

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

12 August 2016



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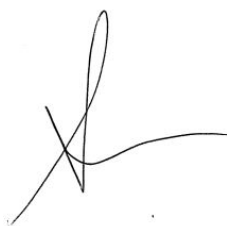
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1. Introduction

- 1.1. We welcome the opportunity to submit on this merger clearance application for Vodafone and Sky Television.

We are committed to an open and uncaptureable Internet

- 1.2. Our vision is of a better world through a better Internet. To help bring that vision about, our mission is to promote the Internet's benefits and uses, and protect its potential. We advocate the on-going development of an open and uncaptureable Internet, available to all New Zealanders. The Society is non-partisan and is an advocate for Internet and related telecommunications public and technical policy issues on behalf of the Internet Community in New Zealand – both users and the Industry as a whole. We aim to look at the whole Internet ecosystem in all our work, including this submission.
- 1.3. Our interest in this merger application relates to that commitment. As content and telecommunications industries come closer together, there are going to be new challenges in how we keep the Internet an open network for collaboration, competition and consumer benefit. These are challenges that InternetNZ regard as our core responsibility to work on, on behalf of the Internet Community of New Zealand.
- 1.4. Our concern is that this merger will reduce competition and choice for New Zealanders in two markets that are already competitively constrained. Our further concern is that in doing so, New Zealand may for the first time face serious questions and challenges about Network Neutrality - questions and challenges that our current legislative and regulatory construct are poorly equipped to deal with.
- 1.5. It is on these issues that our submission is focused. We are concerned that the assurances that are made as part of this process are insufficient to cater for the risks that we see - risks of reduced competition for both content and telecommunications, and risks of unfair treatment of content for anti-competitive ends. This is not because of any bad motives or deception on the part of the applicants - it is simply built on an awareness of the changed circumstances and incentives the merger will create if approved. Good faith assurances do not suffice when the public interest is at stake.
- 1.6. We urge the Commission to consider this clearance application with a great deal of caution and care, as the impacts of this merger if approved would be significant and negative. Absent of any protection and clear assurance that the matters raised in our submission can be appropriately managed, the Commission should decline this clearance application. If they can be appropriately managed, we will no longer have any concerns about the merger.
- 1.7. We would welcome the opportunity to discuss our submission with you if required. Please contact Andrew Cushen, Deputy Chief Executive at andrew@internetcnz.nz or on 021 346 408 to do so.

A handwritten signature in black ink, appearing to be "Andrew Cushen", written over a light blue horizontal line.

Andrew Cushen
Deputy Chief Executive

2. Summary

- 2.1. Our submission focusses on “net neutrality” aspects and addresses our concerns that this merger may lead to substantial lessening of competition for that reason. However, we would consider any solution proffered by the parties that would deal with those concerns, recognising however that behavioural undertakings are not available to resolve the Commission’s issues.
- 2.2. Our summary is self-contained, with supporting detail on key points in the body.
- 2.3. One interpretation of “net neutrality”, is that “*ISPs should treat all Internet traffic fairly, without undue discrimination*”.¹ However, as we outline below, even using expressions like “net neutrality” is not particularly helpful in the immediate context.
- 2.4. The question of who controls key content such as premium sports will change the shape of the online world profoundly, beyond just Pay TV. The key risk is that a vertically integrated operator gets bottleneck control across the markets by leveraging that key content, when so much work has been done via separation and UFB to remove the bottleneck in fixed line.
- 2.5. We agree with what Vodafone UK said in October 2015 (highlighting added), when expressing concern about the effects of control over key content similar to the control Vodafone NZ now seeks:²

*Ignoring the effects of ‘key content’ across wider and traditionally unrelated markets, such as mobile or broadband only customers, will have **an enduring and irreversible effect**, as the focus moves to TV bundled competition.*

- 2.6. We understand that other parties are dealing with issues, such as the effects on telecommunications, internet and broadcasting markets, in relation to the incentives of Vodafone/Sky to wholesale Pay TV to RSPs. Our focus is on the area often called “net neutrality”. However, we will carefully deal with the immediate issue (is there substantial lessening of competition?), in part because “net neutrality” is a controversial concept.
- 2.7. Regulators such as FCC, the EU, and the Canadian regulator, CRTC, have for that reason avoided “net neutrality” as a descriptor when dealing with issues in this area. We will for convenience however refer to net neutrality in this submission, but our focus is whether there is substantial lessening of competition (SLC).

FCC and net neutrality on merger clearances

- 2.8. Regulatory concerns in this area have moved to the point where, in May 2016, FCC would have declined to clear the latest major cable company and telco merger in the US -Time Warner/Charter/Bright House - due to net neutrality concerns - unless the parties gave behavioural commitments. We will use that merger (the “New Charter” merger) to illustrate the competition concerns.
- 2.9. We have set out some detail on this decision at Appendix C, mainly because it is a merger decision, and significantly more relevant than broader regulatory decisions on net neutrality such as the FCC’s Open Internet order. We note that the FCC’s decision did not

¹ Canadian and Radio-television and Telecommunications Commission (CRTC), *Examination of differential pricing practices related to Internet data plans* (18 May 2016) at footnote 5. However, like the EU and FCC, the CRTC has rejected using “net neutrality”.

² Vodafone response to Ofcom’s consultation: Strategic Review of Digital Communications discussion document (8 October 2015), at pp8-9 (available at http://stakeholders.ofcom.org.uk/binaries/consultations/dcr_discussion/responses/Vodafone.pdf).

flow from concerns as to leveraging key content. Rather, in the factual, with a larger scale, the merged entity had the ability and incentive to take anti-competitive steps in the net neutrality area, relative to the counterfactual, as against OTT providers. Here we have the additional consideration of key content.

The net neutrality concerns if the merger proceeds

- 2.10. The immediate concerns, assuming the merger goes ahead, focus on the classic net neutrality concern of parallel delivery to Vodafone/Sky's customers of:
- a) OTT content (such as Netflix, Lightbox, and "free" OTT content such as You Tube and TVNZ On demand (which may be funded by ad revenues)); and
 - b) Sky content (currently Sky Pay TV, NEON and Fan Pass, plus other Sky products that emerge (STV, PPV or SVOD)).
- 2.11. Vodafone/Sky has incentives to promote its content relative to competing OTT content, in order to grow its revenues, for example:
- a) by making its Pay TV more attractive to viewers than the OTT content,
 - b) by forcing OTT providers to pay Vodafone/Sky more (or to accept lower quality of service to the viewer unless they pay more).
- 2.12. Vodafone/Sky has the ability to do so in various anti-competitive ways which bring into question SLC concerns, including:
- a) Prioritising its content online ahead of OTT content so that the viewer has a superior experience (the so-called "fast lane" relative to "slow lanes");
 - b) Throttling back OTT content relative to the Sky content (with the same effect);
 - c) Differential retail charges as between OTT content and Sky content. Zero rating the provider's Pay TV content is one way of doing this. Vodafone Ireland's zero rating of its Pay TV offering over mobiles is an example. This is one of the most likely strategies by Vodafone/Sky, particularly over mobile.
 - d) Charging content providers more for accepting the OTT content and forwarding it to the customer (like mobile termination, this is a termination service, which we will call an IP interconnection service). This can have the effect of reduced quality of service if the OTT provider does not pay.
- 2.13. Some say that these issues largely haven't arisen so far in New Zealand - in fact they have. But that ought not be the focus. It is the future after the merger that is the focus. For example, while in the New Charter FCC decision noted above, the merging parties did not take the sort of action listed above, the merger changes the ability and the incentives, and there would emerge a real prospect of harm to video and TV competition. It was the latter which drove the FCC to its conclusions.

Game-changing context

- 2.14. The Vodafone/Sky merger, including bottleneck control of key content by the vertically integrated Vodafone/Sky, would occur in the context of these game changing developments:
- a) The move to convergence between mobile and fixed line, such as triple and quad plays and integration between platforms, with mobile emerging as a primary means

for viewing Pay and FTA TV including VOD. This is happening in the context of (a) the concentrated mobile market with only 3 MNOs (of which Vodafone is one) and (b) New Zealand having almost the highest mobile data charges in the OECD (we are 100% higher for 6Gb packages than the OECD average and rank 33rd out of 34 countries). High data charges mostly affects the most intensive user of data: video content. This means for example that, while available data caps are high or unlimited for fixed line, mobile data caps where there is zero rating would be strong incentives for viewers to favour the Sky TV products ahead of OTT.

- b) The move to the fibre world, mainly via UFB. UFB uptake drives innovation and investment. Video content is recognised as the main driver for uptake, in addition to price. Reduced competition leads to reduced UFB uptake, innovation and investment.

2.15. This context, and the scale of the merged company, drives the incentives to take the discriminatory steps outlined above.

What if the merger does not proceed? The counterfactual

2.16. The applicants acknowledge two related changes that are happening and which they say they must address:

- a) Sky's subscriber numbers and revenues are declining;
- b) There is a Pay TV - including STV and VOD - move to online, including mobile.

2.17. Other submitters will explain in more detail why this means that Sky's options to address those challenges would not include buying or building RSP functionality if the merger does not proceed.

2.18. Without that RSP functionality, Sky would not have the ability to engage in actions such as discriminating against OTT content. Even if Sky acquires or develops an RSP, the SLC impact will be substantially smaller, relative the merger, as the RSP will be considerably smaller.

The New Charter FCC decision- some detail

2.19. Three large national cable companies – each with Pay TV, internet and voice services – sought to merge into one of the USA's biggest cable companies: New Charter. FCC was concerned that, in the factual, New Charter had more incentive, relative to the companies separately, to:

- a) Zero rate its Pay TV offering while enforcing data caps and usage based fees on OTT providers; and
- b) Charging OTT providers more to accept traffic destined for New Charter customers.

2.20. That's two of the 4 concerns noted above (the only reason the other two weren't raised is that the U.S. has regulation that deals with throttling and with fast lanes).

2.21. FCC said New Charter had the ability and the incentive to discriminate in that way, and required behavioural commitments as a condition of clearing the merger. New Charter was prohibited from charging usage based fees and prohibited from discriminating in IP interconnection agreements for 7 years.

Conclusion

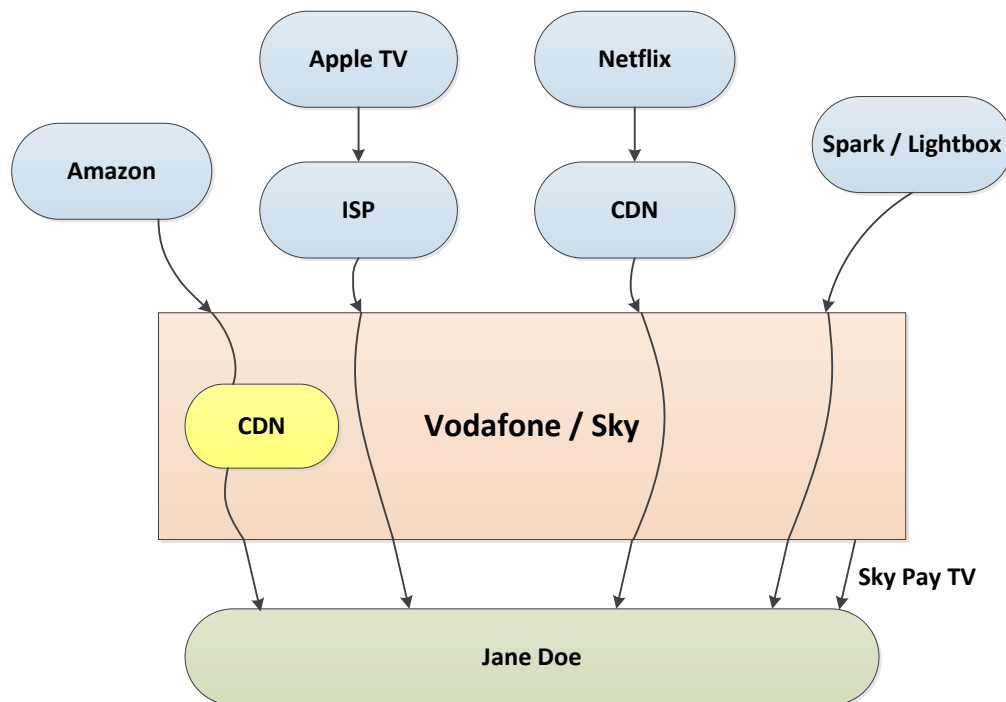
- 2.22. We conclude that, absent commitments that meet the concerns arising if the merger proceeds, the Vodafone/Sky transaction is likely to substantially lessen competition in markets, relative to the position if the merger does not proceed. This is in ways that go to the heart of the broadcasting, internet and telecommunications markets. A particular concern is that the merger will reduce UFB uptake, with the innovation and investment issues that entails.
- 2.23. In the counterfactual, the net neutrality concerns in the factual cannot arise, as Sky will not have an RSP, or if it does (in the unlikely event that Sky gets RSP functionality), the SLC, if any, is substantially lower relative to the factual.
- 2.24. We now deal with some of the main topics dealt with above.

3. “Net neutrality”

- 3.1. “Net neutrality” has a variety of interpretations.
- 3.2. But trying to define “net neutrality” for present purposes is not particularly helpful, especially as the focus here, under the Act, is specifically on whether or not the merger will lead to a substantial lessening of competition (SLC). This area has received close focus with new regulation introduced by the EU, FCC and the Canadian telco regulator, CRTC. Each has deliberately avoided using the language of net neutrality.
- 3.3. Our views and submissions in relation to legislative change differ from what is material here, even though there is overlap.
- 3.4. Most agree that there are technical reasons why some traffic should be prioritised and managed ahead of other traffic. The net neutrality issues arise where traffic is prioritised for commercial and potentially anti-competitive purposes.

4. What are the “net neutrality” concerns?

- 4.1. This is best illustrated by an example, on the assumption that the merger goes ahead, as in this diagram. (The role of ISPs and CDNs is not the same for these parties so it is hypothetical, other than the Sky TV service.)



- 4.2. Relevant here is that the only issue is content received by Vodafone's customers (Jane Doe in the diagram). Further, all content is flowing toward Jane Doe, from external sources in the case of the OTT content such as Netflix.
- 4.3. Additionally, given the trend to more content being viewed on mobile, the OTT content, just like the Sky TV content, could be viewed on mobile as well as fixed line.

Sky TV content

- 4.4. Vodafone/Sky supply the Sky TV service online to its customers. For the purposes of the concerns relevant to the clearance application, this can include not only the Sky service currently broadcast by satellite: it could also include SVOD (NEON-type products) and TVOD (Fan Pass-type products).

OTT content

- 4.5. Vodafone/Sky also receives OTT content directly from Lightbox/Spark, and carries it to Jane Doe.
- 4.6. Apple TV gives the content to an ISP which then passes it to Vodafone/Sky.
- 4.7. Netflix, however, provides the content to a content delivery network (CDN) which in turn passes the content to Vodafone/Sky to on send to Jane. CDNs come in different forms. One has it provided by Vodafone/Sky itself (that's Amazon in the example).

The Internet Ecosystem

- 4.8. That is a simplified description of the complexities around how internet traffic is carried domestically and internationally. For a more comprehensive overview, see the New Charter FCC decision at Para 94-103.³

³ FCC MB Docket No 15-149 (at <https://www.fcc.gov/document/commission-approves-charter-twc-and-bright-house-merger>).

5. Actions and unilateral effects of favouring Sky TV over OTT

- 5.1. Vodafone/Sky has incentives to discriminate in favour of its Sky TV service, vis-à-vis OTT providers, for the reasons we outline below, and as overviewed in Appendix C. It also has the ability to do so, in the 4 ways we noted in our Introduction:
- a) Sky TV in the fast lane: OTT in the slow lanes;
 - b) OTT content throttled;
 - c) Price differential paid by retail customer (e.g. Sky TV zero-rated just as Vodafone Ireland does);
 - d) Content provider pays more to terminate content with Vodafone/Sky retail customer.
- 5.2. Primarily at issue on the SLC assessment are the unilateral effects as between:
- a) the Vodafone/Sky services including Pay TV (such as Sky TV, NEON and Fan Pass and Vodafone/Sky content products yet to be introduced); and
 - b) OTT content such as Lightbox and Netflix, but also “free” content, such as You TVNZ On demand, where revenue is derived from ad revenues.

6. Telecommunications Act remedies not relevant

- 6.1. There is no current regulation under the Telecommunications Act dealing with net neutrality concerns. It would take over 2 years to achieve that regulation by way of a determination. Therefore, it is submitted, the prospect of a remedy under that Act is not relevant to the SLC assessment. We set this out in more detail in Appendix A.
- 6.2. In any event, the Act does not permit regulation affecting some of the net neutrality concerns identified in this submission, as we outline in Appendix B.

7. The two game changers

- 7.1. In our Introduction and Summary we referred to two main developments: (a) convergence and the move to mobile and (b) UFB. We now set out some more detail.
- 7.2. The applicants summarise their intentions heading in their applications as follows:

[T]he Transaction will allow the Combined Group to better serve customers' evolving preferences by enhancing the delivery of content across multiple devices and via multiple distribution technologies, including satellite, broadband (UFB and fixed wireless (rural)) and mobile. For instance, the parties envisage that over time they will be able to offer pay-TV subscribers the ability to seamlessly move between delivery technologies and viewing devices, e.g. start watching a show on their television via UFB and then pick up where they left off on another device, e.g. their mobile phone via WiFi or the user's mobile network. To that extent, the mobile market is relevant in the sense that over time new technologies are likely to see more pay-TV content delivered over such networks – be that content served up by Netflix, TVNZ OnDemand, SKY or others.

- 7.3. This reflects the trend to convergence including as to mobile. This raises the issue of zero rating and data caps.
- 7.4. Data caps for fixed line are relatively high or unlimited, although that does not take away scope for fixed line differential pricing for Sky TV as against OTT content. However, the position as to mobile, a platform to which video and TV is moving, is more apparently critical.
- 7.5. We only have three mobile network operators and this likely produces our poor OECD performance on higher mobile data plans. The Commission in its latest Annual Telecommunications Monitoring Report shows that, as at February 2016, New Zealand's retail mobile pricing for data is higher than nearly all other OECD countries. The 1.5 Gb and 6 Gb data services referred to in the Commission's report are around 50% and 100% higher than the OECD averages respectively. New Zealand ranks 28th and 33rd out of 34 countries, for the 1.5GB and 6Gb packages respectively).
- 7.6. Vodafone, as one of the three MNOs in an already concentrated market, thereby magnifying the problem, will have a larger footprint post-merger, and can be expected to be substantially more inclined to zero rate its own TV, and not zero rate OTT content, in order to discriminate and harm competition. It has the ability and the incentive to do so. The effect is to make the conditions for entry and expansion more difficult for OTT providers.
- 7.7. In relation to UFB uptake, RSPs freely competing, and OTT providers obtaining non-discriminatory access to Vodafone/Sky customers, are substantially more likely to encourage UFB uptake. For example, RSPs are more likely to innovate and compete with services related to UFB, such as more content-rich offerings. If instead, Vodafone/Sky controls key content and sells it at retail mainly, while also discriminating against OTT providers, its incentives to innovate to attract customers to UFB are low. Video content apart from price is the key driver for UFB uptake. To the contrary of Vodafone and Sky's intentions as quoted above, not merging would lead to more innovation and investment as to UFB than in the merger scenario.

8. What if the merger does not proceed? The counterfactual

- 8.1. There are two related changes that are happening and which the applicants say they must address:
 - a) Sky's subscriber numbers and revenues are declining;
 - b) There is a Pay TV - including STV and VOD - move to online, including mobile.
- 8.2. Sky's options to address this would not include buying or building RSP functionality, if the merger does not proceed. They would not gain a sufficient retail footprint to remedy the declining revenues. Plus, building an RSP from scratch and developing the retail footprint would take too long. The same problem arises if Sky buys a smaller RSP. It is expected that other submitters will conclude that proactive wholesaling by Sky will be the path it would take absent the merger.
- 8.3. In any event, even if Sky does go down the path of developing RSP functionality, the footprint and impact of any of the above actions, such as fast lane v slow lane and zero-rating, will be considerably smaller than if the merger with Vodafone goes ahead. The scale of the impact would be substantially smaller. That would be so even in the unlikely event of the next largest RSP move happened outside the merger with Vodafone, namely, a deal with the RSP business of Vicus.

8.4. In any scenario, therefore, SLC is reduced if the merger goes not go ahead.

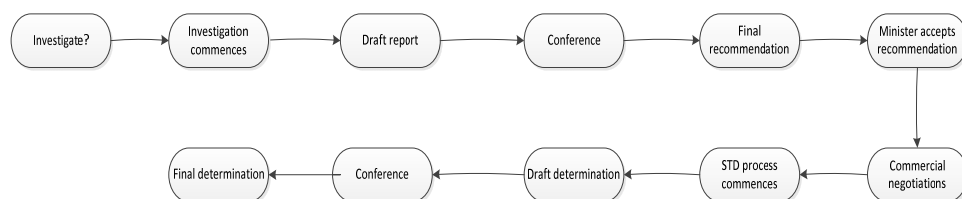
9. Conclusions

- 9.1. We conclude that, absent commitments that meet the concerns arising in the factual (i.e. the merger proceeds), the transaction is likely to substantially lessen competition in markets, relative to the position if the merger does not proceed. This is in ways that go to the heart of the broadcasting, internet and telecommunications markets. A particular concern is that the merger will reduce UFB uptake, with the innovation and investment issues that entails.
- 9.2. We would consider any commitments to address these issues that the applicants raise, recognising however that behavioural undertakings cannot be taken into account by the Commission.
- 9.3. We note in that regard that the TCF Broadband Disclosure Code:
 - a) Cannot be taken into account for that reason; and
 - b) In any event, its scope and terms cover substantially less than the net neutrality concerns outlined above.

Appendix A: The Current Telecommunications Act: overview

Introduction

1. In its decision clearing Vodafone's acquisition of TelstraClear,⁴ the Commission concluded that a particular market problem was solved by the prospect of regulation under the Telecommunications Act, via adding a service under the Sch 3 process.
2. It is submitted that, generally, the processes under that Act, as history shows, take too long to achieve effective regulation within the 2 year period usually under review on a clearance application (or within an even longer period). Further, access providers have incentives not to concede the position until there is a determination in place, typically well outside that 2 year period. Therefore, the prospect of effective regulation under the Telecommunications Act should not be taken into account.
3. No regulated service under the Telecommunications Act addresses the net neutrality concerns. To achieve that, there is a process under the Act, starting with a Schedule 3 investigation as to whether to add a service to Sch 1 of the Act (e.g. IP interconnection in this context).
4. That process, summarised in the following diagram, leads to a determination. (There are multiple additional steps such as multiple exchanges of submissions and cross-submissions). Only then is there effective regulation which is implemented.



5. History shows that such end to end process takes well over 2 years.

Adding services by Schedule 3

6. Other than law change (which is a common way by which services are added (e.g. UCLL and UBA)), access seekers have the ability to ask the Commission to add or change a service. This is the Schedule 3 procedure (mobile termination is an example of a service added via Sch 3, not legislation).
7. The first step under Schedule 3 is for the Commission to decide whether to launch a Sch 3 investigation as to whether or not to add or change a service. I
8. Once the investigation is underway, the Commission goes through a draft report, consultation, hearing, and final report process. If it decides there should be an amendment, it so recommends to the Minister to approve. The access providers can offer a formal undertaking in lieu of regulation. Typically, throughout, stakeholders are asked to submit.
9. The next phase is, typically, the Standard Terms Determination (STD) process, which must be preceded by attempts to commercially resolve access. This phase alone can take one to two years.

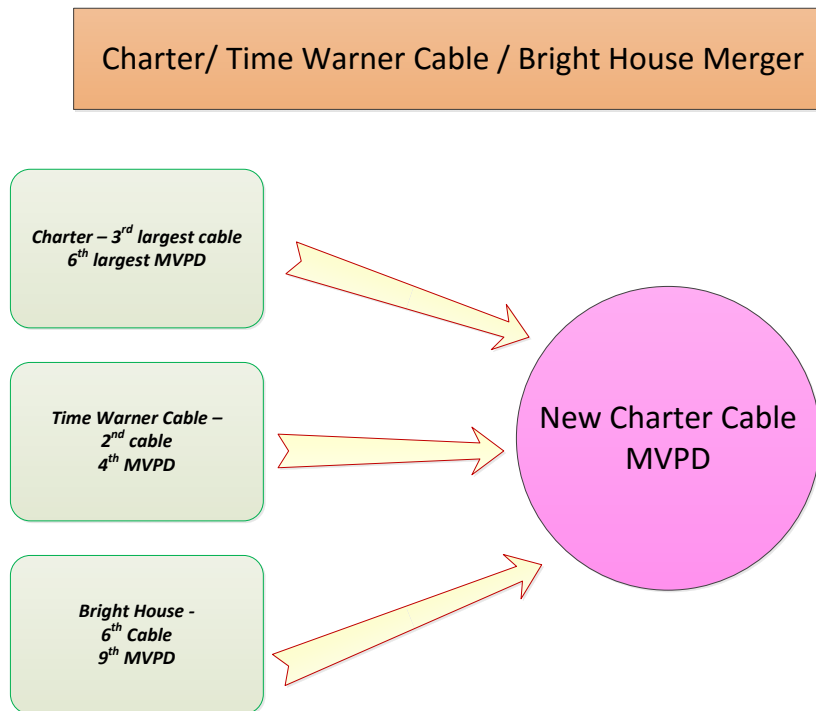
⁴ At Para [402]

Appendix B: The current Telecommunications Act as to net neutrality

1. For the Act to impact net neutrality, the relevant service must be a “telecommunications service”, for those are the only services for which there can be determinations (s 20).
2. The Act, and the underlying policy, is focused on the wholesale layer, leaving retail competition to flow from regulating supply at wholesale to RSPs.
3. In a determination, the Commission can include “the actions (if any) that a party to the determination must do or refrain from doing” (s30).
4. On rare occasions, the Commission has, controversially, added terms as to the retail layer, based on that provision, but that is unlikely to ever be extensive or even repeated. It hasn't happened for some years.
5. This means that regulation as to what RSPs can charge their customers, for their own TV content relative to OTT content (for example, as to zero rating their own content) is unlikely under the current Act. We identify further reason for this below.
6. The definition of telecommunications services is wide, but is clearly limited to services that enable or facilitate transmission of data, voice content, etc. It is the transmission of content that is regulated, not the content.
7. Regulation under the Act can include, for example, IP Interconnection agreements for the termination of OTT and other content on the RSP's network with its customers; providing CDN facilities or interconnecting with CDN facilities and so on. In this way, some classic areas for breach of net neutrality are potentially capable of regulation.
8. Moreover, it is at least possible that such IP Interconnection agreements contain terms that the access providing RSP provides the same level of service to the OTT provider as it does as to its own content. Essentially, that the RSP's Pay TV offering and the OTT offering are carried over the same “fast lanes”, or just the same lanes. This is complex to put into a determination and there are challenges in ensuring compliance in the real world, given incentives to game which are commonplace for vertically integrated operators. However, it is possible to develop a regime under the current Act to deal with the underlying concerns.
9. In that respect, the following non-discrimination standard access principle in Sch 1 may apply when and if IP interconnection agreements are added to Schedule 1, and then there is a determination:

Principle 3: the access provider must provide the service on terms and conditions (excluding price) that are consistent with those terms and conditions on which the access provider provides the service to itself.
10. What is particularly significant from that principle is the clear statement that the non-discrimination obligation does not extend to price. Therefore, for example there cannot be a provision in a determination by which the RSP charges the interconnecting ISP the same as what it charges itself for the same service. In any event, that is notoriously difficult to achieve in this context, as supply of the Pay TV services is an internal cost. Further, cost based regulated pricing does not solve the problem. Those concerns are among the main reasons underpinning the separation of Spark and Chorus.
11. In summary, while the Telecommunications Act can regulate as to relevant non-price terms, it cannot do so to, for example, require that OTT content in the same “fast lanes” as the RSP's pay TV content is charged at the same price (e.g. so there is no carve out of the pay TV for zero rating).

Appendix C: The Time Warner/Charter and Bright House merger



1. It is convenient to overview the New Charter decision by FCC on 10 May 2016.
2. In the United States there has been a number of clearance applications as to cable companies and telcos, mostly involving Pay TV channels, as the sector consolidates. Some have been cleared and some not.
3. The latest is the merger of major cable TV companies, Time Warner, Charter and Bright House, each large providers on their own, into a single major cable company called New Charter. See the above diagram. On 10 May 2016, FCC cleared the merger by the FCC New Charter decision,⁵ but on conditions that are relevant to net neutrality in New Zealand.

Glossary

U.S. abbreviation	U.S. words	NZ equivalent
BIAS	Broadband Internet Access Service	RSP broadband retail services
MVPD	Multichannel Video Programming Distributor	Sky TV equivalent, whether cable, online, or satellite
OVD	Online video distributor	OTT provider eg Netflix
UBP	Usage based pricing	Pricing customer pays for Gb within data cap

Net neutrality issues - what's included and what's not

4. The decision focussed on two issues relevant to net neutrality and the Vodafone/Sky circumstances:

⁵ FCC MB Docket No 15-149 (at <https://www.fcc.gov/document/commission-approves-charter-twc-and-bright-house-merger>).

- a) Essentially, the “zero rating” type of issue. FCC was concerned that, post-merger, New Charter had greater incentives to impose usage based pricing (UBP) and data caps, to discriminate against OTT providers (OVDs), thereby harming video competition, as New Charter provided its own TV content without any data charges (zero rating). As a condition of clearing the merger, New Charter had to undertake to have no data caps or usage based pricing for 7 years;
 - b) FCC was also concerned that New Charter was more likely to discriminate, in favour of its retail offerings, relative to the pre-merger companies, against OTT providers (OVDs) in relation to the prices charged, and services provided, to those content providers. This is the issue similar to Vodafone/Sky’s ability to charge content providers and associated parties such as CDNs, more, to discriminate in favour of its own Pay TV services. As a condition of clearing the merger, FCC imposed non-discrimination conditions on New Charter so that it would not discriminate in this way in its IP interconnection agreements.
5. Notably, on that counterfactual approach, the FCC’s decision wasn’t based on the involvement of “must have” content, which is the position here. That is an additional, and substantial, factor on this clearance.
 6. Absent from the FCC’s decision is any reference to the 2 other net neutrality issues we have identified, namely, “fast” v “slow” lanes, and the throttling concerns. However, that is because the FCC separately regulated in regard to those issues in its Open Internet order. Therefore, under that regulation, not applicable here, the concerns did not arise. Such actions in principle absent that regulation, fall to be considered under the same framework and approach as to zero rating and IP interconnection with content providers.
 7. We turn now to address each of the data caps and interconnection issues in more detail.

Data caps and usage based pricing

8. The FCC decision notes, in the counterfactual analysis, and recognising that data caps and usage based pricing had not been implemented:

71.The record indicates that edge providers such as OVDs [OTT providers] represent a common threat to both New Charter and the entire cable industry. Post-transaction, New Charter will have a larger footprint and pass more homes, and thus can capture more of the gains from any discriminatory actions directed against the OVD threat. In order to address New Charter’s increased incentive to discriminate against OVDs in the future, targeted conditions are necessary to ameliorate anticompetitive harms with respect to data caps and UBP [usage based pricing]....

73...Notwithstanding New Charter’s apparent intent not to take such actions at present, we conclude that there is a greater probability in the future that New Charter could [implement] data caps and UBP to harm video competition.

83.We further find that the proposed transaction may make New Charter more likely to impose data caps or UBP to inhibit OVD competition and that New Charter’s use of those caps would be more damaging to OVDs than any of the Applicants acting individually. We acknowledge that Charter’s current management team has not implemented data caps or UBP and have rejected internal proposals for implementing such policies.

Interconnection with content providers

9. The FCC, in its counterfactual analysis, concluded:⁶

We find that the transaction increases New Charter's ability and incentive to harm video competition by harming OVDs. As discussed above, New Charter will have a greater ability to harm OVDs through its enhanced control over interconnection than either Charter or Time Warner Cable could individually. New Charter will have a greater incentive to use interconnection to harm these OVDs because OVDs are especially vulnerable and New Charter's affiliated video services are likely to pick up subscribers dissatisfied with a congested OVD.

126. OVDs are more susceptible to interconnection-related harms than other edge providers [that is, content and data providers]. OVDs are particularly heavy consumers of network resources, requiring up to 5 Mbps for a single High Definition stream or up to 25 Mbps for a single 4K stream.

10. As a condition of clearing the merger, FCC concluded:⁷

132. We determine that a mandatory interconnection condition is necessary to mitigate transaction's interconnection-related harms. By requiring that large backbone providers, CDNs, and edge providers have reliable, unfettered access to New Charter subscribers for seven years, we believe that New Charter will be constrained from harming the public interest in the interconnection market.

135. Because interconnection agreements are frequently subject to non-disclosure agreements, we are concerned that abusive behavior by New Charter could go unnoticed. To ensure that we are able to detect any such behavior, we impose a condition that requires New Charter to file all interconnection agreements with the Commission.⁴³¹ This condition will continue for seven years after the transaction closes.

⁶ At para 125 and 126 (footnotes omitted)

⁷ At Para 132

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We provide community funding to promote research and the discovery of ways to improve the Internet. We inform people about the Internet and we ensure it is well understood by those making decisions that help shape it. Every year we bring the Internet community together at events like NetHui to share wisdom and best practice on the state of the Internet.

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