

**USE OF CAPACITY
UNDER INDEFEASIBLE RIGHT OF USE
FOR SUBMARINE CABLES
LANDED IN HONG KONG**

Statement of the Telecommunications Authority, Hong Kong

**Statement No. 1 on Issues Connected with the Implementation of
Competition in External Facilities Market**

8 May 2000

INTRODUCTION

On 5 May 1999, the Government announced the policy that, to progressively liberalise the external telecommunications facilities market and to encourage the provision of additional capacity for external connections to and from Hong Kong, the Government would issue licences for the operation with effect from 1 January 2000 of external telecommunications facilities based on submarine or land cables only to those who invest directly in bringing physical cable(s) to Hong Kong. With effect from 1 January 2000, the three Fixed Telecommunication Network Services (FTNS) licensees which entered the market in July 1995 were allowed to operate all forms of external telecommunications facilities as already reflected in their FTNS licences. As for those who have acquired capacity through the purchase of Indefeasible Rights of Use (IRU) of cables, the Government may consider applications from them for licences for the operation of external facilities with effect from 1 January 2003.

2. The Telecommunications Authority (TA) has in July 1999 invited proposals for the operation of external facilities under FTNS Licences. A new invitation was issued in April 2000. It was stated in the Guidance Note for the invitation that the proposals on external cable facilities should be based on bringing “new physical cables” to Hong Kong. The Guidance Note issued by the TA has defined what was

meant by “new physical cables” (paragraph 5.2 of the Guidance Note issued on 18 April 2000). The new FTNS Licences to be issued for submarine cable-based external facilities will become effective when the new submarine cable capacity proposed and accepted is brought into operation. Once the licences become effective and only from then, there would be no restrictions on the use of other cables for the provision of services under the licence (paragraph 5.8 of the Guidance Note issued on 18 April 2000).

USE OF CAPACITY UNDER IRU IN SUBMARINE CABLES

3. To encourage the use of all available capacity in submarine cables landed in Hong Kong, the TA considers that the owners of IRU in these cables should be allowed to use the capacity *through a licensed FTNS operator (FTNS Licensee) in Hong Kong*. Under the policy announced on 5 May 1999, such licensed FTNS operators include the four wireline-based FTNS Licensees which have authorisation to operate external facilities as from 1 January 2000, and any new submarine cable-based external FTNS Licensees when their licences become effective upon commissioning of their new submarine cables.

4. The modes of usage of the capacity through the FTNS Licensees include

- (a) Case 1: the termination of the capacity of the non-licensee IRU owners for the purpose of routing of traffic terminated in, or originated from, Hong Kong; and
- (b) Case 2: the termination of the capacity of the non-licensee IRU owners for the purpose of routing of traffic which is in transit through Hong Kong.

5. The TA considers that the usage in both cases given in paragraph 4 should be permitted subject to the entry into commercial agreements between the IRU owners and the FTNS Licensees.

LEGAL AND POLICY CONSIDERATIONS

6. The FTNS Licensees have been licensed to operate external telecommunications circuits between any termination point in Hong Kong (including cable termination facility) and one or more points outside Hong Kong, and any means of telecommunication capable of facilitating such circuits. The operation of an external circuit could take place in a scenario where an FTNS Licensee enters into commercial arrangements with a third party owning IRU on the submarine cables. The FTNS Licensee will be regarded, from the regulatory point of view, as establishing and maintaining in Hong Kong a means of telecommunication capable of facilitating the operation of an external circuit through the cable capacity owned by a third party. Under section 8 the Telecommunication Ordinance, the establishment or maintenance of a means of telecommunication is subject to licensing, but the ownership *per se* of the apparatus for telecommunication is not subject to this requirement. Accordingly, as a matter of law, the owner of the IRU, if it only owns the IRU in cables that land in Hong Kong but does not operate a means of telecommunication, is not subject to licensing under the Telecommunication Ordinance.

7. Thus where the owner of the IRU enters into a contract with an FTNS Licensee to terminate the cable capacity in Hong Kong, the FTNS Licensee *itself* would be treated as operating external circuits through the cabling capacity. In Case 1 of paragraph 4, the FTNS Licensee establishes external circuits between Hong Kong and another place outside Hong Kong. In Case 2 of paragraph 4, the FTNS Licensee establishes external circuits to more than one place outside Hong Kong and link the two circuits together in Hong Kong. The TA does not see the basis for such operation to be restricted.

8. In late 1999, the TA has consulted the four wireline-based FTNS Licensees on the above issue:

- Cable & Wireless HKT International Limited (CWHKTI, as the company operating the external facilities within the group holding the FTNS Licence)

- Hutchison Global Crossing Limited (then known as Hutchison Communications Limited, HCL)
- New T & T Hong Kong Limited (NT&T)
- New World Telephone Limited (NWT)

9. CWHKTI's position was that the co-location space and facilities or interconnection service may only be sold or resold to an FTNS operator which has been licensed to operate external facilities. CWHKTI cited the recent Court of Final Appeal (CFA)'s judgement in *Uniglobe Telecom (Far East) Limited v HKSAR* in which CFA took the view that it would be artificial to regard the "segments" that make up a means of telecommunication, which may be provided by different parties, as separable and distinct for the purpose of the strict liability that may arise under the Telecommunication Ordinance. CWHKTI's concern was to avoid the potential of being exposed to legal liability for knowingly facilitating the provision of a means of telecommunication by unlicensed third parties contrary to Telecommunication Ordinance.

10. The TA does not agree with this view. The CFA case is distinguishable from the scenario in question and should not be read out of the context of its particular facts. In the case cited by CWHKTI, the appellant was licensed under a Public Non-exclusive Telecommunications Service (PNETS) licence to operate a system which validated their subscribers' calls and enabled their outgoing international calls to be routed through the gateway operated by CWHKTI. The illegal act committed by the appellant was the maintaining of a means of telecommunication without a licence by entering into an arrangement with a company which operated an unlicensed means of telecommunication (the contractor) to bypass the gateway of CWHKTI otherwise than in accordance with its PNETS licence. Unlike the contractor in the *Uniglobe* case which operated an unlicensed means of telecommunication to bypass the gateway of CWHKTI that formed an integral segment of the means of telecommunication established by the appellant, in the scenario of landing IRU, the IRU owner is *not* operating any unlicensed means of telecommunication by virtue of its ownership of the IRU which land at the co-location facilities. Thus the entry into

the commercial arrangement with the IRU owner would not expose the FTNS Licensee to any legal liability arising from an “illegal” act of the IRU owner as that act has not arisen.

11. An analogy can be found in the case of the establishment and maintenance of external circuits through satellites. While the earth station in Hong Kong is operated by an FTNS Licensee in Hong Kong, typically the transponders on the satellites are not owned by the FTNS Licensees. The FTNS Licensee is regarded as establishing and maintaining the external circuits through the capacity provided by the transponders owned by others. There has never been any suggestion that the owners of the transponders should obtain a telecommunications licence in Hong Kong (with the exception of transponders on Hong Kong registered space object, for which the licensing is for the establishment and maintenance of a means of telecommunication on the satellite). There has also been no restriction on new FTNS Licensees to terminate only circuits established and maintained through transponder capacity owned by them.

12. CWHKTI considered that the restriction on sub-leasing is consistent with the regulatory framework and Government’s policy objective to encourage new investment in infrastructure by external facilities licensees. The TA does not agree with this view. Allowing third parties to terminate their capacity on the equipment of other licensed external facilities operators is in line with the Government policy announced on 5 May 1999 to progressively liberalise our external facilities market. The three new FTNS Licensees are allowed, as from 1 January 2000, to operate all forms of external telecommunications facilities. New cable-based external FTNS Licensees must invest directly to bring new submarine cables into Hong Kong. When their licences become effective upon commissioning of their new submarine cables, their licences will too allow them to use other submarine cables. IRU owners of submarine cables may come into commercial agreement with these licensed operators before they may apply for external FTNS licences for operation from 1 January 2003.

13. The TA views the arrangement as one of the FTNS Licensee supplying the external circuits to the IRU owners as a particular class of

customers. This class of customers has ownership of an element essential for the provision of the external circuits. The supply of the external circuits is regulated as a service under the relevant conditions under the FTNS Licence concerning provision of service and tariffs. Whether the FTNS Licensee provides such a service is a commercial decision of the Licensee. The TA is not in a position to direct the Licensee to provide the service under the FTNS Licence. As the IRU owners is not the operator of licensed systems within the meaning of section 36A of the Telecommunication Ordinance, the TA is not in a position to determine the terms and conditions of interconnection between the capacity under the IRU of the non-licensee owners and the facilities of the FTNS Licensees.

CONCLUSIONS

14. The TA considers FTNS Licensees, in operating the submarine-cable based external facilities under their licences, may enter into commercial agreements with the IRU owners who are not FTNS Licensees for the handling of traffic over the capacity under the IRU for the following purposes:

- (a) routing of traffic terminated in, or originated from, Hong Kong; and
- (b) routing of traffic which is in transit through Hong Kong.

15. The above is intended to clarify the implementation of the Government policy announced in May 1999. The TA considers that the implementation provides additional choices to users and encourage full use of capacity in submarine cables already landed in Hong Kong.

Office of the Telecommunications Authority

8 May 2000