COMMENTS ON SECTION 5 OF THE DRAFT ICT POLICY

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FAIR TRADING COMMISSION

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The following comments are submitted in conjunction with our comments of January, 2009, (which includes the practice in other jurisdictions) copy of which is enclosed as an attachment.

Section 5 of the Draft ICT Policy provides as follows:

The ICT Regulator is to have jurisdiction for ex ante matters such as non-access anti-competitive issues regarding change of ownership and control; ex ante competitive safeguards; terms and conditions of interconnection and other forms of access; and facility sharing.

On the other hand, the Competition Regulator is to retain jurisdiction for ex post matters which affect competition in the ICT sector. The Competition Regulator will notify and have regard to any recommendations made by the Competition Regulator.[1]

The Legislation will make provision for rules of procedure to govern the foregoing; The Inter Regulators Forum will be the mechanism for resolving any uncertainties of jurisdiction.

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[1] The reference to the Competition Regulator on both occasions in this section of the Draft Communications Policy document (see section 5.1 (c) (i) at page 22) seems to be an error.

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Inter Regulators Forum

An Inter Regulators Forum to settle jurisdictional issues assumes a body to settle such issues thereby avoiding recourse to the courts. It is unlikely that the decisions of such a body would escape being challenged before the courts unless the body and its decisions are expressly referred to in the amended legislation as final decisions not subject to review.

A preferred approach is that the amended legislation establishes a clear procedure for when and under what circumstances jurisdiction is to be assumed by the ICT Regulator or the Competition Regulator.

Section 5 of the Telecommunications Act, 2000 provides some basis on which this can be done. The section reads:

Where after consultation with the Fair Trading Commission the Office determines that a matter or any aspect thereof relating to the provision of specified services –

(a) is of substantial competitive significance to the provision of specified services; and

(b) falls within the functions of the Fair Trading Commission under the Fair Competition Act,

the Office shall refer the matter to the Fair Trading Commission.

Section 5 does not state whether the word 'determines' is a formal determination with a statement of reasons provided formally and in respect of which interested parties can make submissions to influence the outcome of the decision to refer the matter to the FTC or an informal determination with the only parties to the consultative process being the FTC and the OUR.

The prevailing practice favours the latter interpretation to avoid protracted delays in dispute settlement on jurisdictional issues before addressing the merits of competition claims. If section 5 is to be retained in the amended legislation, it is preferable that the latter interpretation employed in practice be stated unambiguously as the interpretation to be borne by the provision.

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EX ANTE MATTERS

Ex ante regulation refers to predetermined rules to examine anti-competitive conduct before the conduct occurs and, therefore, seeks to pre-empt anti-competitive conduct.

According to the Draft Telecommunications Policy *ex- ante* non-access anti-competitive issues regarding change of ownership and control are to be regulated by the ICT Regulator. This would presumably include a merger provision for review of proposed mergers of telecommunications service providers. If this is so, the ICT Regulator would require expertise in competition law to assess the competitive effects of a proposed merger unless the Competition Regulator is to be consulted in these matters and its recommendation taken into account in the decision of the ICT Regulator.

There is no express merger review provision in the Fair Competition Act, 1993 (FCA) and an *ex-ante* provision for change and ownership and control (that includes mergers) to be governed by the ICT Regulator would not necessarily pose a jurisdictional conflict. Section 17 of the FCA, however, covers agreements whose purpose or effect substantially lessens competition in a market and provides the FTC with a legal basis on which to examine mergers since the meaning of the term 'agreements' is sufficiently broad to cover 'any agreement'.[2] It is important to note that there is no express limitation as to the sectors in which this provision can be utilized.

The FTC's practice has not featured the examination of mergers to any significant extent particularly because there is no express merger notification provision as exists in other jurisdictions. However, section 29 of the FCA gives the FTC the power to grant authorizations for agreements that may be contrary to the FCA. In as much as the nature and scope of the provision can accommodate the examination of mergers, it is conceivable that sections 17 and 29 of the FCA could function together as merger review provisions. If this is so, an *ex-ante* provision (regarding change of ownership and control) in the amended legislation to govern the

[2] See section 2 of the FCA.

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telecommunications sector should be carefully drafted to exclude the operation of sections 17 and 29 of the FCA, if this is the preferred policy position.[3]

EX POST MATTERS

Ex-post regulation refers to rules that govern anti-competitive conduct after the alleged anti-competitive conduct has occurred.

The Draft Telecommunications Policy recommends that the Competition Regulator have jurisdiction for *ex-post* matters affecting competition in the ICT sector. Typically, this may cover matters such as conduct that amounts to collusion, an abuse of dominance, predatory pricing and agreements that lessen competition substantially in a market.

The *ex ante* competitive safeguards for which the ICT Regulator is to have jurisdiction should be carefully drafted to avoid confusion regarding jurisdictional issues that may arise for areas to be covered *by ex-ante* competitive safeguards.

For example, interconnection rates are to be governed by the ICT Regulator in accordance with an *ex-ante* competitive safeguard regime whereby interconnection rates are to be cost-oriented. The determination of a cost-oriented interconnection rate may provide for some discretion in the rate to be charged below the applicable cost oriented cap. Where this is the case, the question of anti-competitive discriminatory pricing may arise as between interconnection rates charged by one telecommunications service provider to other telecommunications service providers. There is no clear policy position on how such disputes are to be resolved with regard to the jurisdiction of the ICT Regulator or the Competition Regulator.

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[3] Sections 17 and 29 of the FCA do not limit the agreements or sectors to which the provisions can apply.

CONCLUSION

An Inter Regulators Forum may not resolve jurisdictional conflicts between the ICT Regulator and the Competition Regulator unless those decisions are made final and not subject to review. It is preferable if the amended legislation stipulates the procedure for sharing of jurisdiction between the ICT Regulator and the Competition Regulator.

With regard to *ex-ante* regulation covering non-access issues relating to ownership and control the amended legislation should ensure that jurisdictional conflicts do not arise with the possible application of sections 17 and 29 of the FCA which can together operate as merger review provisions.

With regard to *ex-post* regulation, there is no clear policy position for the settlement of jurisdictional issues for disputes concerning discriminatory interconnection pricing within a cost-oriented cap.

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