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Commerce Commission  
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### **SKY Submission on draft Terms of Reference for Study on Demand Side Issues**

1. SKY Network Television Limited ("SKY") wishes to comment on the Commerce Commission's Draft Terms of Reference ("draft TOR") for its *Study on Demand Side Issues*. Its feedback is set out below.
2. SKY submits that:
  - (a) paragraph 3 of the draft TOR should more accurately reflect the Government's economic policy goals; and
  - (b) consideration of content arrangements should be removed from paragraph 6(i)(b) of the draft TOR and not considered as a possible barrier to uptake of high speed fibre broadband services in New Zealand.
3. If the Commission wished it could redefine the draft TOR to focus on assessing the likely level of uptake of UFB services, the effect on competition in telecommunications markets and the flow-on benefits this will bring.
4. If the reference to content arrangements is retained, then the draft TOR should acknowledge that content arrangements relating to broadcasting cannot be considered, as broadcasting is specifically excluded from "telecommunications" under the Telecommunications Act 2001 ("the Act").
5. The non-regulatory nature of a section 9A study needs to be recognised.
6. The Commission should take care to ensure a fair process at the industry conference proposed in the draft TOR.

#### **Focus of Commission's inquiry**

7. Paragraph 6(i)(b) of the draft TOR says that the Commission proposes "*to identify whether there are any barriers likely to inhibit the uptake of high speed fibre broadband services in New Zealand*", including content arrangements.

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8. SKY questions whether content arrangements should be included in the Commission's consideration of barriers to the uptake of UFB services for four reasons.
9. First, the draft TOR are based on the premise that demand for content services will drive demand for UFB services. SKY considers, however, that the relationship between these services is the other way round. Content services are one of the many types of services that may be delivered over UFB networks. Accordingly, demand for content services will be facilitated *by* the availability of UFB services. For example, the availability of UFB services is likely to increase consumer demand for high definition video services over the internet.
10. Second, the draft TOR seems to treat the development of UFB networks as an objective in itself. SKY considers that the development of UFB networks should not be seen as the ultimate goal. Rather, they are part of the telecommunications infrastructure that supports the provision of other services of value. A February 2010 report by the Canadian Radio-television and Telecommunications Commission called *Navigating Convergence: Charting Canadian Communications Change and Regulatory Implications* says that "*a world-leading broadband network infrastructure is not an end in itself. The 'pipes' are only useful inasmuch they are used to deliver services, applications and content*".
11. Paragraph 3 of the draft TOR states that the Government's economic policy goal is to encourage New Zealanders to adopt fibre based high speed broadband. This is not entirely correct – rather the Government's economic policy goals are to "*build the foundations for a stronger economy*" (Prime Minister John Key's Statement to Parliament 2011) and "*to deliver greater prosperity, security and opportunity to all New Zealanders*" (Hon David Carter, Minister for Economic Development, World Class New Zealand Summit, 7 April 2011). Encouraging adoption of UFB is simply one of the means by which that broader goal will be achieved. Describing the Government's economic policy goal as being to encourage uptake of UFB is only half the story, and seems to have led to the view that the Commission needs to examine the narrow question of whether content arrangements are a barrier to the uptake of UFB services. The Government's economic policy goals (especially delivering prosperity and opportunity) may be achieved through the provision of a higher level of content services, which could be facilitated by UFB services, but this is different than the question posed by the Commission.
12. More specifically, the Government's UFB Initiative objective is to accelerate the roll-out of UFB for the purpose of making a significant contribution to economic growth (CAB Min (09) 8/9). This objective was also confirmed by Hon Steven Joyce in September 2009, who commented that "*access to UFB is part of the essential infrastructure of a productive and growing economy and will be crucial to New Zealand improving its competitive advantage in the global market*". High speed

broadband networks are simply part of the infrastructure required to help achieve this Government goal.

13. Third, content services are only one of a range of services that could be delivered over UFB networks and used by consumers. It seems strange to single them out. The stated objective of the Government's UFB Initiative is to focus in the first 6 years on "*priority broadband users such as businesses, schools and health services*" (CAB Min (09) 8/9). It is difficult to see how content services, which are mainly entertainment related, will be utilised by these sectors.
14. Further, out of all the possible services that will be facilitated by UFB, content services may be one of the least pressing. Despite a recent study by the World Economic Forum placing New Zealand 18th out of 138 countries in its readiness and capacity to use technology to boost economic competitiveness and improve citizens' lives, the New Zealand Institute has expressed concern that New Zealand is in fact "not ready" for UFB and that there is a risk UFB could be wasted (*New Zealand 'not ready for fast broadband'*, New Zealand Herald, 14 April 2011). The Institute considers that there needs to be an evolution in how New Zealand society uses technology if the benefits of upgraded infrastructure are to be realised, and that the focus should be on how to use new technology to improve areas like transport, health and education, rather than just entertainment.
15. Fourth, in any case, it is too early to consider the value of viewing content as a driver of uptake for UFB services. International studies support the view that in the early stages of UFB development, it is premature to focus on content as it is difficult to tell what services will in fact drive uptake. The February 2010 Canadian report referred to above states that "*[i]t is difficult to predict how... trends may evolve over time with any certainty. New technologies, consumer tastes, business demands and public policy will shape market directions; current trends could be accelerated, slowed, reversed or otherwise altered by the evolving communications landscape*". It also says that "*[i]t would be premature to pronounce on the potential for Internet-delivered content to... fragment audiences*".
16. In addition to these points, SKY suggests that the focus of the draft TOR on "barriers" is not appropriate. The focus on "barriers" to uptake of UFB services is a leading and limiting question because it can only result in one of two possible answers: either there are barriers or there are not.
17. The dangers in focussing on barriers include that the Commission's study will be too narrow in terms of the purpose of the Telecommunications Act, it will elicit opportunistic submissions to promote regulation of content (diverting attention away from telecommunication services), and it raises the potential that the Commission will consider matters not related to telecommunications markets or that relate to the Commission's functions under the Commerce Act 1986.

18. In light of these points, SKY considers that:
- (a) paragraph 3 of the draft TOR be amended to more accurately reflect the Government's economic objective and the role of the UFB services in achieving those objectives;
  - (b) reference to content arrangements be removed from paragraph 6(i)(b) of the draft TOR; and
  - (c) if the Commission wished to, the study could assess the likely level of UFB uptake and any effect that will have on the level of competition in relevant telecommunications markets. The Commission might also consider the flow-on benefits of such competition, including for the delivery of content services over UFB networks.

#### **Commerce Commission cannot consider broadcasting**

19. If the reference to content arrangements in the draft TOR is retained, however, SKY asks for there to be a specific acknowledgement in the draft TOR that the Commission cannot consider content arrangements that relate to broadcasting.
20. This is because broadcasting is specifically excluded from "telecommunications" under the Act. The Act defines "telecommunications" as "*the conveyance by electromagnetic means from one device to another of any encrypted or non-encrypted sign, signal, impulse, writing, image, sound, instruction, information, or intelligence of any nature, whether for the information of any person using the device or not*". The definition says that telecommunications "*does not include any conveyance that constitutes broadcasting*" (subject to one exception). The reason for this is that broadcasting is regulated separately under the Broadcasting Act and not by the Commerce Commission under the Telecommunications Act.
21. The Commission is relying on section 9A(1)(b) of the Act as the basis for the Study. That section allows the Commission to examine "*any matter relating to the telecommunications industry or the long-term benefits of end-users of telecommunications services*" [emphasis added]. Matters relating to broadcasting cannot be matters relating to "telecommunications" as defined. Although section 9A(1)(b) is drafted in broad language, SKY considers it should not be interpreted too broadly so as to allow the Commission to consider broadcasting matters, given the clear wording of the definition of telecommunications.
22. SKY also thinks that, because of the way "telecommunications" is defined, the Commission should take care to avoid reaching any conclusion under the Study that in essence is a recommendation for regulation of broadcasting services. Doing so would be inconsistent with the Commission's powers under section 9A(1)(b) and the scheme of the Act.

### **Non-regulatory nature of the study**

23. SKY is also concerned about the general approach that the Commission will take in the proposed demand side study, and that it will become a quasi-regulatory inquiry.
24. In particular, there is a danger that the Commission's conclusion in the study will have a quasi-regulatory effect. For example, if the Commission made a finding that content arrangements are a barrier to uptake of ultra-fast broadband this is likely to elicit a call for regulation by some parties and could lead to changes in behaviour by parties who are involved in those content arrangements, regardless of whether the Commission is right or wrong.
25. As the Commission is aware, there is already a process for imposing regulation set out in Schedule 3 of the Act, under which the Commission commences an investigation if it considers there are reasonable grounds, applies the purpose of the Act, etc. Crucially, this process includes making a recommendation to the Minister, who then decides whether or not to regulate particular telecommunication services. These processes have been established to ensure a fair, open and transparent process that also places constraints on the Commission both in terms of the criteria to be considered and the kinds of services that can be subject to a Schedule 3 inquiry. SKY would be concerned if the demand side study effectively became an alternative means of regulation, bypassing Schedule 3 of the Telecommunications Act.
26. SKY considers that more useful information may be gained by, as suggested above, focussing on the likely level of uptake and the effect on competition, rather than whether there are barriers to uptake. This more open inquiry would be consistent with the way the aims of the Commission's Next Generation Networks study were phrased (for example that the Commission would "*provide a strategic assessment of the likely impact of technological change on market structure and competition*").
27. SKY also asks that the non-regulatory nature of a study under section 9A be recognised and that the Commission be careful in the study not to make any findings that could have a regulatory effect.

### **Process issues - conferences**

28. SKY notes that the Commission's proposed process for the study, set out on page 2 of the draft TOR, includes an industry conference to discuss the issues identified in the discussion paper and to provide "*an opportunity for individual presentations*".
29. SKY submits to the Commission that it will need to think carefully about how that conference is conducted, in order to be fair to all parties. SKY submits that the Commission needs to avoid the situation where presenters use the conference to advocate on behalf of certain parties without identifying that interest and without giving other parties an adequate opportunity to respond to any issues raised. SKY

would appreciate the Commission making this clear when arranging any such conference. It will be important in the study that the Commission conducts its processes fairly and in an un-biased manner.

30. SKY hopes that its feedback on the draft TOR is of use to the Commission. It looks forward to engaging further with the Commission in relation to the Study.

Yours sincerely

A handwritten signature in black ink, appearing to read "John Fellet". The signature is written in a cursive style with a large, sweeping initial "J".

**John Fellet**  
Chief Executive Officer