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Determination

Spark New Zealand Trading Limited and Craig Wireless New Zealand Spectrum Operations Limited and Woosh Wireless Holdings Limited [2016] NZCC 7

The Commission:	Dr Mark Berry Sue Begg Dr Jill Walker
Summary of application:	Spark New Zealand Trading Limited seeks clearance to acquire the management rights to 70MHz of radio spectrum in the 2300MHz band from Craig Wireless New Zealand Spectrum Operations Limited and Woosh Wireless Holdings Limited.
Determination:	Under section 66(3)(a) of the Commerce Act 1986 the Commission determines to give clearance to the proposed acquisition.
Date of determination:	23 March 2016

Confidential material in this report has been removed. Its location in the document is denoted by [ ].

The proposed acquisition

Summary of the proposed acquisition

1. On 18 December 2015, the Commerce Commission (the Commission) registered an application from Spark New Zealand Trading Limited (Spark) to acquire management rights to 70MHz of radio spectrum in the 2300MHz band (management rights 396 and 415) from Craig Wireless New Zealand Spectrum Operations Limited and Woosh Wireless Holdings Limited (together Craig).

Our decision

2. The Commission gives clearance to the proposed acquisition, as it is satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

Our framework

3. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.[1]

4. Section 47 of the Commerce Act 1986 states that a person must not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market. Section 138 of the Radiocommunications Act 1989 deems that management rights in relation to radio frequencies and spectrum licences are assets of a business, and that their acquisition is subject to section 47 of the Commerce Act 1986.

The substantial lessening of competition test

5. As required by the Commerce Act 1986, we assess mergers using the substantial lessening of competition test.

6. We determine whether a merger is likely to substantially lessen competition in a market by comparing the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).[2]

7. We make a pragmatic and commercial assessment of what is likely to occur in the future with and without the acquisition based on the information we obtain through our investigation and taking into account factors including market growth and technological changes.

8. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise price above the price that would exist in a

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

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

competitive market (the 'competitive price'),[3] or reduce non-price factors such as quality or service below competitive levels.

When a lessening of competition is substantial

9. Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.[4] Some courts have used the word 'material' to describe a lessening of competition that is substantial.[5]

10. There is no bright line that separates a lessening of competition that is substantial from one that is not. What is substantial is a matter of judgement and depends on the facts of each case. Ultimately, we assess whether competition will be substantially lessened by asking whether consumers in the relevant market(s) are likely to be adversely affected in a material way.

The clearance test

11. We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.[6] If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.[7]

Key Parties

Spark

12. Spark is a subsidiary of Spark New Zealand Limited, New Zealand's largest provider of commercial and residential telecommunications products. Spark offers a large variety of residential and commercial broadband, fixed and mobile phone services, system integration and IT services.

13. Through its Skinny brand, Spark currently offers a fixed wireless broadband product in limited areas. Spark has extensive ownership of mobile infrastructure (including cell phone towers) throughout New Zealand.

Craig

14. Craig is a California-based, Canadian company which provides telecommunications services in a number of countries, as well as holding and trading in spectrum. Craig owns 75% of Woosh, which provides wireless broadband services in New Zealand and owns 131 cell phone towers and associated infrastructure.

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3 Or below competitive levels in a merger between buyers.
4 *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].
5 Ibid at [129].
6 Commerce Act 1986, section 66(1).
7 In *Commerce Commission v Woolworths Limited* (CA), above n 2 at [98], the Court held that "the existence of a 'doubt' corresponds to a failure to exclude a real chance of a substantial lessening of competition". However, the Court also indicated at [97] that we should make factual assessments using the balance of probabilities.

History of the management rights

15. The management rights at issue were originally sold in 2007 as part of a nine-lot auction of various spectrum allocations. Management right 396 was purchased by Kordia Limited, while management right 415 was purchased by Woosh. Craig purchased management right 396 from Kordia in 2013.

16. At the time of the 2007 auction, it was intended that the spectrum covered by the management rights would be used to provide a fixed wireless broadband service. The rules of the auction required the successful purchaser to utilise the spectrum for a specified purpose by a specified time.

17. The management rights have not been used to provide any commercial telecommunications service since they were originally awarded in 2007.

Implementation requirements

18. The auction rules required the successful purchaser to utilise the management rights to provide either:

    18.1 a wireless broadband access service in 15 local authority areas and available for use by and offered for use on a commercial basis to at least 30% of the population in each of these areas; or

    18.2 a cellular phone service to at least 50% of New Zealand's resident population.

19. The owner of the management rights was required to submit a statutory declaration to the Ministry of Business, Innovation and Employment (MBIE) stating that they have met these implementation requirements.

20. Under the original deed, the successful purchaser was required to issue its statutory declaration by 31 December 2014, unless the purchaser exercised a buyout right which would grant it a further two years to meet the implementation requirements. Craig exercised the buyout rights for both management rights.

21. The terms of the management deeds were amended in 2013 and 2014, removing the original requirement for the declaration to be submitted six months in advance, as well as the requirement that the service be in operation for six months prior to the date of the declaration. Under the current management deeds, the owner of the management right must declare by no later than 31 December 2016 that they have met the implementation requirements.

22. MBIE has informed us that [ ].[8]

[8] Interview with MBIE, 2 February 2016.

23. Any transfer of management rights must be approved by MBIE. [ ] MBIE is likely to approve the transfer of the management rights to Spark.[9]

24. If the implementation requirements are not met by 31 December 2016, the management rights revert back to the Crown. MBIE was not able to provide any guidance as to what it would do with the management rights, were that to occur.[10] Such a decision would likely require Ministerial and Cabinet approval.

Spark's rationale for the transaction

25. Through its Skinny brand, Spark is currently offering a fixed wireless product, utilising its existing spectrum infrastructure. This means that its fixed wireless product is currently sharing Spark's cellular bandwidth. [ ].

26. The additional spectrum Spark is seeking to acquire would enable it to migrate its fixed wireless offering to a dedicated spectrum band. Currently, Spark's fixed wireless service is available in limited areas, so as to minimise disruption to its existing cellular network. Spark intends to expand the service [ ].[11] The service will then be rolled [ ].

27. Spark is also seeking to [ ].[12] Spark submits that providing a wireless broadband service over its extensive existing cellular infrastructure will enable it to more readily compete on prices with other providers.

With the acquisition

28. With the acquisition, Spark would obtain management rights 396 and 415 and use them to deliver a fixed wireless broadband service utilising the 2300MHz spectrum.

29. Spark has told us that, initially[ ].[13]

30. Nonetheless, it notes that [

[9] Ibid.
[10] Ibid.
[11] Due to distance from the local exchanges.
[12] Application at 4.15(b).
[13] Email from Russell McVeagh, 25 February 2016.

] in some territorial authority areas.[14]

31. Beyond the implementation date[

].[15]

Without the acquisition

32. Spark has submitted that in the absence of the acquisition, it believes that another party would likely acquire the spectrum management rights from Craig. Spark further submitted that this third party would likely utilise the management rights to provide a fixed wireless service (similar to that proposed by Spark).

33. [

[16]

34.

[17]

35.

[18]

36.

[19]

37.

[20]

[14] ibid.

[15] Email from Spark to Commerce Commission, 14 March 2016.

[16] [ ]

[17] [ ]

[18] [ ]

[19] [ ]

[20] [

]

38. [21]

39.

40.

] Craig has not provided us with any firm plans as to its future use of the spectrum, [ ].

41. The Commission considers that in the absence of a sale to Spark, Craig would be unlikely to let the management rights lapse and revert to Crown ownership, as that would prevent Craig from realising the value of the assets, and from recouping its initial investment.

42. As outlined in paragraph 14 above, Craig has (through its ownership of Woosh) the necessary expertise and experience at operating a wireless broadband network. Woosh also has a number of cellphone towers and other related infrastructure which could be used to provide a service.

43. The Commission considers that absent the acquisition, Craig would likely try to meet the implementation requirements by launching its own FWA service utilising the management rights.

44. Were Craig to fail to meet the implementation requirements, the spectrum would revert to MBIE. Although it is uncertain what may happen in that scenario, we consider that the spectrum would not likely be used for some time.

Market definition

Our approach to market definition

45. Market definition is a tool that helps identify and assess the close competitive constraints the merged entity would face. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.

46. We define markets in the way that best isolates the key competition issues that arise from the merger. In many cases this may not require us to precisely define the boundaries of a market. What matters is that we consider all relevant competitive constraints, and the extent of those constraints. For that reason, we also consider products which fall outside the market but which still impose some degree of competitive constraint on the merged entity.

[21] [ ]

Spectrum markets

47. In previous spectrum clearances, the Commission has defined the relevant market with reference to the potential use of the spectrum.[22] In this case, the spectrum rights at issue are only able to be used for the provision of a fixed wireless broadband service or the provision of a mobile phone service.

48. Spark submits that it is appropriate to consider the impacts of this acquisition on the national market for the supply of broadband services (including fixed and fixed wireless).[23] Both with and without the acquisition, we consider that the spectrum management rights would likely be utilised to provide a fixed wireless broadband service.

49. The auction rules allow for the owner of the management rights to meet the implementation requirements with either a fixed wireless broadband service, or a mobile phone service. However, Spark [ ] have stated that the management rights will be utilised to offer fixed wireless broadband services.

Product market

50. In the Vodafone/TelastraClear merger, the Commission defined a market for residential fixed line broadband services, which largely consisted of parties offering broadband services over the copper network.[24]

51. Since our decision in Vodafone/TelstraClear,[25] the supply of residential broadband internet services has expanded to include broadband provided over fibre optic cables, and over mobile networks (through Fixed Wireless Access services).

52. Generally, the pricing and data allowances of these different broadband options are similar, with the main difference being the speed of the service. This is illustrated in Table 1 below which compares the price of Spark/Skinny broadband plans to those of Slingshot :

Table 1 – Slingshot and Spark broadband pricing March 2016

	Slingshot		**Spark / Skinny**	
	Data allowance	*Price*	*Data allowance*	*Price*
ADSL	100Gb	$69.95 / month	80Gb	$74.99/ month
VDSL	100Gb	$74.95 / month	80Gb	$84.99 / month

22 See Telecom New Zealand Limited and The Crown [2014] NZCC 13.
23 Application at 8.2 and 8.3.
24 Vodafone New Zealand Limited and TelstraClear Limited [2012] NZCC 33.
25 Ibid.

Fibre	100Gb	$69.95 / month	80gb	$69.99 / month
FWA (Fixed Wireless Access)			50Gb	$55.00 / month

Source: Retrieved from http://www.spark.co.nz/shop/internet/plans-and-pricing/, https://www.skinny.co.nz/broadband/, and https://www.slingshot.co.nz/plans/broadband on 15 March 2016.

53. There are functional similarities between FWA broadband and broadband delivered over copper or fibre optic networks. However, the extent to which FWA is a substitute for traditional wired services is unclear, as it will depend on the broadband options available at a location.

54. For a customer located far from an exchange who does not yet have access to a fibre optic service, FWA may be a close substitute to a copper service. However, a customer who can choose between fibre optic, copper and FWA services may not consider FWA a close substitute, given the generally lower speeds and data allowances of this service.

55. However, for the purposes of assessing the competitive impacts of this acquisition, the Commission considers that FWA broadband services should, as a matter of fact and commercial common sense, be included within a broader residential broadband market.

Geographic market

56. In Vodafone/TelstraClear, the Commission considered that residential broadband markets could be separated into smaller, localised markets, given providers' propensity to engage in geographic price discrimination.[26]

57. Spark has informed the Commission that this form of localised price discrimination is no longer prevalent in the market.[27] We understand that customers generally pay the same price for a given product, regardless of their location.[28]

58. As outlined in paragraph 26 above, Spark has [ ]. These customers are typically located further away from their local exchanges.

59. Craig has informed the Commission that, absent the acquisition, [

[26] Vodafone New Zealand Limited and TelstraClear Limited [2012] NZCC 33 at [86] and [87].
[27] Email from Spark to the Commerce Commission, 20 March 2016
[28] At least for those customers in urban areas.

].[29]

60. In assessing the competitive impact of the acquisition, the Commission has not strictly defined the geographic scope of the relevant market. Instead, we have (as much as practicable) focused on those areas which will be most impacted by this acquisition, noting the current limited availability of FWA services.

Competition analysis

How the acquisition could substantially lessen competition

61. The proposed acquisition could lessen competition, by removing the potential for Craig's competition [ ].

62. In other words, the acquisition by Spark of the management rights could prevent Craig from expanding Woosh's broadband offering, and could thereby prevent Craig from providing a significant competitive constraint on Spark (and other providers of broadband services).

63. However, we do not consider that the presence of Craig would likely provide a significant additional competitive constraint. [ ], consumers already benefit from significant competition between Spark and a number of other broadband providers. For the reasons set out below, we do not consider that Craig's presence would significantly affect pricing or introduce a broadband product with significantly different non-price features (such as quality or service).

Market feedback

Wireless internet service providers

64. Fourteen separate wireless internet service providers in different geographic locations offer wireless broadband services utilising the public wireless spectrum (400MHz). These providers generally operate in small towns or rural locations throughout the country and do not generally overlap.

65. These wireless internet service providers collectively submitted in opposition to the acquisition, as they consider that the sale of the management rights to Spark is not the most efficient or publicly worthwhile use of the spectrum. Instead, they submitted that the management rights should revert back to the Crown, and then be made available to smaller providers.[30] As discussed above, we do not consider this to be a likely counterfactual.

[29] Email from Gary Birkland to the Commerce Commission, 26 February 2016.
[30] Submission from [ ], 9 January 2016.

Vodafone New Zealand Limited (Vodafone)

66. [ ].[31]

67. Vodafone has instead opted to make investments in carrier aggregation technology, which allows it to achieve greater utilisation of its existing spectrum holdings. [ ].[32]

2Degrees Mobile Limited (2Degrees)

68. 2Degrees is of the view that the acquisition is likely to [ ].[33]

69. 2Degrees was [ ].[34]

Spark's proposed use of the spectrum

70. Spark submits that the proposed acquisition will not result in a substantial lessening of competition. Instead, Spark submits that its FWA offering would generate a number of pro-competitive benefits to broadband customers. Specifically, Spark submits that the service would:

    70.1 [ ];[35]

    70.2 [ ];[36] and

    70.3 provide a competitive alternative to Vodafone's Rural Broadband Initiative product in rural areas.[37]

71. Spark also stated [ ].[38]

72. Spark intends to expand its FWA [ ].[39]

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[31] Interview with Vodafone 25 January 2016, Interview with Vodafone, 10 February 2016.

[32] Interview with Vodafone. 25 January 2016.

[33] Interview with 2Degrees, 21 January 2016

[34] ibid.

[35] Application at 4.15 (a).

[36] Ibid.

[37] Application at 1.12.

[38] Application at 4.15 (b).

73. Spark has targeted a FWA customer base of approximately [ ]. Spark expects that approximately [ ] of these customers will be migrated from its existing broadband products, while [ ] will be new customers. Spark has said that [ ].[40]

74. We consider that Spark's proposed usage of this spectrum may have some pro-competitive effects, if it results in the introduction or expansion of an effective, competing broadband product.

Would the acquisition remove a significant constraint?

75. Were Craig to meet the implementation requirements by introducing its own FWA product, this may provide some limited, short-term competitive constraint on other broadband providers, including Spark. [33 34 above].

76. Spark already offers an FWA product in some urban areas, through its Skinny brand. Where Spark currently operates, the transaction may result in a lessening of competition, as Craig's potential competing product could be excluded from the market.

77. Currently, Woosh offers a fixed wireless broadband product in five urban areas,[41] and 10 semi-urban/rural areas.[42] [43] Without the acquisition, [ ], and therefore provide an additional competitive constraint [ ].

78. However, we do not consider that any such lessening of competition would be substantial. [ ].

79. Given Woosh's low existing market share [[44]] we do not consider that a modest expansion of the Woosh network, sufficient only to meet the implementation requirements, would likely provide a significant competitive constraint. The main competitive tension in broadband markets would continue to be between Spark, Vodafone, 2Degrees and M2 Group.

80. In other urban areas, where neither Craig nor Spark currently offer FWA services, the transaction would likely replace one potential offering with another. As such, we do not consider that the acquisition would likely lessen competition in those areas.

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[39] Email from Spark to the Commerce Commission, 14 March 2016.

[40] Email from Spark to Commerce Commission, 15 March 2016.

[41] North Shore City, Auckland City, Gore District, Invercargill City, Porirua City.

[42] Buller District, Carterton District, Grey District, Kaikoura District, Manawatu District, Marlborough District, Opotiki District, Stratford District, Waimate District, Wairoa District.

[43] [.]

[44] [ ]

81. We consider that Craig would not likely provide FWA services in rural areas, absent the transaction. In those areas the transaction may have pro-competitive effects. Although Spark has not indicated an immediate intention to challenge Vodafone’s Rural Broadband Initiative, it is [ ].

Conclusion

82. We consider that the acquisition is not likely to substantially lessen competition for residential broadband services. Instead, the acquisition may have some pro-competitive effects, as it would enable Spark [ ], improve the quality of its service to customers on poor quality copper lines, and provide a competitive alternative to Vodafone’s rural broadband product.

83. In contrast, we have no indication that Craig/Woosh would have any intentions of expanding or improving its service beyond the minimums required by the implementation requirements.

Determination on notice of clearance

84. The Commission is satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

85. Under s 66(3)(a) of the Commerce Act 1986, the Commission gives clearance to Spark to acquire Management Rights 396 and 415.

Dated this 23rd day of March 2016

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Dr Mark Berry
Chairman