



**DRAFT SUBMISSION FROM SKY NETWORK TELEVISION LIMITED**

**ON**

**COMMERCE COMMISSION DISCUSSION PAPER ON  
NEXT GENERATION NETWORKS**

**16 FEBRUARY 2009**

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## 1. INTRODUCTION

- 1.1 SKY Network Television Limited (“**SKY**”) welcomes the opportunity to provide its view on the issues the Commerce Commission has raised in the discussion paper (“**discussion paper**”) on Next Generation Networks (“**NGNs**”), as part of its involvement in the Commission inquiry under section 9A of the Telecommunications Act 2001 (“**Act**”) into NGNs.
- 1.2 In this submission, SKY focuses on answering the questions in the discussion paper that are particularly relevant to its business, namely questions 1, 2, 11,12, 13, and 15. In addition, SKY sets out its interest in NGNs and also raises a query in relation to the scope of the Commission’s powers under section 9A of the Act.
- 1.3 Our contact person for this submission is:

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## 2. EXECUTIVE SUMMARY

- 2.1 The increasing penetration of high quality broadband into homes represents a major change to SKY’s business environment, as it does for every broadcaster around the world.
- 2.2 SKY, FTA channels and international competitors are already providing content and services to consumers using broadband, although the extent of the services that can be provided is limited by broadband speeds.
- 2.3 NGNs present SKY and many others with new opportunities to offer tailored high quality services to consumers. Enriched electronic programme guides, on demand/catch-up viewing, increased interactivity and personalisation, and the provision of embedded information (metadata) are all possible if content can be delivered via high speed and high capacity IP distribution.
- 2.4 Such developments present SKY with increased competition in every part of the value chain: from content producers providing content directly to consumers, global media brands aggregating video on demand content (“**VOD**”), and FTA providers going online.
- 2.5 To take advantage of the increased opportunities NGNs present, and to remain competitive, a large part of SKY’s business plans is to proactively make its content available over NGNs as soon as they become available.
- 2.6 Therefore, SKY intends to give complete support to the development of NGNs in New Zealand.

- 2.7 SKY considers that the main factors that have hindered NGN roll-out in New Zealand to date are its small population, large geographic scale, geographic isolation from international sources of web traffic, and a lack of government funding.
- 2.8 SKY believes that the user generated content and traditional “broadcasting” content being made available online is increasing the supply side drivers for greater broadband uptake, which is in turn assisting the drive for broadband development in New Zealand. SKY considers that the greatest hindrance to the increased distribution of content over broadband is current broadband reliability and speed: high quality video content is impossible without good quality broadband.
- 2.9 The current ownership of content and how it is accessed will not restrict the development of broadband in any way. Much internet enabled content is controlled and owned by internet users themselves. SKY also does not think the sale of traditional “broadcasting” content presents a barrier to it being used for IPTV or otherwise being transmitted via IP. The use of different “windows” for the sale of traditional ‘broadcasting’ content can easily accommodate new transmission methods. Further, to the extent content is owned by New Zealand companies and other entities, competition is already strong. Convergence will only increase the level of competition.
- 2.10 For these reasons, SKY does not consider that the “subscription TV market” will have any impact on the development and take-up of NGNs in New Zealand, as queried by the Commission in the discussion paper. In any case, the assumptions in the discussion paper on which the question is based are flawed.
- 2.11 Finally, SKY wishes to emphasise that broadcasting is excluded from the definition of telecommunication under the Telecommunications Act. Accordingly, in continuing the study, the Commission needs to ensure that it does not consider broadcasting matters that are only peripherally related to, or not pertinent to, the telecommunications industry or the long-term benefit of end-users of telecommunication services. We ask the Commission to be mindful of this in its consideration of submissions on the discussion paper.

### **3. SKY HAS A STRONG INTEREST IN THE DEVELOPMENT OF NGN**

- 3.1 The increasing penetration of high quality broadband represents a major change in SKY’s business environment. In particular, content delivery via high speed and high capacity IP distribution is fundamentally changing the content industry.
- 3.2 By the end of 2011, Telecom and other network providers intend to have ADSL2+/VDSL2 broadband networks that will cover approximately 80% of the population. This means that NGN services will be available to an increasingly large number of households over the next few years. NGN roll-out will no doubt be further advanced by the Government’s plan to invest \$1.5 billion in the roll-out of fibre networks to 75 per cent of New Zealand homes.
- 3.3 Even with current broadband technology, internet use has increased significantly over the last few years, with more households taking up broadband services, and more time being spent on the internet.

- 3.4 Content delivery via high-speed IP-based networks creates an opportunity for SKY and others to provide enhanced products and services for New Zealand consumers to compliment traditional broadcast technologies. These products and services include on-demand and catch-up viewing opportunities (as opposed to traditional linear viewing), an enriched electronic programme guide, the provision of embedded information (metadata), increased interactivity and personalisation, and opportunities for social media consumption and sharing, amongst other benefits.
- 3.5 This means that SKY has a strong desire to promote the development of widespread, good quality NGNs as soon as possible.
- 3.6 For example, SKY's MySKY HDi set top box is currently equipped with an Ethernet interface, which can be enabled for the delivery of content via IP transport. An IP-enabled MySKY HDi set top box will enable SKY to begin offering new on-demand content offerings, including VOD, catch-up TV and other online interactive content services that we expect to be popular with consumers. These services will require significant bandwidth and network speed requirements. SKY is actively investigating how and when this will be best enabled.
- 3.7 The move to content delivery via high-speed IP-based networks increases the competition SKY faces. There are an ever increasing array of global and local competitors in the content aggregation, content distribution, and content consumption / consumer equipment components of the value chain. This ranges from:
- content producers who are, in a number of instances making their content available directly to consumers (Warners VOD offering in Korea);
  - new online VOD aggregators (Apple, Amazon, Vudu);
  - user-generated content aggregators (YouTube);
  - commercial and state-owned FTA players moving into online delivery (TVNZonDemand, BBC iPlayer, Hulu);
  - consumer electronics and gaming console manufacturers (LG, Samsung, Sony, Microsoft, Nintendo).
- This is in addition to the growing volume of illegitimate content consumed via peer to peer networks.
- 3.8 As a result, the consumer has an increasing array of choices for consuming video content via multiple devices. These services will continue to drive significant uptake of broadband and increase the demand for new high speed high capacity NGN deployments.
- 3.9 SKY is, therefore, very interested in following these demographic trends, and continues to invest and enhance its existing offerings to take advantage of IP distribution, both in response to our customers' demands and to the competitive environment.
- 3.10 SKY has already launched a SKY Online service, which allows subscribers who may have missed a programme to "catch-up" with some of the most popular content from SKY's digital television service. This service allows subscribers to download premium content (including sports, movies, general entertainment and documentaries) to their PC, with the future extension to content

streaming. If this service is to be extended to provide high-quality content streaming, the delivery networks will need to evolve to higher speeds and capacity in order to reach their full potential.

- 4. QUESTION 1: WHAT ARE YOUR VIEWS ON THE APPROACH TO DEVELOPMENT OF THE MARKET FRAMEWORK AND INDUSTRY CONSULTATION THAT SHOULD BE CONSIDERED IN NEW ZEALAND?**
- 4.1 SKY welcomes the discussions and initiatives that are taking place about the technical and commercial issues relating to NGNs, such as the TCF IP Interconnection working party, the various work done by Internet NZ, and Government initiatives in relation to broadband investment, particularly the Government's plan to invest \$1.5 billion in the roll-out of fibre networks to 75 per cent of New Zealand homes. SKY would also be happy to participate in any industry working group that is formed to discuss how the market surrounding NGNs might function.
- 4.2 However, SKY is not sure what the Commission means by its reference in the discussion that relates to this question to a *"strategic approach... in developing the market framework for NGN deployment in New Zealand"*. SKY supports the Commission considering in its study of NGNs what shape the market may take in the future and how this may impact on NGNs, but would express cautious about any approach that saw the Commission considering whether regulation might be used in order to impose a particular market structure.
- 4.3 SKY considers that, in the absence of concrete evidence of a net benefit to regulation, it is inappropriate to attempt to regulate a particular market structure. The development of an NGN requires significant investment by the party that is rolling it out, and such investment decisions should be a matter of commercial judgment. Further, technology in this area changes at a very fast rate, so mandating specific standards could risk locking in obsolete technologies. Both of these issues mean that regulation of market structure could impede both the roll-out and uptake of NGN services. The nature of NGN technology, and the services that use it, are such that it may be counterproductive and even impossible to "design" a particular market structure.

**5. QUESTION 2: DO THESE CORE PRINCIPLES PROVIDE A USEFUL UNDERPINNING FOR CONSIDERING NGN ISSUES, OR WHETHER THEY SHOULD BE MODIFIED OR SUPPLEMENTED?**

- 5.1 SKY generally agrees with the principles set out by the Commission in the discussion paper. However, as noted in its response to Question 1, SKY submits that regulation should only be considered where it is likely to result in a net benefit. SKY therefore suggests that the fourth principle be amended to read *“regulation should be considered only where necessary to constrain market power – where, for example, it is conferred by control over bottlenecks – and where it is most likely that there will be a demonstrable net benefit to the economy from regulation.”* This will ensure that regulation is only imposed when it is beneficial to the public as a whole.

**6. QUESTION 11: MANY ARE OF THE VIEW THAT PIPES SHOULD BE BUILT FIRST AND SERVICES WILL THEN FOLLOW. OTHERS BELIEVE THAT A LACK OF SERVICES AND DEMAND FOR BROADBAND SERVICES ARE AN ISSUE. WHAT IS YOUR VIEW?**

6.1 SKY believes that the following factors have hindered the uptake of broadband in New Zealand to date, rather than a lack of broadband services:

- (a) New Zealand's small population and large geographic scale makes large scale network investments more difficult to justify on a purely commercial basis.
- (b) Geographic isolation from international sources of web traffic (mainly US and Europe based). This leads to higher international bandwidth costs, which in turn leads to regimes such as data caps and traffic throttling to mitigate user traffic volumes.
- (c) Poor national ISP peering situation which requires smaller ISPs to transmit international transmission links in order to interconnect with New Zealand's largest ISPs.
- (d) Government support for infrastructure investment. This has been limited. However, NGN roll-out will no doubt be further advanced by the Government's plan to invest \$1.5 billion in the roll-out of fibre networks to 75 per cent of New Zealand homes.

6.2 To the extent that the New Zealand's existing telecommunications infrastructure can support content services, many organisations are already providing broadband services of the type identified in the discussion paper.

6.3 As noted in paragraph 3.11, SKY has already developed a SKY Online service, which allows subscribers who may have missed a programme to "catch-up" with some of the most popular content from SKY's digital television service. This service allows subscribers to download premium content (including sports, movies, general entertainment and documentaries) to their PC, with the future extension to content streaming. TVNZonDemand provides a similar catch-up service for some of its most popular programming.

6.4 However, the extension of these services to provide high-quality content streaming probably requires the networks to evolve to higher speeds and capacity in order to reach their full potential.

6.5 SKY already anticipates providing those services once networks are capable of supporting them. For example, SKY's MySKY HDi box is currently equipped with an Ethernet interface, which can be enabled for the delivery of content via IP transport. An IP-enabled MySKY HDi set top box will enable SKY to begin offering new on-demand content offerings, including VOD, catch-up TV and other online interactive content services that we expect to be popular with consumers and to require significant bandwidth and network speed requirements. SKY is actively investigating how and when this will be best enabled.

## 7. QUESTION 12: IS CONTENT OWNERSHIP OR ACCESS TO CONTENT A HINDRANCE TO THE DEVELOPMENT OF BROADBAND IN NEW ZEALAND?

- 7.1 SKY strongly believes that content ownership or access to content has not, and will not, hinder the development of broadband in New Zealand.
- 7.2 As noted in SKY's response to Question 11, SKY strongly believes that the lack of development of NGNs in New Zealand is due to the factors listed in paragraph 6.1. This fact appears to be recognised in the table of regulation included in the discussion paper, which does not refer to any country enacting specific regulation of content for the purposes of promoting the development of NGNs.

### *Availability of content over broadband currently*

- 7.3 As is obvious to any industry observer, digitalisation and broadband has made possible the creation of a whole new range of audiovisual content that is not traditional broadcasting content. New content can now be created because of the inherent capabilities of the internet, such as user generated videos and audio, information and knowledge-based services, gaming services and social-networking services ("**internet enabled content**").
- 7.4 Both traditional content and internet enabled content is already available over broadband and will continue to be demanded by consumers over NGNs.
- 7.5 Currently, consumer demand for internet enabled content exceeds the broadband demand for traditional content. SKY considers that demand for this type of content will play an important part in driving broadband development. For example, YouTube's viewership figures dwarf the numbers of streams accessed from commercial services such as Fox Interactive, Hulu and ESPN. In December 2008, YouTube has 24 million unique users, and 77% of all internet users who watched videos online during that period were watching YouTube videos.<sup>1</sup>
- 7.6 This type of internet enabled content (and other high capacity usages such as on-line gaming, Google Earth, Google Ocean) uses a considerable amount of bandwidth. A widely reported New York Times article noted that in 2007 "*the video site YouTube consumed as much bandwidth as the entire Internet did in 2000*".<sup>2</sup> YouTube served over 5 billion video streams in September 2008 and went widescreen and high definition in November 2008. Consumer demand for the broadband capability required to access this type of content will be a significant driver of the development of improved broadband in New Zealand.
- 7.7 SKY anticipates that most, if not all, traditional content currently broadcast in New Zealand will also be provided over broadband in the future.
- 7.8 SKY is already using digital and broadband technology to transmit its content on other providers platforms, including broadband and mobile. SKY launched its SKY Online service as noted in paragraph 3.11 and in February 2007, launched the SKY Mobile TV service in conjunction with

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<sup>1</sup> YouTube sets online video record, Dan Whitworth, BBC  
[http://news.bbc.co.uk/newsbeat/hi/technology/newsid\\_7874000/7874601.stm](http://news.bbc.co.uk/newsbeat/hi/technology/newsid_7874000/7874601.stm)

<sup>2</sup> Article "*Video Road Hogs Stir Fear of Internet Traffic Jam*" Steve Lohr, New York Times, 13 March 2008  
[http://www.nytimes.com/glogin?URI=http://www.nytimes.com/2008/03/13/technology/13net.html&OQ=\\_rQ3D1&OP=35acdc50Q2FEiF-EZH\\_nQ2AHH7REReeKEeQ26EQ23Q26E7F\\_Q27oHdHQ51!EQ23Q26oF7bQ277Q7Cd](http://www.nytimes.com/glogin?URI=http://www.nytimes.com/2008/03/13/technology/13net.html&OQ=_rQ3D1&OP=35acdc50Q2FEiF-EZH_nQ2AHH7REReeKEeQ26EQ23Q26E7F_Q27oHdHQ51!EQ23Q26oF7bQ277Q7Cd)

Vodafone New Zealand. The service, now used by many thousands of subscribers, streams eight channels and live events to a viewer's mobile.<sup>3</sup> SKY also provides a regular package of clips to Telecom New Zealand for its mobile TV offering delivered via its CDMA network.

- 7.9 Other traditional broadcasters are increasingly making content available online in New Zealand and overseas (e.g. TVNZ's TVNZonDemand service, BBC's iPlayer and the NBC/Fox Hulu service). Most of these services are on demand catch-up services of television series that are provided free of charge and ad supported, or blockbuster movies that are either purchased or rented on a pay per view basis.
- 7.10 SKY therefore considers the greatest hindrance to the increased distribution of traditional content over broadband is current broadband reliability and speed: high quality video content is impossible without good quality broadband.
- 7.11 SKY is actively engaged with a number of telcos and ISPs in New Zealand to discuss options that would enable removal of user data caps and throttling (e.g. via content delivery networks, local hosting, improved peering and interconnect) that would reduce New Zealand's reliance on international bandwidth, and improve broadband quality.

#### *Ownership and access to content*

- 7.12 SKY does not believe that the current ownership of content and how it is accessed will restrict the development of broadband in New Zealand in any way:
- (a) *Internet enabled content:* Much internet enabled content is generated and owned by internet users themselves and ownership does not change hands when content is provided on-line. For example, YouTube relies primarily on user-generated video content, including movie clips, TV clips, and music videos, as well as amateur content such as video blogging and short original videos.
  - (b) *Traditional content:* SKY does not think that the ownership and sale of traditional content presents a barrier to it being used for IPTV or otherwise being transmitted via IP. Traditional content rights are normally sold in "windows" that are determined by content rights holders, often large American production studios, or sports bodies such as FAPL (English Soccer) and ICC Cricket. The use of different "windows" can easily accommodate new transmission methods, and content rights holders can decide to sell platform specific rights and create different windows for content if they choose – for example broadband movie rights are already offered to content providers only on a non-exclusive basis.

Furthermore, when NGN services become available, it is likely that content producers will increase the price for broadband rights as there will be a platform that can support the exploitation of these rights. This increase in the cost of broadband rights, matched with increasing competition from overseas providers and others, will mean that no organisation will be able to afford to buy rights it cannot exploit.

Lastly, rights ownership for the vast majority of this content is held directly by overseas companies. To the extent content is owned in New Zealand, competition for these rights is

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<sup>3</sup> It is not necessary to be a subscriber to SKY's existing broadcast services to access either the Vodafone SKY Mobile TV service or the Telecom clips service.

already strong. We set out the current competition for premium content in New Zealand in the section below.

*Competition for premium content and access to premium content*

- 7.13 Three forms of 'premium' content were identified by the Commerce Commission in its Prime clearance decision: blockbuster movies, first-run television series, and live sport. SKY believes that the Commission's findings are not only relevant to the current competition in the markets for premium content, but also can be used to gauge the potential for providers intending to offer IPTV services to compete in those markets.
- 7.14 In relation to blockbuster movies, the Commission noted that different broadcasters usually gain movie broadcast rights to different 'windows' that are set by movie studios that are platform specific (i.e. movies are first shown in the theatre, then on DVD/rental, then on pay-per-view, then on pay-TV, then on FTA). For the broadcast windows, this system means that movies can only be shown during the window and via the platform that the rights are held for, giving the holder of any particular licence (e.g. a broadcaster) limited market power.
- 7.15 It is very important to note that no organisation anywhere in the world has the right to exclusive supply of blockbuster movies over broadband. Therefore, any new or existing content provider could purchase the rights to provide blockbuster movies by VOD over an NGN. There are no barriers created by the current ownership of blockbuster movie rights by broadcasters that would prevent this from occurring.
- 7.16 In relation to first-run TV shows, the Commission noted that these shows are generally acquired through studio output deals. These output deals are typically for two to five years, and entitle the purchaser of the rights to all that studio's output (whether they want it all or not). The Commission noted that FTA channels tended to dominate the acquisition of first-run TV rights, because of the advertising value these series attract. This is borne out by the current control of the major studio output deals:
- TVNZ currently holds the studio output deals for Warners (Cold Case, ER), Disney (Lost, Desperate Housewives, Grey's Anatomy), Granada (Coronation Street), and Sony (Rescue Me, Damages, Cashmere Mafia);
  - MediaWorks currently holds the studio output deals for Fox (Bones, Prison Break, 24), NBC Universal (House, Heroes, SVU), and CBS Paramount (NCIS, Medium, Everybody Hates Chris).
- 7.17 The Commission concluded that while output deals were generally not purchased by pay-TV purchasers, there was nothing to stop them bidding on such deals (although as noted above the relevant output deals are still held by the FTAs). In theory, this also applies to other potential providers of IPTV services.
- 7.18 When acquiring rights to first-run TV shows, the purchaser usually acquires a hold-back over other windows. This ensures the shows retain their value as first-run shows. In itself, however, this is not a barrier to IPTV, as the show could be broadcast over IPTV as a "first-run" show or on a "catch-up" basis. It is also likely that back-series of programmes will be offered over IPTV, once

the hold-back expires. Indeed, overseas experience has demonstrated that blockbuster movies and first-run television series are the most popular broadband content. This is because the “on-demand” nature of broadband services are a good match for this type of content.

- 7.19 In relation to live sports rights, the Commission noted that they are generally sold to the highest bidder, and it did not consider that there were separate markets for pay-TV and FTA rights. It noted that while SKY held a significant amount of live sports rights, FTA broadcasters had obtained a number of other desirable sporting events – for example TVNZ holds the rights to international netball, while MediaWorks held the rights to the 2007 Rugby World Cup. The Commission also noted that it understood that no broadcaster was restricted in its ability to bid for live sports rights.
- 7.20 SKY notes that the FTA channels continue to acquire sports rights, with TVNZ acquiring rights to the America’s Cup, and MediaWorks acquiring rights to Australian V8’s and Maori Television now holding The NZ Breakers and ARL League rights.
- 7.21 SKY considers that the diversity of existing broadcasters who have in the past acquired, and will continue to be able to acquire, rights to major sporting events indicates there are no competition concerns in this market. The acquisition of premium content by smaller channels such as Maori Television and Stratos also demonstrates that premium content is available for new broadcasters and by extension, any new provider of IPTV services.
- 7.22 To the extent it owns live sports rights, SKY is interested in making sports available on-line once capacity is available. SKY’s mobile service has already been used to broadcast live coverage of national and international rugby, cricket, netball and rugby league events.
- 7.23 However, given that the value in sports rights is in showing them live, the demand for this form of content over IPTV as opposed to traditional broadcasting methods may not match the demand for blockbuster movies or first-run TV series. Therefore, this content may be less likely than other forms of traditional content to be the major driver for broadband development.
- 7.24 SKY also has existing content deals with TelstraClear, Telecom, Vodafone and Trustpower, in which these organisations are able to offer their customers SKY services along with their own service such as electricity, internet or phone service.<sup>4</sup> These provide access to premium content held by SKY. When NGN networks are in place SKY may well end up providing content to these organisations who would then provide it to their customers via IPTV services.

*Impact of the development of broadband on traditional content markets*

- 7.25 As noted below, convergence is a key factor in development regarding the ownership and access of all electronic content, including traditional content. Convergence has allowed almost all types of content to be converted into a digital form and exchanged over the internet, satellite, UHF, DTT or mobile platforms. This has led to a rapidly changing market for traditional content in New Zealand.

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<sup>4</sup> Trustpower and Vodafone have not launched their services yet.

7.26 The OECD Paper on policy considerations for audiovisual content in a multi-platform environment stated that:

*“Digitalisation, IP and the development of multimedia devices result in more competition between...content providers and the globalisation of the audio visual content market.”<sup>5</sup>*

*“Product and diffusion of content is not limited to those with a traditional broadcast licence.”*

7.27 Broadband impacts on traditional content markets because it enables global content distribution, reducing the relevance of local ownership of broadcast rights, not only in traditional broadcasting markets but also across borders. Competition for these rights will likely become more competitive with the increased competition from global content providers especially as traditional content producers bypass content aggregators such as broadcasters to make content available directly to consumers via various online services.

7.28 What this practically means for traditional content ownership and access in New Zealand is that there is, and will continue to be, increasing competition between content distributors such as FTA channels, pay-TV providers, foreign channels and content aggregators (e.g. iTunes) (to some extent), and direct providers of content (e.g. Warner Bros - through a Korean venture will be offering the content they produce on a VOD basis direct to customers with no intermediary) to provide traditional content to New Zealand audiences over different platforms.

7.29 As traditional content markets become even more competitive, rights holders are further required to maximise revenue by exploiting access to rights on all platforms or on-selling rights.

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<sup>5</sup> OECD Working Party on Telecommunication and Information Services Policies, (12/01/07), *Policy Considerations for Audio-Visual Content Distribution in a Multiplatform Environment*, page 13.

**8. QUESTION 13: HOW IS THE NATURE OF NEW ZEALAND'S SUBSCRIPTION TV MARKET LIKELY TO IMPACT THE DEVELOPMENT AND TAKE UP OF NGNs IN NEW ZEALAND?**

8.1 The discussion paper states that IPTV services have been a key driver for broadband roll-out overseas. It expresses a concern that New Zealand's current subscription television satellite service will impact on demand for IPTV because New Zealand's geography means that IPTV will never be able to cost-effectively compete and demand for it will be low. This discussion and the above question infers that the subscription TV market will inhibit the development and uptake of NGNs in New Zealand.

***The scope of the question is too narrow***

- 8.2 SKY has a number of concerns about the inclusion of this question in the discussion paper.
- 8.3 Firstly, SKY does not believe that there is a stand alone subscription TV market and referring to it in this question is incorrect. SKY sets out its reasons for this in the Appendix attached to this submission, as the issues are side issues to the main matters raised in the discussion paper.
- 8.4 Secondly, SKY believes that this question is too narrow. If the cost effective delivery of TV via satellite is a barrier to IPTV services, then it will not just be the pay TV market that will need to be considered. The FTA broadcasters are also relevant. In particular, Freeview has rolled out a very successful satellite offering and a DTT service with the customer base growing over anticipated levels. Freeview is now present in 198,938 homes.
- 8.5 Further, it is not simply TV services that will compete with IPTV services. There are a number of other entertainment options such as TradeMe, Online DVD rentals, gaming, and peer to peer file sharing that may influence the uptake of IPTV services in New Zealand.
- 8.6 SKY submits that the Commission should reconsider this question more broadly in the next stage of the study.

***Assumptions in the discussion paper on which the question is based are incorrect***

8.7 Question 13 appears to be based on the statements in the discussion paper that: "*A number of studies have identified IPTV services as one of the single largest drivers of broadband*" and "*Given that IPTV has been a significant driver of IPTV services overseas, the nature of New Zealand's subscription TV market is likely to impact NGN take up in New Zealand*".<sup>6</sup>

8.8 SKY addresses each of these statements in turn below.

***"IPTV services as one of the single largest drivers of broadband overseas"***

- 8.9 SKY queries whether this statement is accurate.
- 8.10 Japan, Korea and the USA are the early leaders in next generation fibre deployment. A paper by Internet Trade Association in the UK, cited in the discussion paper, outlines the following drivers for NGN roll-out in these countries as:

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<sup>6</sup> Page 21.

- (a) Japan: the government's decision to incentivise operators in respect of their capital expenditure obligations; operators motivated to deploy infrastructure while peer to peer file sharing, on-line gaming, and voiceover IP fuel consumer demand;<sup>7</sup>
- (b) Korea: the implementation of government backed initiatives to deliver high-speed broadband access to Korean homes; the large urban residential apartment living population; and
- (c) USA: competition between cable operators and telcos to offer consumers faster broadband speeds. The discussion paper also notes on page 21 that inter-modal competition has been a major driver for NGN deployment in Belgium, Netherlands and Switzerland.

8.11 These examples demonstrate that there can be no one single driver for the development of NGNs. The drivers of NGNs in every country were based on the particular cultural habits, geography, and wealth of those countries in question.

8.12 In addition, some of these drivers are unlikely to be effective in New Zealand. For example, New Zealand's geography has meant that there has not been large cable roll-out, so infrastructure competition between cable operators and telcos will be unlikely to drive NGN roll-out here.

8.13 In any case, SKY believes that it is more accurate to say that the development of NGNs overseas has been driven by uses that increase consumers' demand for, and willingness to pay for, increased broadband capability and speed.<sup>8</sup>

8.14 SKY also notes that one of the key drivers of NGN roll-out in Japan and Korea was regulatory support and encouragement for network operators by Governments. SKY believes that the Government's plan to invest \$1.5 billion in rolling out a fibre network in New Zealand will be a significant driver of NGN roll-out.

*"Given that IPTV has been a significant driver of IPTV services overseas, the nature of New Zealand's subscription TV market is likely to impact NGN take up in New Zealand."*

8.15 SKY disputes this statement.

8.16 Firstly, as stated in paragraph 6.1, SKY believes that there are several factors that have influenced the development of NGNs in New Zealand, none of which relate to IPTV or New Zealand's current broadcasting market.

8.17 Secondly, SKY does not see its subscription TV services as reducing the demand for IPTV. To take advantage of the increased opportunities NGNs present, and to remain competitive, SKY plans to increase its range of IPTV services, once there is broadband capability to support such services. SKY believes that other rights holders will do the same (as set out in SKY's response to Question 12) and this will facilitate the growth of IPTV. Indeed, there are already signs of competition in IPTV in New Zealand (TVNZonDemand, SKY Online, overseas providers etc).

8.18 Thirdly, while IPTV services can replicate linear broadcasting services, IPTV has a number of features that are unique to content delivery via high-speed IP-based networks. For most

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<sup>7</sup> www.interlectuk.org, April 2008, page 8.

<sup>8</sup> Intellect article page 9.

broadcasters, and certainly for SKY this is the primary business reason why SKY is interested in facilitating IPTV services.

- 8.19 Lastly, SKY does not consider that pay TV services have been shown to hinder the development of broadband overseas. In the UK, where BSkyB has a very successful subscription TV market presence, there are still a high number of IPTV providers, such as BBC, Freeview, Top Up TV, Setanta Sport, BT Vision, Virgin Media, as well as BSkyB itself.

- 9. QUESTION 15: WHAT OTHER IMPLICATIONS FOR THE VALUE CHAIN OF TRADITIONAL OPERATORS AND SUPPLIERS CAN BE EXPECTED WHEN MOVING TOWARDS AN ALL-IP ENVIRONMENT?**
- 9.1 SKY agrees with the implications for the value chain already identified in the discussion paper as follows:
- (a) broadcasters, telecommunication operators and newly emerging IPTV providers are offering access to content over IP and increasing competition for AV content;
  - (b) traditional telecommunications incumbents as well as alternative network operators are competing along the value chain for content production and potential distribution channels; and
  - (c) international service providers will potentially influence the competitive landscape either by entering into commercial agreements with service providers and infrastructure suppliers or by bundling services across different and fixed wireless network and end customer devices.
- 9.2 SKY has identified several other implications for the value chain:
- (a) content producers will be able to directly access new international content distributors like Google or Yahoo which will reduce distribution costs for small producers;
  - (b) improved capability for integrated service delivery that is interactive or tailored to particular consumers will allow broadcasters to provide additional services; and
  - (c) content produced in any place in the world will be able to be watched all over the world, which increases competition for broadcasters not only from local telecoms or new market entrants, but established global corporations.
- 9.3 However, SKY considers that it is outside the Commission's power of inquiry under section 9A to consider the impact convergence may have on the broadcasting market in New Zealand as broadcasting is excluded from the definition of a telecommunication service.

**10. SCOPE OF THE COMMISSION'S INQUIRY UNDER SECTION 9A OF THE TELECOMMUNICATIONS ACT 2001**

- 10.1 SKY acknowledges that section 9A of the Act permits the Commission to inquire into matters relating to the telecommunications industry or the long term benefit of end-users of telecommunications services (emphasis added).
- 10.2 We do not think, however, that section 9A extends the matters that the Commission may inquire into to matters that are expressly excluded from being considered under the Act. In this regard, we note that the decision was taken at the time the Act was passed to exclude broadcasting from the definition of a telecommunication service.
- 10.3 It would concern SKY if the Commission, in continuing its study, acted outside of the scope of its power of inquiry in section 9A and considered broadcasting matters that were only peripherally related to, or not truly pertinent to, the telecommunications industry or the long term benefit of end-users of telecommunications services. We ask the Commission to be mindful of this in its consideration of submissions on the discussion paper.
- 10.4 In particular, as broadcasting is regulated by the Broadcasting Act, it would be inappropriate and outside the Commission's jurisdiction to make recommendations regarding the broadcasting market.

## APPENDIX – THE COMMISSION’S USE OF THE TERM “THE SUBSCRIPTION TV MARKET”

1. The Commission discussion paper uses the term “the subscription TV market”. SKY does not consider that it is correct to define a stand-alone subscription TV market.
2. It may be that the Commission uses this term following on from its decision to grant a clearance for the acquisition of Prime TV by SKY in 2006 (Decision No.573).
3. In that decision, the Commission identified separate retail pay-television and FTA broadcasting services and advertising services markets. This differed from the conclusion in its 1995 Decision 276, regarding the Telecom/HKP partnership, in which the Commission stated that pay-television and FTA services compete in the same market for programming, use programme mixes to compete for viewers, and compete to a limited degree for advertising.
4. The decision on market definition in the Prime/SKY decision may have been reached because, if an acquisition is acceptable in a narrow market, it will also be acceptable in a broadly-defined market.
5. In any case, the Commission’s decision was heavily influenced by the differences in the way in which FTA and pay-television revenue are earned. SKY does not think this is significant. In both cases, the key driver is having programming that viewers want to see, whether for attracting advertising revenue or attracting subscriptions.
6. The Commission’s view seems to have been based on an analysis of the “two-sided” nature of the FTA business compared to pay-television. SKY considers that the Commission misapplied the two-sided market analysis.
7. This “two-sided platform” analysis focuses on the two-sided nature of FTA television’s business model, with advertisers and viewers acting as economic agents (viewers are consumers of the television service and advertisers are buyers of the advertising service). FTA’s principal revenue is derived from advertising, which it obtains on the strength of its viewership. Pay-television, in comparison, is one-sided and derives most of its revenue from viewership (in the form of subscription charges), and little from advertising. The Commission saw this one-sided business model used in pay-television broadcasting as an indication that there are separate pay-television and FTA markets.
8. SKY considers that the “two-sided platform” analysis demonstrates the opposite. This is that both kinds of businesses compete for viewers, and that they simply earn their revenue in different ways. This view is supported by an article in the Competition and Consumer Journal which concluded that:

*“Based on a qualitative analysis of conduct and the business interactions between FTA and pay television retail operations and an evaluation of the proportions used to justify separating FTA and pay into different markets, the factors that have traditionally been used... to separate FTA and pay into different markets do not, based on*

*economic theory and the weight of the empirical data, appear to justify separation of these two models into distinct relevant antitrust markets.”<sup>9</sup>*

9. The article supports the view that the different business models do not mean that the two kinds of business do not act as competitive constraints upon, and as economic substitutes for, each other. Even though SKY receives its principal revenue from subscription charges, and FTA broadcasters receive revenue from advertising, competition is inevitably driven by viewership. This is because SKY needs viewers to attract subscriptions, and FTA broadcasters need viewers to obtain advertising revenue.
10. In addition, although only a small amount of SKY’s revenue is derived from advertising, this amount has been increasing in recent years. This reflects the US experience that as pay-television businesses mature, they become more two-sided. In the last twelve months, SKY earned around \$65 million in advertising revenue.
11. The Commission also considered that the extent to which customers switch between pay-television and FTA is limited. The Commission cites (at page 12 of its Prime clearance decision) the fact that SKY’s subscription base has steadily increased since it was first introduced and that SKY’s churn rate is low is evidence that there is limited substitutability between pay-TV and FTA.
12. SKY considers that this is incorrect. AGB Nielsen data for 2007 shows that SKY subscribers on average watch more FTA programmes than SKY programmes.<sup>10</sup> This is no doubt facilitated by all nationwide FTA channels (except TVNZ6 and TVNZ7) being included on SKY’s digital service. A comparison of the average television hours watched by non-SKY subscribers to those watched by SKY subscribers shows that SKY subscribers are swapping approximately only 5 hours of FTA programmes per week to watch subscription programmes.<sup>11</sup> This shows that the FTA programmes are still very appealing. It is therefore clear that viewers switching between pay-television channels and FTA by SKY subscribers and FTA remains significant.
13. SKY’s customer base is susceptible to significant “churn” (the percentage of subscribers who disconnect their services). SKY calculates churn on a rolling gross annual basis, meaning that each month it calculates the subscribers who have disconnected as a percentage of the average subscribers for that month and totals their monthly percentages over 12 months. Churn has slowed to some extent over recent years, with 13.4% churn in 2007, but it remains an issue.
14. Interchangeability of programming genres between FTA and SKY has also become more pronounced in recent years, particularly in programming the more typical narrow broadcasting. For example, music programmes are now available on both pay-television and FTA channels (Juice TV and C4, for example). As a result, consumers who wish to view these channels can do so without subscribing to SKY.

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<sup>9</sup> “Product market definition in the television industry”, Christopher J Pleatsikas, *Competition and Consumer Law Journal*, November 2005.

<sup>10</sup> SKY subscribers watch 12 hours, 15 minutes of FTA channels per week (on average) and 10 hours, 18 minutes of SKY channels per week (on average).

<sup>11</sup> Non SKY subscribers watch 17 hours, 17 minutes of FTA channels per week (on average).

15. Furthermore, the Commission's analysis ignored the fact that SKY subscribers regularly change between watching SKY programmes and FTA programmes retransmitted over SKY. This is facilitated by the positioning of the FTA channels on SKY's electronic programme guide.
16. Finally, the Commission referred to the costs that would be involved in a new FTA broadcaster being established and conversely, a new pay-television broadcaster being established. However, the fact that there are significant costs in setting up such businesses do not mean that they are in separate markets. Also, the entry costs to broadcasting are falling substantially. This can be seen with new channels such as Stratos being established. This is partly a result of a wider range of transmission vehicles having become available. As discussed above, this is likely to continue.
17. SKY also notes that the Commerce Commission acknowledged that there is some competition between FTA and pay-television services. In particular, Freeview's digital platform has expanded quickly since its introduction. As of late January 2008, 198,938 receivers had been sold, including 53,522 HD receivers. This gives Freeview an almost identical HD presence to SKY. These services, and particularly the range of channels available and their HD format, have increased competition.
18. In this regard, the current OFCOM pay television consultation acknowledges that in the UK the growth in the availability of FTA digital channels and the greater range and quantity of available sport means that FTA TV may be a closer substitute in the UK for premium sports channels than the years previously when most consumers only had access to five FTA channels. In New Zealand, as noted elsewhere in this submission, sports rights are widely held.<sup>12</sup>
19. Accordingly, SKY considers that the Commission should, at the least, refer to a mixed pay-TV and FTA broadcasting services market in its work. In relation to NGN services, however, even such a market definition may be too narrow. The relevant question to ask is what services may be in competition with those that are, or could be, provided over the NGN.

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<sup>12</sup> *Pay TV market investigation consultation document*, Ofcom, 30 September 2000, page 70.  
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