

**Publication under Section 36A (5C) of
the Telecommunications Ordinance
of Interconnection Agreements Entered into with
PCCW-HKT Telephone Limited**

Statement of the Telecommunications Authority

18 October 2002

Background

The local fixed telecommunications network services (FTNS) market will be fully liberalized in January 2003. One of the important factors critical to the successful implementation of the full liberalization is that a transparent interconnection charging regime should be put in place so that interconnection arrangements or agreements between carriers can be reached expeditiously. This would facilitate the development of a level playing field for competition among market participants in the industry.

2. At present, terms and conditions of interconnection determined by the Telecommunications Authority (TA) under section 36A of the Telecommunications Ordinance (the Ordinance) are published by the TA. In addition, the TA undertakes regular reviews and publishes TA Statements regarding certain critical interconnection rates which are approved by the TA as tariffs of the dominant operator, such as the local access charge (LAC) for external telecommunications services, interconnection charge for mobile services and interconnection charge (also commonly known as “public non-exclusive telecommunications services (PNETS) charge”) for value-added telecommunications services.

3. With the forthcoming full liberalization of the local fixed telecommunications network services market, the TA intends to enhance the transparency of the interconnection arrangements by publishing the interconnection agreements entered into between the dominant operator and other operators, pursuant to section 36A(5C) of the Ordinance. The policy concern is that in the absence of such industry benchmark, commercial negotiations for similar types of interconnection

arrangements may take unduly longer time to complete and lead to possible delays in the interconnection of networks. Therefore, the TA considers that it is in the interest of the public to publish the most important groups of interconnection agreements (namely, agreements for Type I interconnection, Type II interconnection and interconnection to in-building blockwiring systems) entered into between PCCW-HKT Telephone Limited (PCCW-HKT), the dominant operator in the local FTNS market, and other operators. This will form the industry benchmark to facilitate interconnection agreements to be concluded on a timely, fair and non-discriminatory basis.

Representations from the Parties Concerned

4. Under section 36A(5C) of the Ordinance, the TA may publish all or any part of an interconnection agreement if he considers it is in the interest of the public to do so. Before the publication, the TA has to first give the parties concerned an opportunity to make representations on the TA's proposed publication. In February 2002, pursuant to the requirement of section 36A(5C), the TA wrote separately to PCCW-HKT and the operators who had entered into interconnection agreements with PCCW-HKT that he intended to publish the agreements concluded and invited them to make representations on which parts of the interconnection agreements should not be published.

5. PCCW-HKT and six operators submitted their representations within the time specified by the TA. The responses are summarized as follows:

Views in support of the publication

- ✧ Publication of interconnection agreements can ensure transparency, act as a deterrent for discriminatory treatment or anti-competitive conduct by the dominant operator, and provide industry benchmark. Furthermore, the publication is in line with the spirit enshrined in agreement on basic telecommunications services under the auspices of the World Trade Organization (WTO).

Views against the publication

- ✧ The interconnection agreements already concluded no longer represent industry standard. Further, terms and conditions of the interconnection agreements concluded during 1995-1999 were largely dictated by PCCW-HKT because at that time, other FTNS operators required immediate interconnection services from PCCW-HKT to provide service. Therefore, new interconnection agreements should be negotiated by taking into account the latest market developments, without the burden of historical documents.
- ✧ Disclosing interconnection agreements may infringe the confidentiality or non-disclosure provisions of the agreements and affect the legal rights and interests of the contracting parties. New operators will be able to obtain information regarding the plans and business strategies of existing operators, which is detrimental to the interests of existing FTNS operators and fair market competition.
- ✧ Publication of interconnection agreements with PCCW-HKT discriminates against operators who entered into interconnection agreement with PCCW-HKT because if they entered into interconnection agreements with other operators, the interconnection agreements are permitted to remain confidential between the two contracting parties.
- ✧ The absence of benchmark for interconnection agreements will not cause any delay in concluding new interconnection agreements because if the parties cannot agree within a reasonable time, either party can seek TA determination. On the other hand, if a negotiating party insists on quoting provisions from out-dated agreements and rejects new proposals by the counter-party, the negotiation will only be delayed.
- ✧ With PCCW-HKT's interconnection agreements fully published in the public domain, it will not be possible for both contracting parties to commercially negotiate on special terms and conditions unique to a particular operator. Price setting according to a benchmark instead of market forces will definitely lead to distortion in the interconnection market, which will ultimately affect the retail market.

- ✧ Unfairness and discrimination will not result merely because of the absence of benchmark for interconnection agreements. Under the current regulatory framework, there are already measures that serve to ensure that the dominant operator shall not discriminate against other operators.
- ✧ The Office of the Telecommunications Authority (OFTA) should introduce Reference Interconnection Offers (RIO) in Hong Kong because –
 - terms and conditions of RIO are more relevant and up-to-date than the existing interconnection agreements;
 - terms and conditions of RIO must be fair and equitable;
 - RIO can take care of the current and future needs and objectives of the Government and industry;
 - the greatest degree of transparency can be achieved by RIO.
- ✧ The most transparent and non-discriminatory approach is to adopt a tariffing approach for the terms and conditions of interconnection.

TA's Consideration

6. The TA has carefully considered the representations and sets out in paragraphs 7 – 28 below his responses to the views raised by the PCCW-HKT and other operators in connection to the publication of the interconnection agreements.

Publication of interconnection agreements ensures transparency

7. The TA agrees with the view that the publication of interconnection agreements can ensure transparency and it is in line with the regulatory principles set out in the Reference Paper, which have been enshrined in the obligations of the Hong Kong Special Administrative Region as a signatory to the agreement on basic telecommunications services under the auspices of the General Agreement on Trade in Services (GATS), WTO. The Reference Paper refers to the approaches for ensuring transparency of interconnection arrangements - making

publicly available the interconnection agreements of a “major supplier” (which essentially is synonymous with a “dominant” operator in the Hong Kong regulatory framework) or a RIO. In the absence of a RIO regime at this stage, publication of the interconnection agreements with the dominant operator would be in line with the principles in the Reference Paper.

Existing interconnection agreements cannot produce a meaningful benchmark

8. Some respondents have argued that the existing interconnection agreements entered into with the dominant operator no longer represent the industry standard. Therefore publishing the agreements would not benefit parties engaged in interconnection negotiations and it would only cause confusion. The TA does not subscribe to this opinion for two reasons.

9. First, by publishing all relevant interconnection agreements that have already been concluded in the past, the TA ensures that the industry operators will have a full picture of the evolution of agreements of the same types over time. The publication will make available to the negotiating parties information on the types of interconnection services and supporting facilities available, the technical terms and the commercial terms under the concluded agreements. The TA does not consider that all parts of the agreements are out of date and of no reference value. Without such references, negotiations would have to be conducted from scratch and unnecessarily lengthen the negotiation time. The negotiating parties can judge, based on their commercial considerations, which parts of the past agreements are appropriate as benchmark for the particular type of agreements.

10. Second, once the publication mechanism is established, new agreements may also be published following the procedure under section 36A(5C), and these new agreements will provide updated reference or benchmark for the industry. Without setting up the publication mechanism, the interconnection arrangements with the dominant operator will continue to remain opaque unless the arrangements are determined by the TA under section 36A.

Disclosure of confidential and sensitive information

11. The argument that disclosing interconnection agreements may infringe the confidentiality or non-disclosure provisions of the agreements and affect the legal rights and interests of the contracting parties does not stand. Such confidentiality or non-disclosure obligations should not apply to publication in pursuance of a requirement under the law as both parties are required to abide by the law. As mentioned earlier, section 36A(5C) provides that the TA may publish all or any part of an interconnection agreement if he considers it is in the interest of the public to do so. Prior to section 36A(5C) coming into effect, interconnection agreements were provided to the TA under General Condition 18 of the FTNS Licence which provides for a similar procedure for disclosure of the information supplied to the TA.

12. The TA takes the view that since publishing the interconnection agreements would enhance the transparency of the negotiation process between the dominant operator and others, deals would be made in a fair and expeditious manner. Under such circumstances, development of competition would be further facilitated and undue delay would be avoided. As a result, both the industry and the end users will benefit. Hence, the act of publishing the dominant operator's interconnection agreement is in the interest of the public.

13. Some respondents have taken the view that new operators will be able to obtain information regarding the plans and business strategies of existing operators, which is detrimental to the interests of existing FTNS operators and fair market competition.

14. Operators should note that they are participating in an industry in which transparency of the terms and conditions of the agreements with the dominant operator is expected. Having considered the concerns of the operators, in publishing the agreements, the TA will suppress the following information:

✧ the identities of the other operators; and

- ✧ information which is specific or proprietary to a particular operator and which is of no relevance to other operators.

For example, information on quantity or volume or locations to put price information into context will be published. However, such information that is of no relevance to other operators but merely shows the business plan of the contracting operator will be suppressed in publication.

Unfair playing field for operators

15. There is an argument that publication of interconnection agreements with PCCW-HKT only discriminates against operators who enter into interconnection agreements with PCCW-HKT because if these operators enter into interconnection agreements with other FTNS operators, those agreements would remain confidential between the two contracting parties. This argument can be refuted on the same basis as that given in the preceding paragraph. PCCW-HKT is the dominant operator and operators participate in the industry with knowledge that transparency of the terms and conditions of the agreements with the dominant operator is a legal requirement.

16. The suppression of the information referred to in paragraph 14 should have addressed the concerns of the operators.

Absence of benchmark will not cause delay in concluding interconnection agreements

17. The TA does not subscribe to the opinion that the absence of benchmark for interconnection agreements will not cause any delay in concluding new interconnection agreements because if the parties cannot agree within a reasonable time, either party can seek TA determination.

18. Regulator's intervention in an interconnection arrangement, no matter whether it is in the form of mediation, determination or direction is a time and resources consuming process and should be resorted to as the last option when commercial negotiation efforts fail. A reference or benchmark, established through publishing dominant carrier's interconnection agreements, definitely will facilitate earlier conclusion of

fair interconnection deals.

Unnecessary restrictions by the benchmark of interconnection agreements

19. The arguments that with the dominant operator's interconnection agreements fully published in the public domain, it will not be possible for both contracting parties to commercially negotiate on special terms and conditions unique to a particular operator, and price setting according to a benchmark instead of market force will definitely lead to distortion in the interconnection market, which will ultimately affect the retail market, are not sound.

20. As mentioned earlier, the agreements published will only help the industry to form a reference or benchmark, for instance on price, facilitating negotiation for quicker conclusion of interconnection agreements, but the reference would not hinder operators from concluding new agreements or agreements to suit specific situations, the terms and condition of which would reflect the latest market, regulatory, technology development or the particular requirements of the requesting operator.

Sufficient regulatory measures to ensure fair playing field

21. One respondent has opined that unfairness and discrimination will not result merely because of the absence of benchmark for interconnection agreements, and under the current regulatory framework, there are already measures that serve to ensure that the dominant operator shall not discriminate against other operators with anti-competitive purpose or effect.

22. The TA agrees that under the current regulatory framework, there are measures that prevent the dominant operator from discriminating against other operators with anti-competitive purpose or effect. However, the TA would like to emphasize once again that the purpose of publishing the dominant operator's interconnection agreements is to facilitate expeditious conclusion of interconnection agreements by making the existing interconnection agreements public and transparent to the industry especially in light of the forthcoming full liberalization of the

local fixed carrier service market to be effective from January 2003.

Alternative Suggestions

Reference Interconnection Offer (RIO)

23. There is a view expressed by respondent that OFTA should introduce Reference Interconnection Offer (RIO) in Hong Kong because –

- terms and conditions of RIO are more relevant and up-to-date than the existing interconnection agreements;
- terms and conditions of RIO must be fair and equitable;
- RIO can take care of the current and future needs and objectives of the Government and industry;
- greatest degree of transparency can be achieved by RIO.

24. A RIO is commonly known in the telecommunications industry as a means through which a dominant telecommunications operator makes known the charges, terms and conditions on which it is prepared to provide interconnection services upon request to another telecommunications operator who is eligible to have access to those services. The RIO is normally subject to the prior approval of the regulator.

25. The TA agrees with the view that the publication of RIO approved by the TA by the dominant operator is a better alternative to facilitate the conclusion of interconnection agreements promptly, efficiently and at reasonable costs based on the principles of transparency, cost-orientation and pro-competition. In fact in April 2002, the TA invited PCCW-HKT to consider offering interconnection service to the industry in the form of RIO, but it was rejected by the company, which considered that the tariffing approach would be more appropriate.

26. Given PCCW-HKT's reluctance of making RIO, it may take some time to put the regime of RIO in place. In view of the imminent full liberalization of the local fixed carrier services in less than three months, the TA considers that publishing the dominant operator's interconnection agreements is a feasible and appropriate way forward.

Tariffing Approach

27. The TA does not agree that the tariffing approach is a suitable way to achieve the objective stated in the preceding paragraphs.

28. There are three basic deficiencies of the tariff approach under existing licence conditions of PCCW-HKT's FTNS licence:

- ✧ Under the tariffing approach, the dominant operator decides which services would be provided under tariffs. Under the RIO approach, the dominant operator will have the obligation of submitting proposed RIO, for the TA's approval, for interconnection services specified by the TA.
- ✧ Under the tariffing approach, the criteria for approval of tariffs are restrictive and are not necessarily compatible with the TA's guidelines for determination of interconnection charges such as the cost-based principles.
- ✧ Under the tariffing approach, the TA may approve or reject tariff proposals only. The TA has no power to adjust the proposed tariffs to make it consistent with the TA's guidelines on interconnection.

Types of Interconnection Agreements to be Published

29. When the TA invited representation in February 2002 from PCCW-HKT and the operators who have interconnection agreements with the former, the TA proposed to publish three types of interconnection agreements, namely Type I, Type II and blockwiring interconnections.

30. The TA maintains his view that the above three types of interconnection agreements are the most important types of interconnection agreements which operators in the FTNS market are likely to seek conclusion with the dominant operator as early as possible.

31. However, the TA reserves his rights to publish other types of

interconnection agreements with the dominant operator if he finds it necessary and in the interest of the public to do

Conclusion

32. The TA is of the view that he has adequately considered and deliberated upon the concerns raised by the PCCW-HKT and operators who have entered into interconnection agreements with the former (section 36A(5C)(b) and (c) of the Ordinance) and concludes that it is in the interest of the public (section 36A(5C)(a) of the Ordinance) to publish interconnection agreements for Type I interconnection, Type II interconnection and interconnection with blockwiring systems entered into between the operators concerned and PCCW-HKT.

33. The TA considers that the publication of these interconnection agreements would serve as a useful benchmark for the industry, increase the transparency of the pricing and terms of these types of interconnection agreements, shorten the commercial negotiation time, provide more certainty for new entrants to the market, and prevent unfair discrimination by the dominant FTNS operator. At the end of the day, more speedy conclusion of reasonable interconnection deals will accelerate the development of telecommunications infrastructure and enable the general public to enjoy the benefit of the full liberalization of the local fixed network services.

34. The list of interconnection agreements subject to publication is given in the **Appendix** of this statement. The statement and the agreements are published accordingly on OFTA Web site with the information referred to in paragraph 14 suppressed. The information will from now on be available in a special section of the OFTA Web site under “Telecom Facts” and will be updated from time to time.

Office of the Telecommunications Authority

18 October 2002