.5 As set out in the Clearance Application, it is clear that 'key content' is not the driver of this competitiveness in light of the fact that of the 80+ broadband suppliers in New Zealand, all but Vodafone have opted not to resell SKY services.

4.6 Given the highly competitive nature of these markets in New Zealand, the Proposed Transaction would need to have an extraordinarily profound effect (the potential cause of which is not explained by any submitter) in the telecommunications markets in order to result in an SLC. The Proposed Transaction would also somehow need to increase barriers to entry to somehow insulate the Combined Entity from future competition in order for the prospect of anticompetitive foreclosure to hold any credibility as a theory of harm. We set out below why competition in telecommunications markets will not be lessened by the Proposed Transaction.

Strong competition will remain with Proposed Transaction

4.7 Putting aside the counterfactual arguments, the third party submissions (and in particular the economic reports) appear to suggest that the Combined Entity will engage in anticompetitive foreclosure of premium content and leverage its alleged pay TV market power into the telecommunications markets. Some go as far as to say that "a significant proportion of the $435m in claimed merger revenue synergies will arise from pursuing an input foreclosure strategy."[17] As the Commission is aware from the confidential information provided to it none of the synergies are premised on anticompetitive foreclosure. An anticompetitive foreclosure strategy would simply not be profitable or possible in this case, as described further below.

4.8 Many of the third party submitters claim SKY has not made its content available on a wholesale basis on commercially viable terms, in effect constituting a constructive refusal to deal.[18] Their position is that even if SKY were to offer content on wholesale terms, for example on terms identical to those that Vodafone has accepted, on an arms' length basis, they would not buy. Some incorrectly speculate that Vodafone can somehow make it work due to its cable network in Wellington and Christchurch. It is entirely unclear how the nature of the network over which content may be delivered has any bearing on the commercial terms that SKY might offer a party seeking wholesale content.

4.9 However, as set out in the Clearance Application, the market evidence points to others having the view they don't need SKY services to compete effectively in telecommunications markets.[19]

4.10 It follows that by their own admission, even if the Combined Entity was to cease SKY's current wholesaling (which it will not), the current strong competition in the telecommunication markets would be unaffected relative to the status quo. In this respect, Spark's initial comments when the Proposed Transaction was announced that "*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"* are telling and appear closer to reality than its later submission, based as it is on a strained, entirely theoretical counterfactual analysis.

4.11 In any event, while claiming anticompetitive foreclosure, none of the submissions have sought to apply any credible framework for analysis of economic foreclosure to support their claims. For the reasons set out in the following section (which also draws on the NERA Report), the rare conditions in which anticompetitive foreclosure can occur are in no way met in this instance.

5. Third parties offer no credible "bundling" theory of harm

5.1 As noted in the Clearance Application, and acknowledged by many of the submitters[20] the Commission has said that "bundling is often pro-competitive and can lead to lower prices for consumers."[21] Indeed, non-horizontal mergers give suppliers the opportunity to realise efficiencies and design more attractive products. This is reflected in the Commission's Guidelines which state that "a merger between suppliers…who operate in related markets is less likely to result in an SLC than a merger between competitors."[22] Mergers resulting in anticompetitive foreclosure are exceptional cases, with rare factual scenarios in which competition will be harmed.

5.2 The Proposed Transaction is procompetitive and will lead to better products and faster innovation, significantly benefiting consumers. The third party economic submissions proceed as if any ability to offer bundled offers or superior services must be anticompetitive. However, anticompetitive foreclosure cannot simply be achieved by the merged firm offering an attractive bundle that is popular with consumers. It requires much more, as has previously been recognised by the Commission. In *Vodafone/TelstraClear,* the Commission said:

> [Bundling] could raise competition concerns if bundling prevented rivals obtaining sufficient scale to be viable. Alternatively, bundling might take the form of predatory pricing. It would also have to be likely that following any foreclosure, Vodafone would be well positioned to exercise enhanced market power, such as increasing prices, resulting in a substantial lessening of competition.

---

[17] Spark Submission at paragraph 80.

[18] See "Submission by 2degrees in response to the Commerce Commission's Statement of Preliminary Issues", 12 August 2016 and Spark "SKY TV/Vodafone merger clearance" submission, 12 August 2016.

[19] See paragraph 11.11 of the Clearance Application.

[20] See for example the Axiom Report and Castalia "Analysis of the Competition Effects of the Proposed SKY-Vodafone Merger", August 2016.

[21] *Vodafone/TelstraClear* at paragraph 420.

[22] Commerce Commission "Mergers and Acquisitions Guidelines", July 2013, paragraph 5.1

> Bundling may be a concern in this case if the merged entity acquired the *ability* and *incentive* to foreclose its rivals. We note that pro-competitive bundling can also have an exclusionary effect as a result of superior competitive performance. An additional requirement before bundling becomes a concern, therefore, is that foreclosure would need to have the *effect* of substantially lessening competition.[23]
>
> …
>
> The Commission notes that for there to be a substantially lessening of competition as a result of anti-competitive foreclosure via bundling, the conditions of entry would need to be such that an exercise of market power by Vodafone post foreclosure would not attract price disciplining entry or expansion.[24]

5.3 Similarly, in *BlueScope Steel / Pacific Steel*, the Commission postulated the potential theory of harm in the following terms:

> We have considered whether or not the proposed acquisition would create or increase the ability and incentive of the merged entity to foreclose competitors at different levels in the supply chain by offering bundled discounts or by tying purchases of flat and long steel products together.
>
> In order for such a strategy to be possible and profitable, two factors would have to hold:
>
> - that the merged entity has a "must-have" product for which there are few good, cost-effective alternatives;
> - that tying or bundling the sale of this "must-have" product to a second product, which has substitutes, forecloses a competitor(s) for that second product.
>
> Any losses made by discounting the bundled product would be recouped once producers of the second product are foreclosed (or are rendered less competitively effective). The market power of the merged entity in the second product may thus be enhanced and competition may be lessened.

5.4 The third party submitters do not:

(a) articulate why potential bundling by the Combined Entity would give rise to an SLC; or

(b) apply the framework for analysis adopted by the Commission (which is itself consistent with accepted practice for assessing non-horizontal mergers in other jurisdictions).

5.5 Rather, the submitters tend to assume that bundling by the Combined Entity would necessarily operate to the detriment of competition. They do not provide any analysis of whether the Combined Entity would have the incentive or ability to implement an anticompetitive foreclosure strategy, or whether such a strategy could be expected to be successful with reference to highly competitive telecommunications markets in which effects would occur. Put simply, the submissions have not applied any credible framework to support the claim that an SLC in any market is likely.

5.6 In Vodafone's view, the position can be summarised as follows.

(a) Putting aside the intention to continue to wholesale, access to SKY services is not a must have for RSPs to compete in the relevant telecommunications markets in New Zealand – if it were, Vodafone would not be the only RSP out of 80+ nationwide to offer those services. This is an inescapable fact which undermines the third party assertions to the contrary. While some have tried to obfuscate the issue by saying the terms from SKY are uncommercial, and do not allow for bespoke offerings, that ignores the point – if it were an essential input for an RSP's telecommunications offering other RSPs would be resellers of SKY services, as Vodafone has been for many years. That they have not, and given that the market share trends reveal no meaningful impact from their decision not to do so, further reveals that access to SKY is not a must have in order to compete meaningfully as an RSP in New Zealand's telecommunications markets. The third party submitters have not provided any evidence to suggest that this situation will change in the future.

(b) As set out at pages 30-31 of the Clearance Application, Vodafone's broadband market shares have remained relatively constant over recent years. This indicates that pay-TV offerings do not drive substantial changes in broadband share. If they did, because

[23] At paragraphs 408, 409.
[24] At paragraph 423.

Vodafone is the only broadband supplier currently reselling the full suite of SKY services, a substantial increase in Vodafone's share would be expected to be observed. However, as the diagram below demonstrates, this is not the case. In fact it is the smaller players who have no pay-tv-offering that have gained in market share.

Figure 1: Broadband market shares (by revenue) [REDACTED]

(c) In any event, as set out above, there is nothing preventing competitors bundling their products with any number of additional services, such as WiFi, electricity, or music streaming. Indeed, competitors can include free content in their bundles (as Spark currently does with Lightbox), which would strongly constrain bundles which included paid for content. This has been a key retention strategy for competitors for some time. See the following quote by IDC[25]:

> *"Bundling voice, mobile and internet services has been a key retention strategy for some time. In recent years, bundling strategies have evolved to include other services in the home. Trustpower has had considerable success since it began aggressively targeting the broadband market with energy services included, allowing the company to undercut the broadband market and increase customer stickiness. Content has also proven to be a key addition, with Spark and 2degrees now bundling music services and all three providers experimenting with video content."*

(d) The importance of price in consumer decision making should also not be overlooked in the telecommunications space. In recent times, New Zealand has seen a movement away from bundles and growth of 'no-frills' offerings, with a significant proportion of the 80+ broadband providers offering 'no-frills' options. For example, Bigpipe (a Spark brand) promotes itself as broadband "without the frills" and 2Degrees provides a monthly $10 discount to 2Degrees Pay Monthly mobile customers (i.e. with no additional value-adds). This observation serves to demonstrate that value-adds are not essential inputs to compete in this space.

(e) Notwithstanding the failure of third parties to establish any ability to foreclose, neither have they put forward any cogent evidence as to why the Combined Entity would have the incentive to foreclose. Any attempt to leverage the Combined Entity's position in pay TV would inevitably result in substantial profit sacrifice – both in the short and long term –that could not realistically be compensated for by increased broadband subscription sales via bundles.

(f) Further, the third parties have not articulated a cogent argument as to why the combined entity would be able to *increase* prices post the alleged foreclosure such that an SLC would result. In Vodafone's view the reason why they have not done so is because there is no credible basis upon which to make such an assertion. By many of the third parties' own admissions, the relevant markets are highly competitive (see 4 above).

5.7 In summary, none of the third party submissions provide any factual basis grounded in a robust framework support their allegations that bundling by the Combined Entity could give rise to an SLC in a market. Applying a proper framework reveals that the Proposed Transaction will be pro-competitive and positive for consumers.

6. Net Neutrality

6.1 "Net neutrality" is the notion that internet providers are detached from what information or content is sent over their networks. In essence, it captures the concept that internet providers treat traffic equally. Net neutrality includes concepts that particular content should not be prioritised or degraded relative to other content.

6.2 Third party submitters have raised various "net neutrality" concerns in relation to the Proposed Transaction. They equate net neutrality matters with competition issues and use this to argue that the Proposed Transaction is likely to give rise to an SLC in a market.

[25] IDC report **[REDACTED]**

6.3 As a preliminary point, we consider that the majority of submissions on net neutrality amount to pleas for prioritisation or degradation of traffic to be regulated *ex ante.* Submissions of this type are not relevant to the Commission's consideration of whether the Proposed Transaction lessens competition. However, to the extent submissions are relevant to a competition assessment, the Proposed Transaction does not raise any net neutrality issues:

(a) one of Vodafone's core strategies is to provide the best possible customer experience. Pursuing such a strategy is the absolute antithesis of this core value; and

(b) in any event, the third party submissions fail to articulate why any such net neutrality issues (even if they did exist) would give rise to an SLC in any relevant market.

6.4 We expand on these issues below.

Third party submitters' arguments

6.5 In essence, the submitters' main arguments are that the Combined Entity will be incentivised to make its own content more attractive to consumers and/or make third party OTT content (such as Netflix, Lightbox and free OTT content such as YouTube and TVNZ OnDemand) carried over its network relatively less attractive to consumers. More specifically, submitters argue:

(a) the Combined Entity has the incentive and ability to promote its content[26] relative to the OTT content of its rivals; either by making its own content offer more attractive to viewers than the competing OTT content, including via strategies such as zero-rating its own content or forcing OTT providers to pay the Combined Entity more (or to accept a lower quality of service for delivery of their content unless they pay more);

(b) the Combined Entity will create a "walled garden" business model across the value chain (depending on how the parties' services, being enhanced delivery of content across multiple devices, are developed), via the bundling of specific hardware/devices, software/'apps' to the detriment of competition; and

(c) in respect of the Rural Broadband Initiative (**RBI**), it is argued that Vodafone will be able to offer its retail customers a higher speed and quality service over its RBI funded infrastructure, more suited to HD and other higher end TV services, without wholesaling this to other RSPs.

6.6 These assertions do not stand up to scrutiny and do not provide any basis to conclude that the Proposed Transaction could be likely to lessen competition. Such strategies fly in the face of commercial sense and in any event do not impinge on the competitiveness of Vodafone's rivals.

6.7 Indeed, the practice of RSPs in New Zealand is that no differentiation is made between content originating from different sources. Vodafone's consistent practice is that it does not discriminate against or prioritise any source of content. In addition, content providers are increasingly moving towards end-to-end SSL encryption for media delivery. Vodafone does not manage, control or modify the encryption of any other providers content. In reality, such encryption would limit the ability of any network operator to implement traffic management (even if it did wish to do so).

6.8 As Vodafone has advised the Commission, **[REDACTED]**.

6.9 In addition, a core strategy of Vodafone, which will continue post-Transaction, is to provide the greatest possible service level to its end users. Providing fast, reliable access to the key content consumers demand is a critical part of this. Moreover, Vodafone expects that any customers who suffer a poor user experience would exercise their ability to switch to any of the myriad of competing RSPs. In this context, throttling or otherwise degrading rivals' OTT content is doomed for commercial failure and it is completely against Vodafone's core strategy and values.

6.10 **[REDACTED]**

---

[26] i.e. SKY pay TV, NEON and Fan Pass, plus other SKY products that emerge (STV, PPV, or SVOD).

6.11 **[REDACTED]**

6.12 In any event, if Vodafone were to favour its own content, the commercial reality is that it would lose customers. Vodafone operates in a highly competitive market in which it faces a number of well-resourced competitors with attractive offerings. Internet speed is a critical factor influencing choice of broadband provider. Seeking to degrade the experience of its customers by throttling rivals' OTT content would simply result in losing customers to competitors.

6.13 Against this background, we respond to each of the specific net neutrality concerns further below.

Making SKY content more attractive, e.g. through zero rating

6.14 Submitters have raised concerns that the Combined Entity might "zero rate" SKY content so that streaming SKY content will not count towards their fixed or mobile broadband allowances. While this is entirely speculative, even if it was to occur, it would not raise a competition issue:

(a) while such a product would be of benefit to consumers, it would unlikely lead to substantial switching away from other OTT providers' content to SKY zero rated content. Indeed, the overall effect of zero rating is to increase the amount of data available to consumers – this could even lead to increased usage of other content providers' services because subscribers' consumption of zero-rated content would leave intact their remaining data balance. In any event, growth in unlimited (or high cap) data plans means that zero rating is irrelevant for an ever-increasing number of customers. As set out in the Clearance Application, according to figures released by Chorus in March 2016, one in three households are now on unlimited data plans, over 60% of broadband connections have a monthly cap greater than 50 gigabytes (compared with 1.2% in 2011). The notion that zero rating by Vodafone could somehow force competing pay TV providers below minimum viable scale resulting in an SLC in pay-TV markets does not stand up to scrutiny; and

(b) any other fixed line or mobile provider could also elect to zero rate content to make their offering more appealing to customers. This is just one of many initiatives that they could take in order to seek a competitive edge in the highly competitive telecommunications markets. Accordingly, zero rating content could also have no adverse effect on competition in the relevant telecommunication markets in New Zealand.

Incentive and ability to discriminate against rivals' OTT content

6.15 As set out in the Clearance Application, the Proposed Transaction will combine Vodafone and SKY's complementary businesses in New Zealand to create an entity that combines Vodafone's mobile and fixed telecommunication networks with SKY's TV offering. This will assist the Combined Group to provide a better customer experience and to enhance cross-marketing opportunities, and lead to faster innovation to meet changing customer needs. Ensuring customers have fast and reliable access to popular content is at the core of this strategy.

6.16 To assist customers to make informed choices about internet service providers' streaming capability, content providers such as Netflix produce regular monitoring reports. These reports detail internet speeds and performance of competing broadband providers with respect to the specific OTT content and are freely available (and highly visible) on the internet, including on popular social media platforms. These reports serve to drive customer expectations of fast(er), reliable and consistent quality of content delivery. An extract of such a report by Netflix is reproduced below.[27]

6.17 Such information is readily available to consumers. In Vodafone's view, such information can be a strong driver of choice of provider. Accordingly, Vodafone takes the information produced by content providers such as Netflix extremely seriously and will rapidly seek to remedy any decline in service standards where indicated. Vodafone is all too aware that customers can and will switch between providers where experience does not meet their expectation.

[27] Netflix "ISP Speed Index – July 2016" accessed via https://ispspeedindex.netflix.com/country/new-zealand/.

6.18 By way of example, telecommunications providers, in New Zealand as well as abroad, were caught out by the exponential increase in bandwidth usage predominantly accounted for by streaming on Netflix. In response to this, Vodafone New Zealand invested millions of dollars in network upgrades in order to enhance customer experience in New Zealand. Content providers such as Netflix can and do dictate and drive Vodafone's investment in network capacity. **[REDACTED]**

Figure 2: Extract from Netflix ISP Speed Index


NEW ZEALAND

ISP LEADERBOARD - JULY 2016

RANK	ISP	SPEED Mbps		PREVIOUS Mbps	RANK CHANGE	TYPE
1	Vodafone NZ	3.54		3.56	+1	
2	2degrees	3.53		3.58	-1	
3	Spark	3.46		3.48		
4	Trustpower	3.40		3.29	+2	
5	Bigpipe	3.35		3.33		
6	CallPlus	3.35		3.38	-2	

6.19 While any degradation of a content service by Vodafone would likely drive choice of RSP, it would be highly unlikely to result in a significant shift of customers to SKY content. Quite simply, consumers value Netflix and YouTube content very highly, with a large proportion of data over Vodafone's network accounted for by those services, far greater than the amount of SKY content. On Vodafone's fixed network:

(a) **[REDACTED]**

(b) **[REDACTED]**

(c) **[REDACTED]**[28]

6.20 In light of the above, attempting to throttle other content would have a hugely negative effect on a large proportion (over **[REDACTED]**) of what customers actually consume. It would adversely affect nearly all customers. It would not be rational to seek to degrade this content in the hope that customers might switch to SKY content, particularly when currently SKY makes up such a small proportion of online content consumed by customers and a large proportion of Vodafone customers will not be SKY subscribers. While the parties would hope this volume will increase over time, it is unlikely to approach the levels of usage experienced by Netflix and YouTube in the near future. In short, throttling would cause an enormous cost to Vodafone in the form of lost customers, with virtually no pay-off in terms of new consumers of its content.

6.21 This is consistent with the "Netflix example" previously provided to the Commission. Irrespective of whether Vodafone has pay TV offerings in the territory, globally, Vodafone seeks to work with Netflix to enhance its customers' Netflix experience. For example, despite Vodafone offering pay TV in Spain, Portugal and Ireland, it has launched Netflix in its STBs in those countries. Vodafone has never denied Netflix access to its network to deploy devices that enhance the Netflix experience for customers, including in countries where it has a competing pay TV offering.

The "walled garden" business model

6.22 Third party submitters[29] also argue that the Combined Entity could create a "walled garden" business model across the value chain (depending on how the parties' services are developed)

28 **[REDACTED]**

29 See for example, Coalition for Better Broadcasting "Submission to the Commerce Commission on Vodafone Europe B.V. and SKY Network Television Limited Application for Clearance of Merger", August 2016.

via bundling of specific hardware/devices, software/'apps' and content/formats. Their concern appears to be that the Combined Entity would be able to require, through technological bundling or tying, that customers seeking SKY content use Vodafone broadband or mobile products in order to access this content.

6.23 However, this argument is effectively equivalent to the argument that the Combined Entity will bundle its products to the disadvantage of its competitors. For reasons outlined above, this concern is unfounded. As emphasised throughout this submission, the telecommunications market is highly competitive and contestable; customers can and will switch providers with ease. The ever-increasing OTT offerings by rivals also serve to suggest that such concerns are unfounded.

Rural Broadband Initiative

6.24 Submitters suggest that competition will be removed or substantially reduced in respect of the Rural Broadband Initiative (the RBI footprint) as a result of the Proposed Transaction. The argument is essentially that in this space, satellite and RBI – which is a FWA service provided by Vodafone – are often the only actual or potential competitors for transmission of TV content. Submitters refer to Vodafone's wholesale obligations as recorded in the RBI Deed[30] as being limited to a relatively low sub-HD speed 5 Mb/s service. They argue that Vodafone will be able to offer its retail customers a higher speed and better quality service over its RBI-funded infrastructure without wholesaling this to other RSPs.

6.25 However, the facts as submitted by the third parties are incorrect. When assessed in light of the correct facts, it is clear that no competition issue could arise.

(a) Submitters fail to acknowledge the fact that the RBI Deed requires that Vodafone does not discriminate against Access Seekers in favour of its own services. Clause 5 is reproduced below and the full deed is attached at **Attachment 2**.

5. Obligation not to Discriminate
5.1. Subject to clause 5.2, when doing or omitting to do anything in relation to the supply of the Co-location Service or Broadband Services, Vodafone will not Discriminate.
5.2 Vodafone will achieve compliance with clause 5.1 through compliance with the obligations specified in clause 6 of this Deed.
5.3 For the purposes of clause 5.1, to the extent that any term of this Deed provides for different treatment between Access Seekers or in favour of Vodafone or any Vodafone-Related Party relative to Access Seekers, such different treatment is objectively justifiable and does not harm, and is unlikely to harm, competition in any telecommunications market.

For the purposes of Clause 5, Discriminate is defined as "(a) to treat Access Seekers differently; or (b) where Vodafone supplies itself with the Co-location Service or the Broadband Services, in each case on RBI Infrastructure, to treat itself or any Vodafone-Related Party differently from Access Seekers, except to the extent that a particular difference in treatment is objectively justifiable and does not harm, and is unlikely to harm, competition in any telecommunications market."

This obligation addresses concerns about Vodafone creating a retail-only FWA service not available to wholesale customers. Compliance with the RBI Deed is monitored by the Commerce Commission. There are 11 retail providers offering rural broadband on the back of Vodafone's wholesale offer.[31]

(b) In relation to its wholesale obligations, Vodafone has voluntarily increased the minimum service standard from 5 to 30 Mb/s for both retail and wholesale FWA customers (i.e. an increase of 6 times the current speed). Vodafone acknowledges the importance of reliable, fast internet to rural businesses, schools and lifestyles. A copy of the Minister's announcement in relation to the agreement between the Government and Vodafone can be accessed at https://www.beehive.govt.nz/release/4g-rbi-speeds-lifted-dramatically.

---

[30] As between Vodafone and the Crown.
[31] A number of these retailers have their own resellers, and if this group are included the total number of retailers is ≈20.

Conclusion on net neutrality

6.26 In light of the above, net neutrality concerns do not stand up to scrutiny and are not relevant in the context of the current process. Vodafone is committed to providing the best possible customer experience. Degrading customer experience by throttling rivals' OTT content is not a sound commercial strategy. Customers can and will switch providers with ease when their experience does not meet their expectation.

6.27 Even if any of the net neutrality concerns of third parties could be borne out (which Vodafone submits is not the case) there is still nothing to suggest that this could result in an SLC (and nor do submitters explain why an SLC would result). For example, *even if* a third party OTT provider was in some way disadvantaged, this is a long way from causing an SLC in a pay TV market.

7. Vodafone submissions in overseas jurisdictions

7.1 The third party submitters have referred to excerpts from submissions made by Vodafone entities in other jurisdictions.

7.2 However, the structure and nature of competition in the New Zealand market context and the regulatory considerations applicable in each market, differ markedly from the relevant overseas jurisdictions. As mentioned throughout this submission, the telecommunications markets in New Zealand are highly competitive, including due to the structural separation in the fixed market. Competitive rivalry is high and operators are forced to constantly evaluate their offering to ensure it meets increasing customer expectations.

7.3 In addition, in the New Zealand context, mergers are assessed against the 'SLC' test. The third party submitters merely assert that competition concerns arise in light of comments by other Vodafone entities without engaging the "SLC" test to determine whether a competition concern arises in New Zealand as a result of the Proposed Transaction.

Overall, the third party submissions do not provide any credible theories of harm to suggest that the Proposed Transaction would give rise to an SLC in a New Zealand market. The repetition of excerpts from other Vodafone entities' submissions made in market and regulatory contexts that are quite different from the present case have no place in any objective assessment by the Commission with reference to the New Zealand markets. Ultimately, the Commission needs to assess the Proposed Transaction on the basis of the facts as they stand in the New Zealand markets. We expand on these matters below.

Different market contexts

7.4 The various third party submissions refer to excerpts from submissions made by Vodafone entities in other jurisdictions. The submitters draw their quotes from a limited number of Vodafone submissions (with various quotes repeated throughout several of the third party submissions). However, the quotes primarily come from Vodafone's submissions in relation to:

(a) Ofcom's Consultation: "Strategic Review of Digital Communications discussion document" (UK);

(b) Telefonica's acquisition of Canal+ (Spain); and

(c) The European Commission's Public consultation on the evaluation and the review of the regulatory framework for electronic communications networks and services (EU).

7.5 The third party submitters have not addressed the different market structure and conditions in these other jurisdictions, which means they have limited relevance in the current context. We address the context of each of these submissions below.

Ofcom's Consultation: "Strategic Review of Digital Communications discussion document" (UK)

7.6 Vodafone UK was responding here to a number of concerns raised by Ofcom in its consultation document published in connection with a strategic review of the UK's digital communication markets. The concerns raised by Vodafone in this submission do not apply in the New Zealand context. Rather, they primarily relate to issues with behaviour by the incumbent fixed line provider, British Telecom[32] (**BT**) via Openreach. Openreach is the BT entity responsible for the UK-wide access network offering ubiquitous coverage of both voice and broadband wholesale services. While functionally separate, it remains a subsidiary of BT and has not been structurally separated. In contrast, in New Zealand wholesale access to fixed network services is provided by Chorus, which operates entirely separately from any RSP, is a wholesale only provider and must provide services subject to equivalence and non-discrimination obligations.

7.7 Ofcom's consultation document recognised that functional separation and the regulation of price inputs did not remove scope for, for example, non-price discrimination. Ofcom queried whether functional separation did in fact operate to undermine downstream competition and whether different approach might be required, for example, including structural separation.[33]

7.8 Vodafone's statements about "key" content were made in this context and relate to the behaviour of BT as the vertically integrated incumbent seeking to evade established regulatory constraints and enhance its fixed wholesale and retail market power (predicated upon the subsisting fixed access bottleneck) through the acquisition of "key" content. The following passage provides context for Vodafone's statements:

> Increasingly, access to quality connectivity is viewed as an essential right rather than as an elective value added service. Industry has responded via IP based service competition, but the incumbent, BT has been able to secure a third of the domestic broadband market, 60% of new-adds of Openreach's high speed broadband and is further entrenching its market power through the bundling of Premium TV content.

7.9 This is vastly different than the New Zealand context (including post-acquisition). Unlike in the UK, the providers of the fibre and copper access infrastructure in New Zealand (Chorus and LFCs) are entirely vertically separated with barriers to entry very low evidenced by fact that there are 80+ RSPs. Vodafone is not a dominant RSP or wholesale provider, with a **[REDACTED]**. Indeed, compared to BT's 60% of new fibre adds (with fibre likely to become the key channel for delivering content in the future), Vodafone New Zealand currently achieves around **[REDACTED]** of new fibre adds **[REDACTED]**.

7.10 In addition to the above, the facts surrounding convergence of content and telecommunications products are highly specific to the UK scenario. As set out in the Clearance Application, resale and retransmission access to SKY content in New Zealand have been available on an equivalent basis for RSPs for some time. That only Vodafone has elected to bundle it with its telecommunications products, with little change to market share over time (see Figure 1), indicates that it is not a must have for a telecommunications packages in New Zealand. While a number of third parties assert that this is because the terms are not "commercial", they do not go on to describe why Vodafone is able to successfully sell such a bundle and resolved to do so following a protracted negotiation with SKY.

7.11 The simple fact is that in New Zealand Vodafone is the sole RSP (out of 80+) which has chosen to include the full SKY package in its offering (notwithstanding it is available to all) – and the evidence is clear that competition in the relevant telecommunications markets has not been adversely affected by the absence of such content in the offerings of the other RSPs.

Telefonica's acquisition of Canal+ (Spain)

7.12 The issues above are similar (but more extreme) in respect of references to Vodafone Spain's Telefonica/Canal+ commentary – the context is entirely different in New Zealand from that in Spain.

---

[32] BT owns the pipes and telephone cables connecting nearly all businesses and homes in the to the national broadband and telephone network.

[33] See Ofcom "Strategic Review of Digital Communications – Discussion Document", 16 July 2015 at section 11.

7.13 Telefonica is a leading vertically integrated provider of mobile, landline, Internet and television telecommunications services to more than 300 million customers in several countries in Europe. In Spain, Telefonica is both the **dominant**, **vertically integrated fixed access provider** and the dominant pay TV provider following approval by the CNMC (the Spanish telecoms regulator) to acquire the 56% of Canal+ that it did not already own from Prise last year. Telefonica operates a nation-wide copper network for fixed voice and xDSL services, a large fibre to the home network and a mobile network.

7.14 In the Spanish context Vodafone Spain's concerns arose from the dealings of a fixed line incumbent operator, one which owned the copper access network and a substantial fibre to the home network, which are considered true bottle neck assets. This is a substantial difference from Vodafone's position as the second largest fixed operator in the New Zealand market where structural separation of access infrastructure results in a highly competitive broadband market.

The European Commission's Public consultation on the evaluation and the review of the regulatory framework for electronic communications networks and services (EU)

7.15 This submission responds to a range of questions posed by the European Commission on the current regulatory framework for communications in this sector seeking views on possible adaptions to the existing framework. Again, the concerns regarding fixed incumbents and enduring bottlenecks raised in this submission do not apply in a New Zealand context.

7.16 Vodafone is not aware of structural separation being implemented in Europe to date. The European Commission has previously rejected structural separation in the telecommunications space and has said that regulators should only use functional separation where other tools have proved inadequate. (Although we acknowledge the Commission is yet to release the findings of its recent consultation.) Spain for example has a vertically integrated telecommunications and pay-TV provider 'Telefonica', as above.

Vodafone Group 2016 Annual Report

7.17 Finally, (as set out in our interim submissions) third parties referenced the following excerpt from the Vodafone Group 2016 Annual Report:

> *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.*[34]

7.18 The quote above specifically refers to "incumbents" with "dominance in fixed access markets". As outlined in the Clearance Application, in New Zealand the 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.

Third party submitters do not raise material competition issues

7.19 The third party submissions endeavour to use the references to Vodafone's submissions in other jurisdictions, where the context is materially different, as a substitute for a theory of competitive harm arising from the Proposed Transaction. However, taking into account the New Zealand circumstances and the proper framework for assessing anticompetitive bundling theories of harm, the third party submissions do not stand up to scrutiny.

7.20 The key themes arising from the excerpts repeated by the third party submissions include the following.

(a) The "must have" nature of sport and in particular the premise that sport "stands apart" due to its very specific characteristics.

[34] From Vodafone Group 2016 Annual Report, as quoted by Trustpower, TUANZ and Blue Reach.

(b) In light of the shift to bundled competition and the "must have" nature of this content, the incentives of content providers to leverage this "monopoly asset" and limit distribution to protect market share in adjacent markets (i.e. fixed access).

7.21 The third party submitters do not provide any evidence as to why sport is a "must have" input into telecommunications markets in New Zealand. As set out above in relation to the bundling theory of harm, Vodafone is the only one out of 80+ RSPs which currently provides the full SKY offering as part of a bundle. Yet, the broadband market remains subject to vibrant competition, with RSPs competing on the basis of low cost stand-alone products, bundles with other telecommunication products (e.g. mobile, Wi-Fi), their own or third party content offerings (e.g. Spark with Lightbox and Spotify, 2Degrees with Tidal), electricity (Trustpower) and others. This high level of competition is not surprising given the structural separation and open access regime in place in New Zealand – a key distinguishing feature of the New Zealand market.

7.22 Furthermore, submitters do not provide a credible assessment of how that content will be leveraged into telecommunications markets to the detriment of competition and consumers. As set out above, they tend to assume that bundling by the Combined Entity would necessarily be anticompetitive, rather than applying the correct antitrust framework to assess whether an SLC in a market was likely. To the contrary, the Proposed Transaction will enhance competition and faster innovation by forcing rivals to constantly rethink their offering to ensure the product they deliver is what consumers see as the best value. This is clearly to be benefit of consumers.

7.23 Finally, the submitters' use of the Vodafone entities' overseas submissions does not in any way advance a valid opposition to the Proposed Transaction. Rather, it appears aimed at diverting the Commission from issues that must be assessed with reference to the market features and competitive conditions that exist in New Zealand.

7.24 Whether a transaction is likely to result in an SLC is a fundamentally fact-based enquiry. Restated excerpts of statements made overseas in different markets and out of context are irrelevant in that exercise.

8. Request for conference

8.1 Third parties have requested that the Commission hold a conference under section 69B(1) of the Act. The requests do not identify proposed matters to be considered at the conference but instead suggest that it would be of benefit to the Commission to have opposing points of view tested and challenged through a conference process. TVNZ and 2Degrees refer for support to a 19 September 2007 press release regarding conferences seeking clarification of aspects of submissions made on draft determinations and investigations under the Telecommunications Act (regarding unbundled copper loop local services and co-location services, the Commission's mobile investigation and unbundled bitstream access standard terms). In contrast to the current position under the Commerce Act, where the Commission considered that persons had a material interest in a standard terms determination then section 30L of the Telecommunications Act *required* the Commission to consult those persons or to hold conferences in relation to the matter.

8.2 Vodafone does not consider that holding a conference will materially assist the Commission's consideration of the clearance applications. As the Mergers and Acquisitions Guidelines note, the Commission rarely holds conferences for clearance applications, because the Commission has found that gathering and testing information through information requests and interviews has enabled it to make well-informed decisions.

8.3 Vodafone does not consider that this case requires any different approach. The Commission has issued its statement of preliminary issues and received submissions from key industry participants, consultant economists, and industry representative bodies. The Commission is now considering those submissions, conducting interviews and progressing its investigations. The Commission has robust processes for seeking information and assessing opposing points of view, including the ability to speak further with and interview submitters. The Commission does so against the general background of its business, economic and legal expertise and the specific background of very considerable industry knowledge gained from previous applications, investigations and proceedings involving the telecommunications industry and retail pay-TV industry (see, e.g., Decision 573, the *Sky / Prime* clearance determination). For these reasons, the additional step of holding a conference will not add in any material way to the Commission's assessment of the issues in the applications. It would, however, unnecessarily impose significant burdens on the Commission and applicants.

9. Other matters raised

9.1 In **Appendix 1** we rebut a number of other assertions made by third parties that Vodafone does not consider accurate (but which are not material to the issues at hand).

Appendix 1 – Other matters raised by third parties

The following paragraphs address a range of other matters raised by third party submitters that Vodafone views as not having any material bearing on its Clearance Application, but to which it responds for the record.

1. **Parties are not genuine wholesalers**

1.1 A number of third party submitters make claims about both SKY's and Vodafone's wholesale offerings. The SKY wholesale offering is addressed in the body of this submission. While Vodafone's wholesale offerings in relation to roaming and MVNOs on its network are not relevant to the clearance application, it briefly addresses below several of the allegations made in this regard including:

(a) Trustpower claims that "Vodafone is not a willing wholesaler in our experience" and discusses various "difficulties" in Vodafone's and 2Degrees' wholesale relationship[35];

(b) 2Degrees provides a number of confidential annexures which it claims demonstrate that Vodafone has not been a genuine wholesaler, "having opted to sacrifice wholesale revenue in the interests of its retail business"[36]; and

(c) Bluereach alleges that the Vodafone/2Degrees roaming agreement contains "relatively poor price and non-price terms, such as providing only 3G coverage even though 4G is available from Vodafone over the same footprint."[37]

1.2 Vodafone strongly refutes these claims. It has always engaged willingly in commercial negotiations with parties seeking wholesale access to its products.

1.3 Trustpower appears to be confused in its view that only Vodafone services are available for the transmission of pay-TV content in RBI areas.[38]As noted, there are 11 retail providers offering rural broadband on the back of Vodafone's wholesale offer, which is subject to strict non-discrimination obligations enforceable by the Commission. Vodafone must offer the same network performance to these providers as it employs for its own retail products.

1.4 **[REDACTED]**

1.5 Vodafone has provided valuable roaming services to 2Degrees since November 2007 enabling it to use Vodafone's network investments to offer 2Degrees customers a much broader network than would be available to 2Degrees on a standalone basis. It could equally acquire these services from Spark, but has preferred Vodafone, presumably because Vodafone offers a more compelling commercial arrangement. **[REDACTED]**

1.6 Finally, the argument made by Bluereach is, effectively, that it would establish as New Zealand's fourth mobile operator but can only do so if the Proposed Transaction does not proceed because this otherwise will create a wholesale bottleneck, i.e. SKY content, that would prevent entry (based on the assumption that Bluereach could not access this content). There are of course many other conditions that a successful fourth mobile entrant would need to meet in order to enter the mobile market, access to Sky's content is not obviously a condition. In any event, for reasons set out in this submission it is simply not correct to characterise SKY content as a bottleneck. **[REDACTED]** This submission offers nothing of any objective value to enhance the Commission's assessment of the Proposed Transaction.

1.7 As it stands, Vodafone has an independent and active wholesale business unit that is incentivised to maximise wholesale revenue across a variety of channels. Vodafone expects to continue to

[35] See Trustpower "Submission to Commerce Commission in relation to clearance application by Vodafone and SKY", 12 August 2016 (the **Trustpower Submission**) at paragraph 9.8.
[36] See 2Degrees "Submission by 2degrees in response to the Commerce Commission Statement of Preliminary Issues", 12 August 2016 at paragraph 6.1.
[37] See Bluereach, "Submission by Blue Reach to Commerce Commission as to Vodafone and SKY clearance application", 12 August 2016 (the **Bluereach Submission**) at paragraph 6.2.
[38] See Trustpower Submission at [13.1]

wholesale a range of services on commercial terms as it has to date. Vodafone's intention is that the Combined Entity would wholesale content on terms that fully compensates for its opportunity costs of doing so. This is the basis on which SKY has wholesaled content to date.

2. **Merger reduces competition in the mobile market because of MNO's behaviour with relation to wholesale MVNO services**

2.1 In a similar vein, third party submitters have raised issues in relation to Vodafone's offerings in the MVNO space. Once again, these issues are wholly irrelevant to the Proposed Transaction – SKY does not operate a mobile network and is not in any way a relevant operator in the MVNO space. In addition, the statements made in relation to the MVNO market are incorrect. For the record, Vodafone responds briefly to the following submissions:

(a) while the details are all redacted, Trustpower appears to suggest that the MVNO market in New Zealand is developing, but that this will somehow change in the factual;[39]

(b) Bluereach claims that MVNOs are having a lack of impact on the market because of the "too restrictive terms which MVNOs are offered – both price and non-price."

2.2 While wholly unrelated to the Proposed Acquisition, these statements are also inaccurate. Vodafone has historically offered MVNO arrangements with a number of its customers and competitors and continues to do so. Prior to acquiring TelstraClear in 2012, Vodafone provided TelstraClear's MVNO offering which was the largest in the country with over 40,000 subscribers.

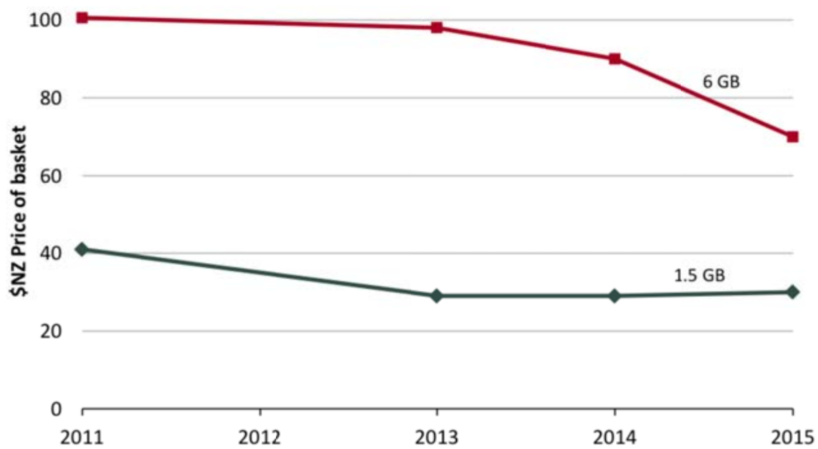
2.3 Furthermore, a competitive market exists for the provision of MVNO services, with buyers of these services playing off Vodafone, Spark and 2Degrees, with examples of switching based on price and non-price factors. Vodafone estimates that Spark provides MVNO services to **[REDACTED]**. As 2Degrees extends the reach of this own network through its continuing build programme, which already provides coverage to 90% of the population with 3G and expanding 4G coverage reaching 70% of population, buyers of MVNO services will increasingly have a further supply option. Indeed, Warehouse Mobile has recently started supplying mobile services via a wholesale MVNO arrangement with 2Degreees. Accordingly, Vodafone refutes that there is any competition issue in the New Zealand MVNO space. Vodafone expects that Combined Entity's approach to remain unchanged post-acquisition: the independent wholesale business unit will continue incentivised to maximise revenue though wholesaling across a variety of channels *subject to* being able to enter commercially sensible agreements with suppliers. Trustpower offers no useful evidence to the contrary and Bluereach simply posits a theory as to how the Combined Entity might behave – **[REDACTED]**.

2.4 As a final point, Trustpower uses a comparison of 5GB 4G mobile broadband products across jurisdictions to argue that the cost of mobile data in New Zealand is substantially higher than that in other countries.[40] Trustpower's position is confusing, not least because the Commerce Commission's own 2015 Annual Telecommunications Monitoring Report (which Trustpower cites) shows a different price trend for mobile data in New Zealand, including a reduction in cost of 6GB data plans to below the price point of $80 for 5GB plans reported in Trustpower's own analysis. A summary of the Commission's analysis is reproduced below.[41]

[39] Trustpower Submission at paragraph 1.9

[40] Trustpower Submission at paragraph 16.2. See also Bluereach Submission at 7.3 onwards.

[41] Commerce Commission "2015 Annual Telecommunications Monitoring Report", May 2016 at page 40. Accessed via http://www.comcom.govt.nz/dmsdocument/14286



2.5 This analysis shows a clear reduction in the price of New Zealand mobile data over time.

2.6 Furthermore, even in the last few days there have been major changes in Spark's offerings, with Spark and Skinny's mobile packages including significantly more data. Spark's new postpay plan includes 60% more data (at $59.99) and includes Lightbox for free in addition to Spotify.[42]

3. **Various complaints about the "lack of effective regulation" of broadcasting in NZ**

3.1 Several of the submitters claim that the New Zealand regulatory regime for broadcasting is insufficient. However, the New Zealand regulatory regime is not a merger-specific issue and this process is not the place to consider the merits or otherwise of the regulatory regime.

4. **Overseas case studies/comparisons to other jurisdictions**

4.1 Some submitters have sought to draw analogies from overseas transactions and case studies to the transaction at hand. For example:

(a) Spark provides a case study about the substantial investment that British Telecom (**BT**) has made into its content offering;[43] and

(b) Internet NZ provides a case study in relation to the Time Warner/Charter and Bright House merger in the US (**New Charter example**).

4.2 It is not clear how these case studies bear any relevance to the issues that the Commission must consider when assessing the Proposed Transaction. In relation to the BT example, Spark argues this demonstrates the type of market that will develop in the counterfactual, The reasons why the counterfactual scenario is unrealistic are set out in the body of the response. More generally, the BT example demonstrates the ability of an RSP to compete hard for content and develop a pay TV offering – something that Spark has started to do and will no doubt continue with or without the Proposed Transaction going ahead.

4.3 In relation to the New Charter example, this involved an entirely different market context. That merger involved substantial horizontal aggregation between fixed network operators (i.e. they owned the access infrastructure). The Proposed Transaction involves no material horizontal aggregation and neither party owns the relevant access networks (being the copper local loop and UFB fibre network).

[42] See https://www.skinnydirect.co.nz/combos/ and http://www.spark.co.nz/shop/mobile/plansandpricing.html?gclid=CKHiyt-N-c4CFQskvQodlloDQQ&gclsrc=aw.ds&dclid=CNyUy-GN-c4CFUt9vQodypEECA

[43] Spark Submission at Appendix 3

5. The "battle for HDMI 1/the remote control" is critical to pay TV competition

5.1 Finally, Fetch TV argues that the "key competition in subscription TV is maintaining control over the way in which the customer acquires, views and then pays for content. This requires control of the remote control unit, the user interface and the customer's bill…" Fetch goes on to argue that access to customers is only possible through relationships with large telecommunications companies.

5.2 However, Fetch's arguments do not provide the basis for a credible theory of competitive harm and are inconsistent with the facts. Indeed, OTT offerings are completely bypassing the need for control of the customer's primary platform. Netflix is the world's leading SVOD provider and has direct relationships with millions of subscribers worldwide. These subscribers can access Netflix content through apps or browsers on a vast array of devices without the need to be on a customer's primary platform. Equally, SKY itself now provides a number of OTT offerings, including Neon and FanPass that do not require access to SKY's platform.

Attachment 1 – Confidential

[REDACTED]

Attachment 2

Deed of Undertaking

This DEED is made on the 22nd day of September 2011

BY Vodafone New Zealand Limited ("Vodafone")

BACKGROUND

A. The government's objectives for its $300 million Rural Broadband Initiative ("RBI") policy are to:

i. improve broadband coverage in Zone 4 such that 80% of Zone 4 households and enterprises are able to access broadband services ("the Rural Community Objective");

ii. provide an ultrafast connection to at least 93% of Zone 4 schools which have a reasonable cost per pupil; and

iii. make available open access backhaul services across the grant funded fibre connections.

B. Vodafone entered into an agreement with the Ministry of Economic Development ("the Ministry") dated 20 April 2011 ("the Agreement") in relation to:

i. the design and construction of RBI Infrastructure; and

ii. the provision of certain telecommunications services, being the Co-location Service and the Broadband Services (as defined below), to Access Seekers using RBI Infrastructure,

in each case to assist the Ministry in meeting the Rural Community Objective.

C. The undertakings contained in this Deed relate to Vodafone's provision of the Co-location Service and the Broadband Services, to Access Seekers using the RBI Infrastructure and comprise enforceable non-discrimination undertakings in relation to those services given by Vodafone in favour of the Crown in accordance with the Act.

D. Once this Deed is approved by the Minister, as evidenced by notification in the Gazette, it will become enforceable by the Commission in accordance with the Act.

THIS DEED PROVIDES as follows:

DEFINITIONS AND INTERPRETATION

1. In this Deed, unless the context requires otherwise:

Access Seeker means any person who has or seeks access from Vodafone to:

(a) the Co-location Service; or

(b) a Broadband Service.

Act means the Telecommunications Act 2001.

Agreement has the meaning given in recital B of the Background, and includes any variations to the Agreement agreed between Vodafone and the Ministry from time to time.

Broadband Services means any or all of the RBI Broadband Service, the RBI Broadband plus Voice Service and the Enhanced RBI Broadband Service, each as described in Schedule 1.

Co-location Service means a service that enables the co-location of telecommunications transmission and reception equipment (including any necessary supporting equipment) on or with the RBI Infrastructure.

Commencement Date means the date on which the Minister's approval of this Deed is notified in accordance with section 156AI(5) of the Act.

Commission has the meaning given to that term in section 5 of the Act.

Deed means this Deed of Undertaking.

Discriminate means:

(a) to treat Access Seekers differently; or

(b) where Vodafone supplies itself with the Co-location Service or the Broadband Services, in each case on RBI Infrastructure, to treat itself or any Vodafone-Related Party differently from Access Seekers,

except to the extent that a particular difference in treatment is objectively justifiable and does not harm, and is unlikely to harm, competition in any telecommunications market.

Enhanced RBI Broadband Service has the meaning given to that term in Schedule 1.

Functionally Equivalent Broadband Service means the Broadband Service that shares the same characteristics (in terms of broadband performance and the inclusion (or otherwise) of a voice service) with a Relevant Retail Service.

Grant Funding means the Crown grant funding to be provided to Vodafone for the purposes of establishing the RBI Infrastructure in accordance with the Agreement.

Non-Cellular Access Seeker means an Access Seeker who wishes to obtain the RBI Co-location Service from Vodafone and who is not an "Access Seeker" in respect of the specified service "co-location on cellular mobile transmission sites" as defined in Part 3 of Schedule 1 of the Act.

RBI Broadband Service has the meaning given to that term in Schedule 1.

RBI Broadband plus Voice Service has the meaning given to that term in Schedule 1.

RBI Infrastructure means the cell towers funded in whole or in part by Grant Funding pursuant to the Agreement.

Relevant Retail Service means a retail broadband service, provided by Vodafone:

(a) to a Wireless Terminal in Zone 4 of a type materially similar to the reference installation in Appendix 1 of Schedule 1; and

(b) that is:

a. provided using end-user devices that use type allocation code-locked SIM cards;

b. provided using the RBI Infrastructure in Zone 4;

c. specifically marketed to customers in Zone 4;

d. provided to the RBI service specifications; and

that competes with retail broadband services offered by Access Seekers that are provided using any Broadband Services.

Retail Mark-Up has the meaning given to that term in clause 6.21.

Rural Community Objective is defined in paragraph A of the Background.

Schedule 1 means Schedule 1 to the Agreement.

Schedule 10 means Schedule 10 to the Agreement.

STD has the meaning given in clause 6.3 of the Deed.

Vodafone-Related Party means any related company of Vodafone within the meaning of section 2(3) of the Companies Act 1993.

Wireless Terminal means a Vodafone approved wireless terminal as contemplated in clause B1.1 of Schedule1.

Working Day has the meaning given to that term in section 5 of the Act.

2. Interpretation

2.1. Examples used in this Deed are only illustrative of the clauses to which they relate. They do not limit those clauses. If an example and a clause are inconsistent, the clause prevails.

2.2. In this Deed, unless the context requires or expressly stated otherwise:

(a) Clause headings are for convenience only, and are not part of this Deed;

(b) References to clauses are references to clauses in this Deed;

(c) The singular includes the plural and vice versa;

(d) Words denoting natural persons include any legal entity or association of entities and vice versa;

(e) Reference to a statute means that statute as amended and includes subordinate legislation;

(f) Reference to a document means that document as amended;

(g) Reference to the agreement of a party means written agreement;

(h) Reference to approval, authorisation or consent means prior written approval authorisation or consent; and

(i) The words "including", "for example" or "such as" when introducing an example, do not limit the meaning of the clause of the Deed to which that example relates.

2.3. Unless otherwise provided in this Deed, capitalised terms used in this Deed have the same meaning as those terms are defined in the Agreement.

3. Scope and Application

3.1. This Deed is binding on Vodafone and is given by Vodafone in favour of the Crown.

3.2. This Deed is enforceable by the Commission in the High Court of New Zealand in accordance with the Act.

3.3. If anything in this Deed and anything in respect of the Broadband Services or the Co-location Service in any agreement or arrangement in respect of Vodafone or between:

(a) Vodafone and the Ministry; and

(b) Vodafone and any Access Seeker;

are inconsistent, this Deed will prevail in relation to the obligations of Vodafone.

4. Commencement and Term

4.1. The undertakings given by Vodafone in this Deed commence on the Commencement Date and, save where this Deed is terminated earlier in accordance with the Act, will continue:

(a) in respect of Vodafone's undertakings in this Deed which relate to the provision of Broadband Services, until such time as Vodafone ceases to provide Broadband Services in accordance with the Agreement; and

(b) in respect of Vodafone's undertakings in this Deed which relate to the provision of the Co-location Service, until such time as Vodafone ceases to provide the Co-location Service in accordance with the Agreement.

4.2. This Deed may be varied in accordance with sections 156AL and 156AM of the Act.

5. Obligation not to Discriminate

5.1. Subject to clause 5.2, when doing or omitting to do anything in relation to the supply of the Co-location Service or Broadband Services, Vodafone will not Discriminate.

5.2. Vodafone will achieve compliance with clause 5.1 through compliance with the obligations specified in clause 6 of this Deed.

5.3. For the purposes of clause 5.1, to the extent that any term of this Deed provides for different treatment between Access Seekers or in favour of Vodafone or any Vodafone-Related Party relative to Access Seekers, such different treatment is objectively justifiable and does not harm, and is unlikely to harm, competition in any telecommunications market.

6. Meaning of non-discrimination obligation

6.1. To achieve non-discrimination, Vodafone makes the following four commitments:

(a) Provision of Co-location Service as provided for in clauses 6.2 – 6.11;

(b) Pricing of Co-location Service as provided for in clauses 6.12 – 6.14

(c) Provision of Broadband Services as provided for in clauses 6.15 – 6.17; and

(d) Pricing of Broadband Services and Relevant Retail Services as provided for in clauses 6.18 – 6.30.

Provision of a Co-location Service

6.2. Vodafone will deploy RBI Infrastructure subject to and in accordance with the terms of the Agreement. Prior to the deployment of RBI Infrastructure, Vodafone will use the process specified in Schedule 1 (as varied by agreement between Vodafone and the Ministry from time to time) to determine the design of the RBI Infrastructure to be deployed.

6.3. Subject to clauses 6.4, 6.5 and 6.6 below, after commissioning of each part of the RBI Infrastructure Vodafone will supply the Co-location Service to Access Seekers as though it were existing infrastructure, on the terms set out in the Mobile Co-location Standard Terms Determination dated 11 December 2008 (as amended) ("STD").

6.4. Vodafone will make the Co-location Service available to Non-Cellular Access Seekers on non-price terms that are substantially consistent with the STD.

6.5. In clause 6.4, "substantially consistent" means substantially consistent subject to:

(a) trivial differences;

(b) differences relating to:

i. liability caps;

ii. insurance;

iii. security requirements;

iv. forecasting;

v. service levels; and

(c) other differences for the purposes of encouraging greater participation on, and/or efficient utilisation of, the RBI Infrastructure.

6.6. In the event that the STD expires or is superseded, then Vodafone will continue to supply the Co-location Service in accordance with the superseded terms or in accordance with the STD terms as they stood prior to expiry.

6.7. Vodafone may not reserve capacity on RBI Infrastructure on the basis of its forecast requirements unless it has reasonable intent, ability, and commitment to deploy in accordance with those forecasts.

6.8. Vodafone will not reserve capacity on the basis of its forecast requirements for anti-competitive purposes.

6.9. Vodafone will not pass on to Access Seekers the portion of operating costs for RBI Infrastructure (as specified in accordance with Schedule 1) for any capacity that it reserves on the RBI Infrastructure regardless of whether the reserved capacity is in use or not.

6.10. If:

(a) Vodafone reserves capacity on any RBI Infrastructure ("Relevant Infrastructure"); and

(b) Vodafone does not use that reserved capacity on the Relevant Infrastructure within two years of reserving that capacity, or three years where the forecast relates to any plans for the future deployment of new Telecommunications Services; and

(c) Access Seekers have requested space on the Relevant Infrastructure under the terms on which the Co-location Service is provided;

then:

(d) Vodafone's capacity reservation on the Relevant Infrastructure will lapse.

6.11. Vodafone will take reasonable steps to ensure that Access Seekers who participate in the design of the RBI Infrastructure are able to install their equipment at the relevant site contemporaneously with Vodafone.

Pricing of Co-location Service

6.12. In order to encourage greater participation on, and/or efficient utilisation of, the RBI Infrastructure, Vodafone will charge Access Seekers for the Co-location Service on the basis of a per 'antenna unit' pricing regime. The antenna unit price will be different for 'Tier 1' antenna units and 'Tier 2' antenna units. To avoid doubt:

(a) Tier 1 antenna unit refers to antenna units located on the top third (1/3) of the Height of the Mast; and

(b) Tier 2 antenna unit refers to antenna units located on the bottom two thirds (2/3) of the Height of the Mast.

6.13. "Height of the Mast" as used in clauses 6.12 and 6.14 means the height of the mast at the highest point inclusive of any antenna.

6.14. An Access Seeker electing to put all their equipment on the bottom two thirds of the Height of the Mast will be subject to a lower application fee for processing an application for the Co-location Service.

Provision of Broadband Services

6.15. Vodafone will supply Broadband Services to Access Seekers:

(a) in accordance with the service descriptions;

(b) in accordance with the provisioning and supply processes; and

(c) in accordance with the Service Level Agreements,

all of which are set out in Schedule 1.

6.16. Where Vodafone offers Relevant Retail Services, Vodafone is not required to provide the Broadband Services to itself.

6.17. Achievement of the following Service Level Agreement ("SLA") targets and process standards set out in the table below will be evidence of Vodafone's compliance with clause 5.1 in respect of the matters to which the process standards and SLAs relate.

	Broadband Service Delivery	**Corresponding element with respect to Relevant Retail Services**
Provisioning	• Staff will be assigned to provisioning the Broadband Services for Access Seekers, and these staff will not also work on provisioning Relevant Retail Services	• Shared processes and systems for completing of provisioning requests
Migration	• Staff will process all orders to move end users from existing service providers, including Vodafone, to the Access Seekers [and from Access Seekers to Vodafone] in the order that	• End users will be able to migrate from Vodafone to Access Seeker [and Access Seeker to Vodafone] broadband services enabled by the Broadband Services on the same timeframes as

	they are received	other customer acquisitions made by Access Seekers
Reporting	• Publish SLA results on the co.nz website	• Same SLA reporting framework targets as wholesale for network, systems and provisioning performance reporting
Faults	• Monthly SLA reporting provided to Access Seekers • Regular operational reviews of SLA performance	• Same agreed target SLAs as wholesale • Tickets prioritised due to severity in the same way as wholesale • Same SLA reporting framework as wholesale
New broadband services	For any "new broadband service", being a new Specified Layer 2 Service (as defined in the Agreement) supplied over RBI Infrastructure, Vodafone will: • Provide access to new broadband services • Provide at least 30 days' notice to Access Seekers of new broadband services • New broadband services to be considered a new Functionally Equivalent Broadband Service, for the purposes of clause 6.21 below • New broadband services do not include any layer 3 + elements or any Wireless Terminal	• New relevant retail service not to be provided before the launch of relevant new broadband service
Network Performance	• Monthly network reports provided to Access Seekers with action plans to address any areas where target SLAs not achieved	• Same network quality with no ability to prioritise customers (except for the prioritisation features of the Enhanced Broadband Service) • Same agreed target SLAs as wholesale • Same reporting framework as wholesale
• References to "same" in this table in relation to an act or thing are a reference to the same act or thing that Vodafone provides to Access Seekers.		

Pricing of Broadband Services

Wholesale pricing

6.18. Vodafone will supply the Broadband Services to Access Seekers at prices not greater than those specified in Schedule 10. For the avoidance of doubt, Vodafone may provide the Broadband Services to Access Seekers at any level below those prices.

6.19. The Agreement requires Vodafone to provide Broadband Services at subsidised wholesale prices to help achieve the Rural Community Objective. This in turn will help ensure that rural New Zealanders get affordable access to broadband.

6.20. It is acknowledged that the prices specified in Schedule 10, including prices for overage, are lower than the costs actually incurred by Vodafone in the provision of the Broadband Services. The prices specified in Schedule 10 reflect the provision of Grant Funding, which effectively subsidises wholesale pricing, and will not provide for full cost recovery. The challenging business case for Vodafone means that below cost pricing is necessary to meet the Government's RBI objectives in terms of delivering affordable broadband. The Grant Funding is a key element in allowing Vodafone to offer the pricing set out in Schedule 10.

Retail pricing

6.21. Vodafone will not supply the Relevant Retail Services to Vodafone retail customers at a weighted average retail price, calculated over the average term of Vodafone's retail customer lifetime, less than the aggregate of:

(a) the wholesale price for the relevant Functionally Equivalent Broadband Service; and

(b) a retail margin adjustment mark up of 38% of the wholesale price of the relevant Functionally Equivalent Broadband Service ("Retail Mark-Up").

6.22. For the purposes of clause 6.21, the weighted average retail price is calculated by:

(a) identifying the advertised Vodafone price for each Relevant Retail Service, (but not including any overage charges);

(b) subtracting from Relevant Retail Services any 'bundled' plain old telephone service ("POTS") local access and calling resale service supplied with the RBI Broadband Service or RBI Enhanced Broadband Service (temporary promotional pricing that Vodafone may offer for a Relevant Retail Service may be excluded for the purposes of imputing the retail price); and

(c) Weighting the imputed prices for each Relevant Retail Service by the number of retail customers on each plan, and taking into account actual or projected usage of Vodafone retail customers on each Relevant Retail Service, to give a weighted average retail price.

6.23. For the purposes of determining compliance with the undertaking in clause 6.21 the weighted average retail price of the Relevant Retail Services sharing the same characteristics (in terms of broadband performance and the inclusion (or otherwise) of a voice service) as the:

(a) RBI Broadband Service will only be measured against the RBI Broadband Service for the purposes of measuring whether the Retail Mark-Up has been maintained; or

(b) RBI Broadband plus Voice Service will only be measured against the RBI Broadband plus Voice Service for the purposes of measuring whether the Retail Mark-Up has been maintained; or

(c) Enhanced RBI Broadband Service will only be measured against the Enhanced RBI Broadband Service for the purposes of determining whether the Retail Mark-Up has been maintained.

6.24. If Vodafone is found to be in breach of clause 6.21, Vodafone may continue to supply Relevant Retail Services provided that:

(a) Vodafone has not acted in bad faith; and

(b) Vodafone pays a rebate to affected Access Seekers of Broadband Services.

The amount of any such rebate will be determined by Vodafone (acting reasonably), however it will be no less than the amount by which the weighted average retail price for the Relevant Retail Service exceeds the price floor established in clause 6.21 and will be paid to affected Access Seekers within a reasonable period of time after Vodafone is found to have breached clause 6.21.

6.25. To avoid doubt, Vodafone may set retail prices for Relevant Retail Services at any level above the aggregate of:

(a) the Retail Mark-Up; and

(b) the wholesale price of the relevant Functionally Equivalent Broadband Service.

6.26. Where the Relevant Retail Service consists of a 'bundle' of the RBI Broadband Service or Enhanced RBI Broadband Service and the POTS local access and calling resale service then Vodafone will pass through the full cost of supplying the POTS local access and calling resale service.

6.27. Whenever Vodafone offers overage pricing for Relevant Retail Services, it will always charge overage pricing in excess of the relevant Broadband Service overage charge. This commitment does not include data charges incurred for a throttled service.

6.28. Where a Relevant Retail Service does not include an overage charge at the Functionally Equivalent Broadband Service data cap then Vodafone will throttle the Relevant Retail Service end-user's service to a speed of no greater than 64 kilobits per second when the Functionally Equivalent Broadband Service data cap is exceeded.

6.29. Vodafone may enter into arrangements with third parties for the supply of goods or services related to the provision of Relevant Retail Services (for example installation services) and may supply those goods and services to end-users on any terms and conditions. Should Vodafone choose to offer such goods and services to end-users at a discount, credit, rebate or subsidy then the quantum of the discount, credit, rebate or subsidy must be recovered within the Retail Mark-Up over the lifetime of the service.

6.30. Vodafone will, not less than once each quarter and at least one week prior to the launch of any new plan for the Relevant Retail Service or any price change to an existing relevant retail plan, review the Vodafone weighted average retail price with a view to ensuring that it is pricing in accordance with the above formula. The results of this review will be communicated to the Commission, as appropriate:

(a) within one month of the quarter concerned; or

(b) at least one week prior to the retail plan launch or price change.

7. Handling of Information

Provision of information to Access Seekers

7.1. Vodafone will provide Access Seekers with:

(a) advance notice of network or service developments and scheduled outages that impact upon the delivery of the Broadband Services; and

(b) information and status updates concerning any unscheduled or emergency outages of the Broadband Services,

in each case as soon as practicable after Vodafone becomes aware of such developments or outages.

Confidentiality of information concerning Access Seekers

7.2. Vodafone will:

(a) separate all information regarding the supply of Co-location Service or Broadband Services to Access Seekers in a manner that only allows access to those of Vodafone's personnel authorised and required to provide services to Access Seeker customers;

(b) separate operational decision-making and governance on the supply of the Co-location Service or Broadband Services to Access Seekers from the operational decision-making and governance on Vodafone's retail products and services; and exclude those personnel that are solely engaged with Vodafone's retail products from participating in this governance and decision-making; and

(c) separate all customer records within Vodafone's IT systems in order to keep information about Access Seeker's end users separate from information about Vodafone's retail end users, and in a manner that only allows access to those personnel authorised and required to provide services to Access Seeker customers.

Transparency in provision of services

7.3. Vodafone will make available to the Commission not later than 10 Working Days after it supplies Co-location Service or Broadband Services to Access Seekers, all of the terms and conditions (including any amendments from time to time) on which it has agreed to provide those services to Access Seekers.

7.4. Subject to clause 7.5 below, Vodafone will also prepare and publish on its website once it has commenced providing the Co-location Service or Broadband Services and quarterly thereafter (within one month of the end of the quarter concerned), public information that is sufficient for interested persons to assess Vodafone's level of compliance with this Deed.

7.5. To avoid doubt, to satisfy the requirements of clause 7.4, the relevant information will comprise:

(a) for the Co-location Service (once such service has commenced), information on Vodafone's performance against the process set out in Schedule 1; and

(b) for the Broadband Services (once any such service has commenced):

i. reports on Vodafone's performance in the delivery of such services to Access Seekers against the provisioning and supply processes and the Service Level Agreements set out in Schedule 1;

ii. reports on Vodafone's performance in the delivery of services inclusive of Relevant Retail Services against processes and the Service Level Agreements set out in Schedule 1; and

iii. reports on Vodafone's compliance with clause 6.18.

7.6. Vodafone will, on request, supply to the Commission within a reasonable period of time such relevant information as it reasonably requires to support its assessment of Vodafone's compliance with the undertakings in this Deed.

8. Miscellaneous

8.1. For the avoidance of doubt, nothing in this Deed requires Vodafone to:

(a) physically separate any personnel involved in the supply of Broadband Services or the Co-location Service to Access Seeker customers from personnel involved in the supply of Vodafone's retail services;

(b) separate the accounting or financial reporting of the supply of Broadband Services or the Co-location Service from its other business reporting; or

(c) institute any internal trading arrangements within its business,

and the obligation in clause 5.1 will be interpreted accordingly.

8.2. Vodafone will not be in breach of its obligations or undertakings set out in this Deed if it fails to comply with any such obligation or undertaking and the failure to comply is trivial or *de minimis*.

IN WITNESS of which this Deed has been executed.

SIGNED for and on behalf of
Vodafone New Zealand Limited by:

Name: James Marsh	Name: Kelly Moore
Director	**Director**
in the presence of:	in the presence of:
Witness name: Nicole Garthwaite	Witness name: Steve Rieger
Occupation: Executive Assistant	Occupation: GM Wholesale + New Business
Address: Auckland, New Zealand	Address: Auckland New Zealand