

Implementation of *ex post* Regulation of the Tariffs of PCCW-HKT Telephone Limited under a New Fixed Carrier Licence

Statement of the Telecommunications Authority

13 January 2005

Implementation of *ex post* tariff regulation

1. Following consultation, the Telecommunications Authority (TA) has decided to implement *ex post* regulation of the tariffs of PCCW-HKT Telephone Limited (PCCW-HKTC) by means of a new Fixed Carrier (FC) licence to replace the company's existing Fixed Telecommunications Network Services (FTNS) licence.
2. Further to the submissions in response to the consultation, the TA has also decided that other existing FTNS or FC licensees will have the option of surrendering their existing licence, in exchange for an FC licence in substantially the same form as the one to be made available to PCCW-HKTC.

Legal basis

3. Under the Telecommunications (Carrier Licences) Regulation¹ (the Carrier Regulation), an existing FTNS or FC licensee is entitled to surrender its existing licence² in exchange for the TA issuing an FC licence³. General conditions (GC) for an FC licence are prescribed by the Secretary⁴ under the Carrier Regulation, but the TA is empowered to attach special conditions (SC) that are consistent with the Ordinance and not inconsistent with the prescribed general conditions⁵. In particular, the provisions for GC 17, 20-23 and 44⁶ of the original form of FTNS licence are not prescribed as general

¹ Came into effect on 1 April 2001

² Regulation 4(3) of the Carrier Regulation

³ Section 7(5) of the Telecommunications Ordinance (the Ordinance)

⁴ Section 7(2) of the Ordinance

⁵ Section 7A of the Ordinance

⁶ GC44 stipulates that if and when the TA forms the opinion that the licensee is not in a dominant position with respect to any market for telecommunications services provided under the licence, it may be directed that, for such period and on such conditions as TA determines, either one or any combination of GC 17, 20, 21, 22 and 23, either completely or as to particular obligations imposed thereunder, shall not apply to the licensee. GC 17 is related to the requirement for accounting separation and reporting in accordance with

conditions of an FC licence. Should an existing FTNS or FC licensee surrender its existing licence in exchange for a new FC licence, it is within the TA's statutory power to implement *ex post* regulation in lieu of *ex ante* by attaching the appropriate SC to the FC licence.

4. The implementation of *ex post* regulation on tariffs through a replacement of licence represents an important change to the existing licensing regime and may only take effect upon:

- (a) consultation of the public and affected parties pursuant to section 6C of the Ordinance, which has been satisfied by the consultation specified in paragraph 5 below; and
- (b) the consent of the subject licensee in surrendering its existing licence in exchange for a new FC licence.

The Consultation

5. On 8 October 2004, the TA issued a consultation paper⁷ to the affected parties on the proposal to move from *ex ante* to *ex post* regulation of PCCW-HKTC's tariffs via a new FC licence. By the end of the consultation period, ten submissions had been received. These submissions can be accessed at www.ofta.gov.hk. The TA's views on the specific comments made by each respondent are detailed in the **Appendix**.

6. Four of the submissions supported the implementation of *ex post* regulation on PCCW-HKTC's tariffs; two submissions objected to the proposal, while the remaining four did not object. The submissions in general recognised that market circumstances for the fixed telecommunications service segment in Hong Kong have changed significantly since *ex ante* tariff regulation was first implemented in 1995, including persistent market share erosion for the incumbent, the emergence of alternative products and the lowering of barriers to entry. There was no contrary assessment to the view in the consultation paper that in the current context, the *ex ante* tariff approval scheme no longer reflects international best practice.

7. The respondents also recognized that implementing *ex post* regulation via a

an Accounting Manual, while GC 20, 21, 22 and 23 are primarily related to the requirement for prior approval of tariffs by the TA and transparency of the licensee's tariffs.

⁷ *Moving from ex ante to ex post Regulation of the Tariffs of PCCW-HKT Telephone Limited and the Proposed Fixed Carrier Licence to be Issued to PCCW-HKT Telephone Limited*, Consultation Paper dated 8 October 2004 (the Consultation Paper).

new FC licence for PCCW-HKTC allows regulatory measures to be imposed on a proportionate rather than an ‘all-or-nothing’ basis, and that the alternative approach of an opinion concerning this particular licensee’s dominance could prejudice the overall *ex post* regime in the long term.

Terms and conditions of the new FC licence

8. The following subsections highlight the major changes to licence conditions between the new FC licence and the original FTNS licence held by PCCW-HKTC.

Ex ante tariff approval scheme is removed

9. GC 21, 22 and 23 of the original FTNS licence are deleted in the new FC licence, reflecting the migration from *ex ante* regulation towards *ex post*. In particular, the power to approve/disapprove tariffs or discounts before they become effective is removed, although the notification and publication requirements are enhanced.

Publication and notification requirements are modified

10. The requirement for seeking prior approval from the TA of discounts from published tariffs under GC 20(4) of the existing FTNS licence has been modified to one of notifying the TA of discounts only in SC 8 of the new FC licence entitled “Notification of Discounts”. The rest of GC 20 is modified into SC 7 of the new FC licence entitled “Publication of Tariffs”. The purpose of this separation is to clearly distinguish between the requirements of publication for consumer information (SC 7 and 8.3), and access to information by the TA (SC 8.1 – 8.2), in the regulation of competition.

11. Under SC 7 of the new FC licence, a licensee is now required to publish tariffs on its business website, which is a source of information more often accessed by ordinary consumers, in addition to the Government Gazette. The purpose is to modernize and facilitate information flow to consumers and assist their making of informed choices.

12. Under SC 8 of the new FC licence, a licensee is required to notify the TA of any discount to its published tariffs at least one day before the discount becomes

effective. Special Condition 8.5 now provides a definition of ‘discount’, making clear which special benefits to customers qualify for notification and those that do not. Refunds or rebates in relation to the licensee’s failure to meet service level or service quality obligations, and waivers of termination penalties are amongst the payments excluded from notification. New Schedule 5 of the FC licence describes the principal terms of a discount which must be furnished to the TA.

13. The TA also recognizes that, transparency around the actual prices being offered by the legacy incumbent operator may be justified for particular service segments and in particular circumstances. Accordingly, SC 8 gives the TA the discretion to make public a discount notified by the licensee, when the public interest justifies it. The ‘public interest’ will be construed in accordance with relevant law, and will encompass consumer, competition and government policy considerations. This does represent an expansion of the narrower ‘consumer interest’ test proposed in the Consultation Paper, and the change is intended to ensure balance in the application of the discretion. For instance, publishing information about the availability of discounts on residential fixed services may assist some less sophisticated consumers to take up the offer, while at the same time discouraging unfair pricing differences between customer groups.

14. A notice period of one day for publication of tariffs and notification of discounts is now imposed instead of 7 days, as initially suggested in the Consultation Paper. Some submissions proposed to lengthen the notice period, while others suggested shortening it, or turning it into a retrospective notice of 24 hours after a tariff or discount becomes effective. A number of the submissions supplemented the TA’s outline of international best practice in this area, with additional detailed information.

15. The TA would like to emphasise that the purpose of the notice period is to facilitate the TA’s access to information relevant to the *ex post* regime and to contribute to the transparency of actual market prices. The notification regime will not operate as a vetting process of the kind in the original *ex ante* regime. Thus the notice timeframe does not need to reflect the time necessary for the TA to complete a competition analysis and give a positive or negative signal about the notified prices. Accordingly, lengthening the advance period is simply not a relevant step. On the other hand, the notice period needs to provide a reasonable opportunity for the TA to consider possible publication having regard to the public interest. Accordingly, the TA does not consider it appropriate to have retrospective notification of discounts. On balance, and with reference to international best practice, the TA is satisfied that a one-day advance notice period for publication of tariffs and notification of discounts is the best way to achieve

the regulatory objective of an effective transition to *ex post* regulation.

Current cost information requirement is inserted

16. A new Schedule 4 is inserted into the new FC licence to stipulate the details of the accounting and cost information requirements that are relevant to the *ex post* regime under SC 6. The objective is to facilitate the information provision process to the TA and to avoid unnecessary delays. In particular, the requirement to furnish cost information that is sufficient to establish the long run average incremental cost (LRAIC) basis is in line with international best practice of current cost accounting (CCA) for regulatory purposes, and is crucial for the effectiveness of the possible *ex post* regulatory regime.

17. The wording of GC 17 of the original FTNS licence remains unchanged under SC 5 of the new FC licence. However, it is the TA's intention to initiate a separate consultation in due course on a possible new direction under SC 5 of the new FC licence to adopt a new accounting manual (AM). Possible changes to the AM include the requirement for CCA and the frequency for filing of accounting reports.

Test of dominance is removed

18. Part or whole of 20(4), 20(6), 41(1)(a), 44 and SC 1.3 of the original FTNS licence refers to a test of dominance within the meaning of GC 16(2) of the FTNS licence which is equivalent to section 7L(2) of the Ordinance. These conditions, or parts of them which refer to the test of dominance, are deleted in the new FC licence, reflecting the abandonment of the conventional approach to *ex post* regulation via positive finding of non-dominance that would prejudice the subsequent application of the competition provisions in the Ordinance.

19. As for GC 4(2), the original intention of this licence condition was to prevent any disruption of basic utility services provided by the legacy incumbent carrier in the event of any transfer of network assets. Accordingly, this provision is now included as SC 1.9 of the new FC licence under the universal service obligation (USO), such that it applies only to the universal service carrier assigned by the TA.

Redundant provisions to the Ordinance are removed

20. GC 15, 16, 19, and 31 of the original FTNS licence are redundant to the Ordinance because the corresponding provisions have now been incorporated into the Ordinance pursuant to the 2000 amendments. GC 20(3) and GC 20(5) are tariff provisions which are similarly found and covered in section 7F of the Ordinance. SC 2 and 4 are merely interpretations of GC 15, 16 and 31. These conditions are therefore deleted in the new FC licence.

Scope of services covered by *ex post* regulation

21. Under the draft FC licence in the Consultation Paper, *ex post* regulation applies generally to services supplied under the licence⁸, including business and residential direct exchange line (BDEL and RDEL) services, hunting lines, direct dialling-in (DDI) lines, local leased circuits (LLC), broadband conveyance services, international direct dialing (IDD), external bandwidth services (EBS), etc. A number of the submissions raised objections to the scope of the services covered by the *ex post* regulation, for two main reasons. First, because the TA did not conduct a separate and thorough market analysis on each individual service and second, it was alleged that the incumbent still held a dominant position in some of the markets for the services concerned.

22. The TA has considered these concerns raised in the submissions. He would like to re-iterate two important points from the Consultation Paper. First, it is not the international best practice to adopt the test of dominance as a pre-requisite for the implementation of *ex post* regulation⁹. Instead, the main consideration is whether the existing *ex ante* tariff approval scheme, under the current market circumstances, remains appropriate, proportionate and effective in facilitating competition. As of December 2004, the number of commercial buildings covered by customer access networks of the new FTNS or FC licensees has exceeded 1,600 (out of a total estimated to be about 3,700). Therefore the capability of the new operators to compete in the market for local bandwidth services has been much enhanced compared with the initial years of liberalisation. Second, the existing *ex ante* tariff approval scheme does not in fact address the problems with LLC services, i.e. the lack of coverage of the new operators in certain areas, and prices remain high as a result. The TA noted in the

⁸ Apart from those exempted under Schedule 6 and those interconnections that are subject to SC 3. See subsequent sections for details.

⁹ Footnote 20 and 21 of the Consultation Paper

Consultation Paper that the remedies applied by other regulators are mandatory access to ‘partial leased circuits’ and price control arrangements, but not *ex ante* tariff approval arrangements¹⁰.

23. The TA remains of the view that, on balance, it is in the public interest to move from the *ex ante* tariff approval requirement to *ex post* regulation for all services offered under the FC licence, subject to certain exceptions in relation to interconnection as explained in paragraphs 24-28, as well as exemptions as explained in paragraph 29. The TA recognises the concerns of the new operators about potential anti-competitive offers by PCCW-HKTC in relation to LLC services. These concerns are best addressed however by the TA closely monitoring the discounts filed by PCCW-HKTC with a view to prompt intervention against potential breaches of the fair competition provisions.

Interconnection

24. A number of submissions raised particular objection to the removal of the *ex ante* tariff approval scheme in relation to charges for interconnection of PCCW-HKTC’s network with their own. Essentially, the concern is that *ex post* regulation may disturb the *status quo* – the safeguard against anti-competitive interconnection charges under tariffs through the *ex ante* approval procedures. Accordingly, the TA has decided to amend SC 3 of the new FC licence as to the “requirements for interconnection”. The sole purpose of this change is to maintain the *status quo* and articulate it in a way that clearly distinguishes between two separate regimes – the tariff regime pursuant to section 7F of the Ordinance, and the interconnection regime pursuant to section 36A of the Ordinance.

25. The TA would like to draw the respondents’ attention to the following facts about the *status quo*:

- There are three ways to establish the terms and conditions for an interconnection. The first is by bilateral agreement as a result of commercial negotiation. The second is by TA determination pursuant to section 36A of the Ordinance, should commercial negotiation fail or on the TA’s own initiative in the public interest. The third is by the licensee establishing a tariff which is open for all parties seeking to interconnect.
- Subject to compliance with the fair competition provisions sections 7K, 7L and 7N, there is no mandatory obligation for a licensee to establish a tariff for

¹⁰ Paragraph 53 of the Consultation Paper

an interconnection. For those interconnections that are determined by the TA, there is no need to establish a tariff because the determined terms and conditions are already binding. For those interconnections that are commercially negotiated, a licensee can choose to engage in bilateral agreements with each individual party seeking to interconnect, in which case no tariff is necessary because the terms and conditions have been commercially accepted by the interconnecting parties. Unless a tariff is established, the interconnection falls outside the scope of the tariff regime (no matter *ex ante* or *ex post*).

- Where a licensee establishes a tariff for an interconnection, there is no ground for the TA to disapprove it under *ex ante* regulation unless it is in contravention with the competition provisions under the Ordinance. In particular, if no anti-competitive purpose or effect can be established, that the tariffed charge is not based on the relevant reasonable cost attributable to interconnection is not a ground for disapproving a proposed tariff for an interconnection.
- The *ex ante* tariff approval scheme is a negative vetting process only. The pre-approval step alone does not compel a licensee to offer interconnection under tariffs, let alone at particular terms and conditions. It is only under section 36B(1)(a)(iii) that the TA is empowered to positively direct a licensee to interconnect, and section 36A of the Ordinance that the TA is empowered to positively determine the specific terms and conditions of interconnection. In addition, a licensee has to comply with sections 7K, 7L and 7N in deciding whether to offer interconnection under tariffs. These powers are separate from the tariff regime, and will not change whether tariffs are regulated *ex ante* or *ex post*.

26. It should be clear from this description of the *status quo* that the *ex ante* tariff approval scheme, in itself, does not ensure that new interconnections in the future would be subject to the prior approval requirement. The ultimate safeguards are in the fair competition provisions sections 7K, 7L and 7N, the determination of the terms and conditions of interconnection by the TA under section 36A and the direction to interconnect under section 36B of the Ordinance. Nevertheless, the TA recognises the concerns expressed by the respondents with regard to certain existing interconnections (e.g. the mobile/fixed interconnection, interconnection for value-added services, etc.) provided under tariffs and relied upon by other network operators and service providers in the market. The TA has therefore incorporated SC 3.4 into the new FC Licence to

preserve the *status quo* for these existing services.

27. Under the revised SC 3 of the new FC licence, sub-paragraphs 3.1-3.3 reflect the existing provisions under the original FTNS licence. SC 3.4 preserves the *ex ante* approval requirements, should there be any amendment to any published tariff for interconnection which was in force at 1 December 2004 and continues to be in force, including those interconnections listed in Schedule 7. Overall, SC 3 is consistent with the *status quo*. It does not expand or prejudice the TA's existing powers in relation to interconnection matters.

28. Interconnection requirements which arise after 1 December 2004 will be in relation to new networks or products not yet in operation, but in respect of which existing operators will have had fair opportunity to develop competing products. As such, it would be inappropriate to apply *ex ante* tariff regulation over any such new interconnection. For new interconnection tariffs, SC 7 and 8 will apply. The safeguards under the fair competition provisions, section 36A and section 36B of the Ordinance will continue to be available in relation to all new interconnections.

Exemption from *ex post* regulation

29. A new Schedule 6 is inserted to the new FC licence, listing out those services provided under the licence that are exempt from *ex post* regulation, particularly the publication and notification requirements. For an existing FTNS/FC licensee, this 'negative' list will initially comprise those services provided under the existing licence that have been found non-dominant by the TA in the past, reflecting the absence of competition concerns. For new licences to be issued in the future, the list will be evaluated on a case by case basis. The TA may from time to time amend Schedule 6 of any licensee at his discretion. New services introduced by a licensee will not be listed on Schedule 6 unless and until the TA is satisfied otherwise. In exercising the discretion on Schedule 6, the TA will give due regard to the public interest within the meaning of the Ordinance.

Trial services

30. The new FC licence no longer includes an explicit provision for trial services. Under the previous *ex ante* regime, the TA may approve a trial service to be provided for a limited period of 6 months maximum without having the licensee to publish a

tariff for the service. This no longer applies under the *ex post* regime, given that the prior approval scheme will no longer exist. The TA appreciates the need to keep commercial confidentiality on innovative services during the trial period. The following arrangements should address this need:

- if a trial service represents a variation from the terms and conditions of an existing tariffed service, the trial service should be notified to the TA in the form of a discount under SC 8; and
- if a trial service represents a brand-new product which is not related to any existing tariffed service, the licensee should seek a permit to be issued by the TA pursuant to section 7E of Ordinance to conduct the trial¹¹.

Way forward

31. The TA will initiate a consultation to affected parties on the new AM to be directed under the new FC licence in due course. In the meantime, any licensee wishing to surrender its existing FTNS/FC licence in exchange for a new FC licence, including but not limited to PCCW-HKTC, should submit a written request to the TA.

32. The TA is still processing the two applications made by PCCW-HKTC for declaration of non-dominance in the markets for BDEL and RDEL services. No opinion has been reached on any of the applications. However, if PCCW-HKTC opts to exchange its existing FTNS licence for a new FC licence, the two applications would be deemed withdrawn, because the basis upon which the two applications were made, namely GC 44 of the existing FTNS licence, would no longer exist in the new FC licence.

Office of the Telecommunications Authority

13 January 2005

¹¹ SC 7.1 of the new FC licence requires publication of tariffs for the services operated under the licence. As such, the provision of a trial service without publishing a tariff falls outside the licensing regime, and for this reason a permit must be sought from the TA for conducting the trial. Otherwise, the trial would be prohibited under section 8 of the Ordinance.

Views of the TA on the submissions

I. China Resources Peoples Telephony Company Limited (Peoples)

	Comments made	The TA's view
A.1	Peoples does not intend to make comments on the legal technicality of the regulatory control over PCCW-HKTC.	Noted.
A.2	The mobile network is unable to choose its preferred "service provider" of interconnection and is always obliged to pay for the bilateral traffic. Competition in this area does not play a role.	Noted.
A.3	The level of interconnection charges of PCCW-HKT, being the dominant fixed network operator, is now set as standard tariff approved by the OFTA.	Although the tariff approved by the TA is binding for PCCW-HKTC, the tariff approval step alone does not compel a licensee to establish a tariff. See paragraph 25 (sub-bullet 4).
A.4	If the interconnection services of PCCW-HKT are included in the new <i>ex post</i> regulatory control, the industry benchmark will disappear.	The tariff was established by PCCW-HKTC on a commercial basis, not by regulation. In any case, the TA has decided to preserve the <i>status quo</i> on interconnection. See paragraphs 26 and 27.
A.5	With nine fixed network operators and six mobile network operators in the market, it may result in a condition that OFTA will have to face a flood of requests for Section 36A Determinations on bilateral interconnection.	Interconnection terms determined by the TA will serve as an industry benchmark. It is not the intention of section 36A of the Ordinance to conduct separate determinations for every pair of interconnecting parties. For example, only one determination was made for local access charge (LAC) between nine fixed network operators and hundreds of the external telecommunications services (ETS) operators.

A.6	Peoples proposes that, while the fixed / mobile interconnection charges remain asymmetrical, the regulatory control on PCCW-HKT for these services should remain <i>ex ante</i> .	The TA has decided to preserve the <i>status quo</i> on fixed-mobile interconnection. See paragraphs 26 and 27.
A.7	Peoples believes that the fixed/mobile interconnection charge regulated for PCCW-HKT should set a ceiling for the whole industry.	Although the benchmarking effect of PCCW-HKTC's tariff has been apparent, the interconnection terms of other fixed operators were established upon commercial considerations. There is no 'price cap' under <i>ex ante</i> regulation on PCCW-HKTC's tariff, or others licensees'.
A.8	Peoples believes that the review of interconnection principles and charging between fixed and mobile carriers should be carried out with the utmost urgency.	The TA has separately received this request for review and has agreed to deal with the request outside this exercise.

II. Hong Kong Broadband Network Limited (HKBN)

	Comments made	The TA's view
A.9	HKBN considers that it would be premature for the TA to consider the issue for moving from <i>ex ante</i> to <i>ex post</i> regulations of the tariffs of PCCW... until there is a full overview of the market undertaken by TA after the full withdrawal of the Type II Interconnection Policy by 30 June, 2008.	The new Type II interconnection policy was based on, amongst others, a prudent and thorough analysis on the barriers to entry to the local fixed network market. The decision to withdraw Type II interconnection in a phased manner was based on the technical and economic feasibility to roll out alternative customer access networks to 75-80% of households. By 2008, broadband wireless access technology is also expected to facilitate access to the majority of the remaining 20-25% of households. Thus the barriers to entry are not expected to rise as a result of the new policy. There is no need to wait until a market review in 2008 before the TA decides to implement <i>ex post</i> regulation.
A.10	We noted the difficulties for the TA under the <i>ex ante</i> regulations, in having insufficient costing information... Having said that, this should be no ground that the <i>ex ante</i> regulation should then be scrapped and be replaced by an <i>ex post</i> regulation regime... without further justifications.	Insufficient costing information is not a reason why the TA replaces <i>ex ante</i> regulation with <i>ex post</i> . Instead, availability of adequate costing information is a necessary feature for proper implementation of <i>ex post</i> regulation.
A.11	It is undeniable that PCCW still wield power in the BDEL and RDEL markets with its strong hold of over 70% of market shares.	First, the market share figures quoted by HKBN are inconsistent with the confidential figures collected by the TA. Second, market share is only one factor for the analysis of market power. Third, it is not the international best practice to adopt the test of market power as a prerequisite for implementing <i>ex post</i> regulation. See also paragraph 32.

A.12	It has yet to come a time when mobile phone and/or VoIP services would, from the perspective of the general public, truly become a “substitute” of these household and offices utilities. Until then, it is probably speaking too soon that the relative significance of the traditional fixed telephony services is in decline.	The TA has not taken a view whether at this point of time, mobile phone and/or VoIP services are ‘substitutes’ of BDEL and RDEL services. Going forward, as and when the TA is required to form a view on market definition, the widely accepted approach under competition law over the appropriate period will be adopted.
A.13	The UK liberalisation process has started some 20 years ago... The process of deregulation since that time has been a gradual one.	The time taken for the liberalisation process in UK is not necessarily a good reference for Hong Kong because the pace of competition development is very different in the two places.
A.14	British Telecom (BT) still has to obtain prior approval for reduction of certain retail prices and furthermore, in the wholesale level, BT must obtain prior approval of any change of pricing for certain services.	In November 2003, Ofcom found BT to have SMP in the fixed narrowband retail services markets, but the remedies imposed did not include prior approval of tariffs. There is a ‘price cap’ regulation on retail tariffs, and a ‘retail-minus’ regulation on wholesale tariffs, both of which are <i>ex post</i> .
A.15	HKBN would refer to the 2 responses made in respect of the 2 consultation papers on the two non-dominance applications made by PCCW for BDEL and RDEL services that PCCW still controls over most of the essential facilities and network resources throughout Hong Kong.	Non-dominance is not a necessary condition for implementing <i>ex post</i> regulation. In any case, HKBN’s claims are inconsistent with the Government’s analysis on barriers to entry in the formulation of the new Type II interconnection policy.
A.16	With reference to OFTA’s recent study report of the LLC market, 10 out of 13 major companies procured over 70% of LLC from PCCW.	As pointed out in the Consultation Paper, the current problem in the LLC market is excessive prices. The <i>ex ante</i> approval scheme is no answer to this problem. See paragraph 22.

A.17	PCCW has consistently engaged in tying practices with respect to their DEL and broadband services to lock in customers. In cases where existing customers desire to migrate its DEL services to a competing carrier, PCCW can easily threaten to remove the benefits/savings of broadband services unless the customers change their minds.	Bundling is an initiative for product differentiation which is not prohibited <i>per se</i> . PCCW's competitors are able to offer similar bundled products. The effect of bundling conduct on competition can only be properly dealt with under competition law provisions (i.e. <i>ex post</i> regulation) rather than the <i>ex ante</i> tariff approval scheme.
A.18	If the TA thinks the market is competitive enough, HKBN believes that it is because of the existing <i>ex ante</i> regulatory regime, which helps to control the tariffs of PCCW.	The <i>ex ante</i> tariff approval scheme has served its purposes during the developing stage of competition. Taking a forward-looking stance, it is no longer proportionate.
A.19	The change from <i>ex ante</i> to <i>ex post</i> shall mean there is no longer any presumption of dominance or non-dominance for PCCW. TA must bear the burden of proof on a case-specific basis that the licensee is dominant before establishing whether a specific conduct is abusive... TA has not stated out any detailed guidance... regulatory uncertainty may induce over-litigation.	Guidance in relation to dominance, as well as presumption of dominance, is found in the <i>Competition Guidelines</i> issued in 1995. The implementation of <i>ex post</i> regulation does not change the legal threshold for establishing dominance for the purpose of abusive conduct.
A.20	HKBN is concerned that the removal of existing <i>ex ante</i> obligations on PCCW will place great burden of proof unfairly on competitors, rather than on PCCW.	Under <i>ex post</i> regulation, the burden of proof resides with the TA (with investigation powers) rather than with the complainant. Even under <i>ex ante</i> regulation, the burden of proof for disapproving a tariff has always been on the TA rather than PCCW-HKTC.
A.21	TA also needs to provide more information on the necessary framework, mechanism or procedures how they shall approach investigating all these cases.	Noted. The <i>Competition Guidelines</i> issued in 1995 does contain guidance on the procedures for an investigation. This set of guidelines will be reviewed in due course.

A.22	Given Hong Kong does not currently have a complete/comprehensive set of <i>ex post</i> competition law like our foreign counterparts, we would oblige TA to explain more on the sufficiency of the current <i>ex post</i> regulation, so far as the abuse of dominance is concerned.	The Ordinance has jurisdiction over all telecommunications licensees, and the set of <i>ex post</i> competition provisions under the Ordinance is sufficient, complete and comprehensive.
A.23	Despite that the wordings of GC 15, 16, 19, 20(3) & (5) and 31 do have similar provisions in the Ordinance, there are still differences in some of these wordings of the provisions.	So far as GC 15, 16, 19, 20(3) & (5) and 31 are concerned, it is not the TA's intention to impose additional or contradictory obligations to the Ordinance. These conditions appear in the original form of FTNS licence in 1995 merely because the Ordinance (as amended in 2000) was not enacted when the existing FTNS licences were issued.
A.24	HKBN does not see how TA has come to a conclusion that GC 4(2), 20(6), 4(1)(a), 44 and SC 1.3 which generally refer a test of dominance, is "equivalent" to section 7L(2) of the Ordinance and therefore proposed that they be all deleted.	It is the TA's intention to remove the test of dominance for <i>ex ante</i> purposes in the new FC licence. Matters related to dominance should be properly dealt with by the <i>ex post</i> provisions under the Ordinance.
A.25	TA has failed to mention details or any guiding principles or guidelines on what they shall consider as "to protect consumer interests", otherwise it becomes arbitrary in whether or not they shall publish these notifications of discounts.	See paragraph 13.
A.26	We do not see on what basis TA has determined such 7 days notice and why this notice requirement is just limited to the initial stage of implementation.	The notification requirement is particularly necessary during the initial stage of implementation, but is not necessarily limited to the initial stage. See also paragraph 15.

A.27	We would doubt the efficiency of the <i>ex post</i> regulation in enforcing against the abuse of dominance after the relevant acts.	<p>The TA's access to information for investigation purposes under <i>ex post</i> regulation is improved when compared with <i>ex ante</i> regulation. See paragraph 16.</p> <p>As regards the efficiency of <i>ex post</i> regulation vis-à-vis <i>ex ante</i>, it should be noted that <i>ex post</i> enforcement is the norm for all economic sectors in jurisdictions where there is general competition law. As always, it is the duty of the TA to enforce the law, including fair competition provisions, diligently.</p>
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III. Hong Kong Cable Television Limited (HKCTV)

	Comments made	The TA's view
A.28	Given that PCCW is still in a dominant position, there should not be any change to the existing <i>ex ante</i> regulatory framework and the TA should not issue the proposed Fixed Carrier Licence to PCCW.	It is not the international best practice to adopt the test of dominance as a prerequisite for implementing <i>ex post</i> regulation. See also paragraph 32.

IV. Hong Kong CSL Limited (CSL)

	Comments made	The TA's view
A.29	It appears that OFTA's proposal is to replace PCCW's licence, impose special conditions on PCCW and not change any of the existing arrangements with respect to PCCW's dominant status in the residential and fixed line market. CSL is not opposed to this concept.	Noted. However, there will be no presumption of dominance or non-dominance under the new FC licence.
A.30	Any contemplation of structural change should preserve in entirety <i>ex ante</i> regulation for all other PCCW services until appropriate action is taken. In particular, CSL opposes any relaxation of <i>ex ante</i> regulation of interconnection charges without proper consultation.	The TA has decided to preserve the <i>status quo</i> on fixed-mobile interconnection. See paragraphs 26 and 27.
A.31	CSL urges the TA to proceed with the review of the principles and methodologies for fixed-mobile interconnection charges as soon as possible.	See A.8.
A.32	CSL would expect the TA to explain... how any modified fixed carrier accounting manual would compare with the finalised accounting manual applicable to the carrier mobile licensees.	The accounting manual for mobile carrier licences serves different purposes from that of fixed carrier licences, particularly in respect of provisions under SC 12 and 13 of mobile carrier licences.

V. Hutchison Global Communications Limited (HGC)

	Comments made	The TA's view
A.33	HGC concurs in general with the idea that regulation has to be in line with the underlying market condition. In light of intensifying competition in the Hong Kong FTNS market, we understand the rationale for reforming the existing tariff regulations applicable to PCCW-HKT, which was formulated a decade ago.	Noted.
A.34	SC 8.3 of the proposed FC licence allows the TA to publish any discounts of PCCW-HKT for the sake of protecting consumer interest. We recommend that within at least the first year after the initial relaxation of tariff regulation, the TA should require PCCW-HKT to publish on its company website all discounts offered to customers... Such publication allows easier identification of any potential abuse of market power.	Notification of all discounts to the TA would suffice for the purpose of identifying potential anti-competitive conduct. The intention for publishing discounts is only for protection of public interest. As such, the public interest test is inserted into SC 8.3 as a qualifying condition for publication of discounts.
A.35	If the TA is minded to reform the existing regime from an <i>ex ante</i> to an <i>ex post</i> manner, he should also modify all existing FTNS licences and FC licences to remove any presumption of dominance which may be applicable, so that all licensees would be regulated under a uniform framework.	Noted. Each existing FTNS/FC licensee is entitled to exchange its existing licence for a new FC licence. See paragraph 2.

VI. New World Telecommunications Limited (NWT)

	Comments made	The TA's view
A.36	NWT has no objection to the proposal to move to <i>ex post</i> regulation of PCCW-HKTC's tariffs for fixed line telephony services... NWT agrees that regulation of the market should be 'proportionate' to the market conditions, and that adjustment from <i>ex ante</i> to <i>ex post</i> tariff regulation may be justified.	Noted.
A.37	NWT considers that for trial purposes, the scope of the <i>ex post</i> tariff regime change should strictly be limited to fixed line telephony (BDEL and RDEL) services... In the absence of thorough examination and scrutiny of the competitive development of markets other than BDEL and RDEL, it would be ill-advised to consider modification to the prevailing tariff regulatory regime for such other markets.	The TA has decided to preserve the <i>status quo</i> on interconnection. See paragraphs 26 and 27.
A.38	If PCCW-HKTC's discounts on retail services are not published, then PCCWHKTC will have the ability and opportunity to discriminate in offering the discounts to the public.	Price discrimination is a common marketing behaviour which is not prohibited <i>per se</i> . Only anti-competitive price discrimination is prohibited. In any case, discounts will be published when public interest justifies it.
A.39	Without publication of PCCW-HKTC's discounts, NWT is concerned that PCCW-HKTC will target the customers of its competitors rather than its existing customer base, by specifically targeting particular customer segments or locations by targeted advertising and sales promotion, and will fail to conduct general promotion of discounts to the wider public.	See A.34.

A.40	NWT does not believe that there are any major drawbacks to publication of PCCW-HKTC's discount tariffs. Possible reservations about publication, such as potential price collusion or price following, are unproved in Hong Kong.	It is commonly accepted amongst competition authorities in other jurisdictions that excessive price transparency can induce collusion. Accordingly, public interest must be considered when requiring publication of discounts.
A.41	NWT considers that existing mode of publication requirements for retail pricing, by publication in the Government Gazette, are insufficient. In our view, PCCW-HKTC should be required to publish a full price list and separate discount list on its corporate website and in city newspapers.	Under the new FC licence, the licensee will be required to publish tariffs on its website. As for newspapers, it would be excessively onerous given the cost implications.
A.42	It seems that many overseas national regulatory operators require publication of tariffs in national newspapers, or sometimes more specifically to each individual customer.	According to the table submitted by NWT (prepared by Oftel in 2001), only 3 out of 13 countries specifically require publication of prices in newspapers. Also, internet access has further developed since 2001. As for notification to individual customers, it would be excessively onerous given the cost implications.
A.43	NWT considers that PCCW-HKTC's interconnection prices are of special interest to the telecommunications market and should continue to be published.	If PCCW-HKTC establishes a tariff for interconnection, then it must be published under SC 7. The TA is also empowered to publish an interconnection agreement (i.e. not tariffed) under section 36A(5C) of the Ordinance.

VII. PCCW-HKT Telephone Limited (PCCW)

	Comments made	The TA's view
A.44	PCCW welcomes the move to <i>ex post</i> regulation if such a regime can be appropriately fashioned. Certainly the move to <i>ex post</i> regulation is consistent with the current developed state of competition, is proportionate and is consistent with current international best practice.	Noted.
A.45	PCCW strongly believes that the developed state of competition clearly warrants a finding of non-dominance in relation to the pending RDEL and BDEL applications.	See paragraph 32.
A.46	The TA has, in the past, rightly emphasised that the purpose of regulation is not to protect competitors, but to protect the competitive process for the ultimate benefit of consumers...these consumer benefits cannot be maximised until PCCW is allowed to fully compete on a level playing field.	Noted. In any case, the TA will continue to curb any anti-competitive conduct under <i>ex post</i> regulation.
A.47	Sections 7K, L and N greatly increase the ability of the TA to address and quickly curb anti-competitive behaviour. In addition the increased information reporting regime mandated by OFTA enhances the ability of the TA to assess whether competition is likely to be prevented or substantially restricted by particular conduct.	Noted. Section 7K, L and N have been in place under <i>ex ante</i> regulation and will remain unchanged under <i>ex post</i> regulation.
A.48	Were the TA to rely upon a presumption of dominance, then the decision [for disapproving a tariff] would be legally flawed.	It is outside the scope of this statement to consider whether a licensee is dominant or not under its existing FTNS licence. However, presumption of dominance or non-dominance will no longer apply to the <i>ex post</i> regime under the new FC licence.

A.49	International regulatory practices in relation to retail pricing are not as interventionist as those in Hong Kong... Where there are interventionist regulatory practices, the focus is on controlling excessive price increases by incumbents through price cap controls rather than on preventing price decreases through setting price floors... and in those limited situations where there is a requirement to file or seek approval for price decreases, international best practice is for one day's notice after prices come into effect (in the UK). Second best is for one day's notice prior to coming into effect (an increasing tendency in the US). Both are significantly shorter periods than the 7 days proposed in the Consultation Paper.	Noted. The TA has decided that the advance period for notification should be one day. See paragraph 15.
A.50	PCCW generally finds the proposed Fixed Carrier Licence to be well drafted and acceptable.	Noted.
A.51	PCCW agrees with OFTA that GC 15, 16, 19 and 31 of PCCW's licence are redundant... Similarly, as GC 20 (3) and GC 20 (5) are incorporated in Section 7F, they too are redundant as are Special conditions (SC)2 and 4 (that amplify the meaning of the deleted GCs).	Noted.
A.52	PCCW agrees that it is appropriate to move GC 4 (2) under the special conditions to reflect that that subsection's appropriate focus is on network continuity rather than any broader issues tied to licensee ownership.	Noted.

A.53	The ability of the regulator to vigorously investigate complaints is crucial to the success of any new <i>ex post</i> regime. Therefore, PCCW accepts that the continued provision of accounting information to regulators will be an important tool if PCCW's conduct is ever investigated. PCCW will continue working with the TA to develop mechanisms to facilitate the provision of costing information required under Schedule 4.	Noted.
A.54	PCCW welcomes the proposal by the TA to only furnish information pursuant to Special Condition 6 and/or Section 7I of the Ordinance, to ensure compliance with the provisions of the Ordinance, licence conditions or for other regulatory purposes.	It is the TA's intention to initiate a separate industry consultation for a review of the AM, including a review of the periodic filing requirements. However, the TA will keep an open mind and has no preconceived view whether the accounting manual should indeed be modified or not. See paragraph 17.
A.55	PCCW welcomes the decision to remove GC 20(4) and GC 20(5) from the licence, and replace those provisions with the new SC 7, SC 8 and Schedule 5... PCCW supports the TA's proposal to delete the formal requirements in GC 21, GC 22 and GC 23 of the licence.	Noted.
A.56	Special Condition 1.6 generally reproduces old GC 4(2) that specifically dealt with the fixed telecom network assets of a dominant licensee. In an <i>ex post</i> regime it may be more appropriate to limit this section to the network assets which are used to provide the <i>ex post</i> listed services found in Schedule 6 as referenced in SC 8.1.	It is difficult to break down a telecommunications network along the dimension of services provided by the licensee. As such, the network referred to in SC 1.9 must apply at the licensee's level.

A.57	Mandating directory information services may be obsolete given the plethora of alternative directory and like services.	It is outside the scope of this statement to deal with issues related to the universal service regime. In any case, the scope of basic services under the universal service regime is defined by the Ordinance. The TA will consider a separate consultation on SC 10.4 of the new FC licence in relation to charges for directory services.
A.58	SC 7 and 8 inadvertently subjects PCCW's currently non-dominant services to substantially greater regulation than they have today.	Noted. See paragraph 29.
A.59	SC 8.3 provides the TA with the discretion to publish any discount if the Authority considers it necessary to protect consumer interests. PCCW would respectfully request that the TA use this power selectively and cautiously.	Noted. See paragraph 13.
A.60	PCCW, as a supporter of consumer education, would suggest that discounts published by the TA be limited to circumstances where the TA has transparently identified a market segment that, for consumer reasons, is not contestable and that publication of a specific discount may be particularly useful to vulnerable consumers.	See paragraph 13.
A.61	Allowance needs to be made in the new licence for the launch of trial services so that PCCW is not required to notify or publish innovative new products that competitors may otherwise be able to mirror prior to these products being launched.	See paragraph 30.
A.62	The import of this <i>ex post</i> consultation will impact on other services and, in line with best practice, the appropriate regulatory considerations are best dealt with on a forward looking basis.	Noted.

A.63	PCCW would suggest, for clarity, that all of its regulated services move to <i>ex post</i> from <i>ex ante</i> regulation, and then a small set of services be subject to the full application of SC 7 and SC 8 per Schedule 6.	Services listed under Schedule 6 are only exempt from SC 8, but not SC 7 (see paragraph 29). In addition, existing interconnection tariffs are subject to SC 3.4 (see paragraphs 26 and 27).
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VIII. SmarTone Mobile Communications Limited (SmarTone)

	Comments made	The TA's view
A.64	SmarTone has concern about the proposal of relaxing <i>ex ante</i> regulation applicable to the interconnection services.	The TA has decided to preserve the <i>status quo</i> on interconnection. See paragraphs 26 and 27.
A.65	Mobile operators so far have no choice over the supplier of interconnection services.	Noted.
A.66	SmarTone is of the view that the [<i>ex post</i> regulation] issue is intertwined with other fixed-mobile interconnection issues and should therefore be dealt with in a comprehensive review of the interconnection regime between fixed and mobile operators in early 2005, or after the said review is completed.	Fixed-mobile interconnection is a separate regime which is not intertwined with the implementation of <i>ex post</i> regulation. See also A.8.

IX. SUNDAY o/b Mandarin Communications Limited & SUNDAY 3G (Hong Kong) Limited (SUNDAY)

	Comments made	The TA's view
A.67	Without doubt, liberalization since 1995 created new opportunities for competitors entering into the fixed market, which was then followed by competition... More choices and substitutes widely available in the market place, along with the rise of consumers' bargaining power, have significantly contributed to decline of retail tariff... In most of the cases, the market mechanism has been operating well to safeguard consumer interest. In these circumstances, SUNDAY does not see any strong reason why OFTA should not move from <i>ex ante</i> to <i>ex post</i> regime.	Noted.
A.68	Analyses of the market definition regarding fixed-mobile interconnection were undertaken by the European Commission a couple of years ago. It ultimately came to the conclusion that fixed-mobile interconnection constitutes a separate "wholesale market".	The TA has decided to preserve the <i>status quo</i> on fixed-mobile interconnection. See paragraphs 26 and 27.
A.69	OFTA suggests that under the future <i>ex post</i> regime, the interconnection charge will be commercially negotiated, failing which the parties may seek the TA's determination under Section 36A. But the fact remains that mobile operators have no leverage to influence commercial negotiations without recourse to the TA. The down side will be that many applications for Section 36A determination are expected to be filed with the TA resulted in bottleneck, delay, huge paper works and also uncertainty of outcome.	That a licensee has chosen to publish an interconnection tariff under a non-compulsory <i>ex ante</i> regime reveals that there is no incentive for the licensee to engage in multiple negotiations, no matter under <i>ex ante</i> or <i>ex post</i> regulation. See also A.5.

A.70	it is SUNDAY's expectation that the TA should initiate a review of the interconnection regime, methodologies and principles in line with the TA's work plan and timetable under his "Major Tasks and Projects for 2004-2005".	See A.8.
A.71	The TA should continue to be the price regulator under a monopolized market in which <i>ex ante</i> regulation of PCCW-HKT's interconnection charge will continue to apply.	See A.68.

X. Wharf T&T Limited (WT&T)

	Comments made	The TA's view
A.72	WT&T firmly believes PCCW is still dominant in the local fixed lines market. Yet it is our understanding... that with the proposal in the Consultation Paper the 2 applications submitted by PCCW... would be withdrawn and the TA would not be making the declaration sought by PCCW.	See paragraph 32.
A.73	Whilst we note the many developments in the telecommunications industry since 1995 and the continual evolution of the industry, both in terms of services and technologies, there is always the danger of moving from <i>ex ante</i> to <i>ex post</i> regulation, particularly at a time of rapid changes, uncertainty and how the imminent withdrawal of Type II interconnection at exchange level in 2008 would pan out.	See A.9.
A.74	WT&T sees the proposal for moving <i>ex ante</i> to <i>ex post</i> regulation as an administrative response to PCCW's longstanding complaints as well as the public's misconception that PCCW has been crippled and unable to be responsive to customer needs in pricing its services in the market due to restrictive tariffing rules and processes.	It is international best practice that regulation should be proportionate to the level of competition in the market. The TA did acknowledge in the Consultation Paper that the <i>ex ante</i> approval process would inevitably delay normal competitive responses to demand changes.
A.75	WT&T sees the proposal as a reflection of the reality in the tariffing control of PCCW... Since the TA has been approving most of PCCW's tariff applications, it does not really make much difference in reality if the TA now wishes to move from <i>ex ante</i> to <i>ex post</i> regulation.	Noted. The criteria for intervening against anti-competitive conduct are the same under <i>ex ante</i> and <i>ex post</i> regulation.

A.76	WT&T would like to seek assurance from the TA that having the <i>ex ante</i> tariff regulation removed and replaced by <i>ex post</i> behavioral sanctions, the TA would be more prepared to take prompt actions under the relevant competition provisions in the Telecommunications Ordinance... should the TA find PCCW engaging in anti-competitive conduct or abusing its dominance on an <i>ex post</i> basis.	See A.27.
A.77	The Draft FCL should go further to require PCCW to publish and advertise its discounts in the top circulation English newspaper and the top 3 circulation Chinese newspapers with equal prominence; and notify all its customers of the discount via direct mailing or bill inserts.	The TA considers that such requirements would be excessively onerous to licensees.
A.78	WT&T has reasons to believe that PCCW has used discounts to target at selected customers that it intends to lock or in response to intention to churn to competitors due to better offers. Requiring PCCW to publish and notify all its customers of the discount would eliminate selective offers and ensure that all its customers would be able to make informed decision in switching.	See A.34 & A.38.
A.79	WT&T agrees that to make the modernization of the tariffing regulations meaningful, the TA should be mindful of effective enforcement. We support the imposition of more onerous obligations to provide pricing and cost information on PCCW under the Draft FCL.	Noted.
A.80	In the interests of competition, WT&T proposes that the proposed relaxation should not extend to interconnection services at wholesale. The proposed relaxation should be confined to retail sectors.	The TA has decided to preserve the <i>status quo</i> on interconnection. See paragraphs 26 and 27.

A.81	The lack of resources and expertise means that it takes far too long for investigation and conclusion of cases concerning anti-competitive conduct or abuse of dominance. This includes complaints on unauthorized discounts by PCCW even under the <i>ex ante</i> regime.	The TA will continue to prioritize and devote resources against anti-competitive conduct. WT&T rightly pointed out that investigations under <i>ex ante</i> and <i>ex post</i> regime are equally complicated and resource-consuming.
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