

**Publication of the Progress of  
Applications under Section 14(1A) and  
Interconnection Determination Cases under Section 36A of the  
Telecommunications Ordinance (Cap 106)**

**Statement of the Telecommunications Authority**

**17 July 2002**

**Introduction**

On 29 May 2002, the Telecommunications Authority (TA) issued a consultation paper entitled “Publication of the Progress of Applications under Section 14(1A) and Interconnection Determination Cases under Section 36A of the Telecommunications Ordinance (Cap 106)” (the Consultation Paper). The Consultation Paper invited comments from interested parties on the TA’s proposal to publish the progress of section 14(1A) applications and section 36A determination cases that are still being considered by the TA.

2. The consultation ended on 29 June 2002. A total of five submissions were received. The respondents are:

- Hong Kong Broadband Network Limited (HKBN)
- Hutchison Global Crossing Limited (HGC)
- Hutchison Telephone Company Limited and Hutchison 3G HK Limited (HTC & H3G)
- New World PCS Limited (NWPCS)
- Wharf New T&T Limited (New T&T)

The submissions can be downloaded from the website of the Office of the Telecommunications Authority (OFTA): [www.ofta.gov.hk](http://www.ofta.gov.hk).

3. Having considered the submissions received, the TA has finalised his views on the proposal and sets out the same in this Statement.

**Publication of Progress of Section 14(1A) and Section 36A Proceedings**

4. HKBN, HTC & H3G, NWPCS and New T&T are in support of the TA's proposal, which they consider will increase the transparency of the section 14(1A) and section 36A proceedings and provide valuable reference to the industry. NWPCS nonetheless emphasises the importance of maintaining a fair balance between public interest and the interest of the concerned parties. Only the relevant informative timeline of the proceedings and the results excluding the financial information should be published. Extra care has to be taken if the disclosure would adversely affect the interest of the parties concerned.

5. HGC says it is generally supportive of the principle of increasing transparency in section 14(1A) applications and section 36A determination cases. However it has concerns that the method proposed to achieve that goal could to a certain extent reveal extremely confidential information, such as the relevant party's new business plans, current business activities and competitive packages being offered. This kind of information would be of much interest to competitors. The prejudicial value of publicly disclosing all stages of section 14(1A) applications and section 36A determination cases may outweigh its likely benefit.

6. HGC draws analogy with court actions, stating that where too many details of a case are being made public prior to the TA reaching a decision, there could be a risk that the decision of the TA could be affected by comments made by the public, media or competitors. In order to safeguard the confidentiality of sensitive information, HGC suggests that the format of publication should be approved by all concerned parties. HGC further suggests that the TA can keep a register of all section 14(1A) applications and section 36A determination cases. The parties to an application would be given access to the register to check the progress of the proceedings, whilst third parties should be denied access unless it can be justified by very exceptional circumstances and special permission is given by the TA.

7. To allay the concerns of NWPCS and HGC, the TA only intends to publish the subject matter, identities of the parties and progress of the proceedings of the section 14(1A) applications and section 36A determination cases. In short, as accurately pointed out by NWPCS, only the "informative timeline" will be disclosed to the public. No details relating to the arguments or submissions, financial or other business information provided by parties will

be published. The TA does not consider that the mere disclosure of the stage of the proceedings the parties are in constitutes disclosure of confidential information which will adversely affect the interest of the parties concerned. HGC draws analogy with court actions. The TA notes that in court proceedings, the writ stating the claims of the plaintiff is a public document. In the TA's proposal, the extent of disclosure of the "claims" of the applicant (for section 14(1A) application) or the requesting party (for section 36A determination case) cannot even begin to compare. Only the subject matter of the proceedings and the parties involved will be listed. The rest of the information to be published relate to procedural matters such as whether the parties have reached a particular stage of the proceedings and how long it has taken to reach that stage.

8. In the circumstances, the TA does not consider that there is any "risk" that the TA will be affected by the comments made by the public, media or competitors on the details of the cases. Nor will it be likely that there will be any misreporting on the facts of the case. The views of the TA on the section 14(1A) applications and section 36A determination cases will not be made known to the public unless and until the completion of the proceedings, namely, when the TA publishes the authorizations (for section 14(1A) applications) and determinations (for section 36A determination cases).

9. Given the clarification above, the TA does not consider there is any sound reason to adopt the suggestion of HGC that the format of the publication should be approved by all concerned parties. Further, its other suggestion that the TA shall keep a register and that the register can only be accessed by the public in exceptional circumstances will wholly defeat the purpose to increase the transparency of the proceedings.

### **Section 14(1A) Applications**

10. The respondents have given comments on the actual information which should or should not be provided in the publication. Some of these comments apply to both the section 14(1A) applications and section 36A determination cases, whilst some other apply only to one type of the proceedings.

11. HTC & H3G propose that, in addition to publishing the authorizations

(for section 14(1A) applications) with full reasoning given, the TA should also publish the reasoning of the TA in case of *rejection* of a section 14(1A) application. HGC makes a similar but more general comment in relation to the proceedings in general.

12. The TA considers that the disclosure of the TA's reasoning in rejecting a section 14(1A) application goes outside the scope of the TA's current proposal to publish the *progress* of the proceedings. As explained in paragraph 7, the information disclosed relates to procedural matters such as whether the parties have reached a particular stage of the proceedings and how long it has taken to reach that stage. The question of publishing the reasons for rejection of the application may be re-visited in the future if the TA decides to review the procedure for section 14(1A) proceedings.

13. Further, it is clearly spelt out in section 14(1B) of the Ordinance, as well as the "Procedures for Processing Applications for Authorization of the Telecommunications Authority pursuant to Section 14(1A) of the Telecommunications Ordinance" (Section 14(1A) Procedures) the factors that the TA is obliged to consider before granting an authorization or rejecting an application. As such, there is transparency in the criteria that the TA has to take into account before making a decision. The TA would also like to add that the same consideration applies to section 36A determination cases.

14. HTC & H3G also ask the TA to clarify, in respect of the "subject matter" of section 14(1A) applications, whether the TA will disclose the actual location of the installation, or the intended coverage of the installation, or both.

15. The proposed form of disclosure was set out in Appendix 1 to the Consultation Paper. For "subject matter", the proposed disclosure was stated to be:

"Placing and maintaining installation in [*location*] for [*place*]"

The "[*location*]" refers to the actual spot or place upon which the installation is to be placed or maintained. The "[*place*]" refers to the intended coverage to be provided by the installation. The TA confirms that the disclosure will cover both the location of the installation and the intended coverage.

16. HTC & H3G also refer to the TA's proposal that the disclosure of the progress of the proceedings will include disclosure of whether a mediation is in progress. HTC & H3G remark that mediation is not a requirement under section 14(1A) and that mediation should only take place upon the mutual consent of the parties concerned.

17. The TA confirms HTC & H3G's understanding that in no circumstances will mediation be forced upon the parties to a section 14(1A) application, and indeed parties to a section 36A determination case as well. Mediation will only take place if the parties have given their consent. When parties are engaged in mediation, the proceedings will be put on hold and time according to the procedure will stop. The whole point of publishing the fact that a mediation is in progress (without divulging the details of mediation) is to let the public know why the proceedings have been stayed.

### **Section 36A Determination Cases**

18. New T&T proposes that the TA should extend the scope of publication to cover the determination cases under section 36AA of the Ordinance and other requests for determination pursuant to other provisions in the Ordinance and/or the fixed telecommunications network services (FTNS) licence, eg determination under General Condition 25 of the FTNS licence concerning directory information and directory information service.

19. It is clearly provided in section 36A(3A)(g) of the Ordinance that the terms and conditions in a section 36A determination case may include "the sharing of facilities referred to in section 36AA". As such, provided that the matter required to be dealt by the TA in relation to the sharing of facilities under section 36AA falls with the description of section 36A(3A)(g), it will be processed as a section 36A determination case. The progress of the proceedings will be published in the same way as other section 36A determination cases.

20. As regards the publication of the progress of other cases processed under other provisions of the Ordinance or the FTNS licence, the TA considers that this is outside the scope of his proposal. The distinct feature of section 36A determination cases, as well as section 14(1A) applications, from a procedural point of view is that there are established rules of procedures for the

parties to adhere to. This would make the public easy to follow whether a particular case is or is not proceeding normally as it should be. However, there is no such reference guidance for other matters required to be decided by the TA either under the Ordinance or licences issued under the Ordinance. And the issues may come up in various different forms. Whilst the TA will not pre-empt at this stage the likelihood of disclosing the progress of any particular kind of cases handled by him *other than* section 14(1A) applications and section 36A determination cases, this is entirely a separate issue which is not within the scope of his current proposal. In any case, a sweeping commitment to disclose the progress of all cases handled under the Ordinance or licences is too vague and will only lead to confusion.

### **Comments Applicable to Section 14(1A) Applications and Section 36A Determination Cases**

21. NWPCS proposes that the timeframe set out in sections 14(1A) and 36A procedures should be published as part of the OFTA's service level agreement. It is to be noted that the timeframes for both section 14(1A) applications<sup>1</sup> and section 36A determination cases<sup>2</sup> have been set out clearly for public's information. The TA considers that this already constitutes commitment on the part of the TA to follow the procedures in the proceedings, subject to any circumstances arising in individual cases which make strict adherence to the timeframes impractical.

22. For both section 14(1A) applications and section 36A determination cases, the TA proposed in the Consultation Paper that there would be a Remarks column to explain the progress of the case. The remarks could include whether further investigation is being undertaken, extension has been granted to the parties to make representations, mediation is in progress etc. NWPCS considers that the scope of information to be disclosed under the Remarks column is so wide that it is not clear what is being contemplated. It submits that the list of remarks should be an exhaustive one to provide certainty. NWPCS's concern is that, with a non-exhaustive list, there is a risk of "inappropriate" inclusion of information (such as confidential information) as remarks which will be disclosed to the public.

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<sup>1</sup> See "Procedures for Processing Applications for Authorization of the Telecommunications Authority pursuant to Section 14(1A) of the Telecommunications Ordinance" issued on 31 July 2001.

<sup>2</sup> See "Procedures for Making Determinations on the Terms and Conditions of Interconnection under Section 36A of the Telecommunications Ordinance" issued on 27 September 2001.

23. The TA considers that there is no sound basis for NWPCS's worry. The information provided in the Remarks column is only meant to explain the progress of the proceedings, more particularly progress of those cases where the timelines set out in the relevant procedures have not been adhered to. An obvious example will be that a party to the proceedings asks for and is granted extension to make submissions. Another example is that the TA considers additional information or clarification is required from the parties before he is able to make a preliminary or final decision. As many different circumstances may arise which would affect the progress of a case, the TA does not consider that it is appropriate to provide an exhaustive list of remarks. Nonetheless the TA cannot see that the Remarks column will include any information relating to the substantive facts or issues of a case.

24. HKBN comments that the TA should not only publish the date a party submits a section 14(1A) application or section 36A determination case to the TA, he should consider disclosing also the date the applicant or requesting party first commenced negotiation with the other party. It might even be better if the publication could include a short summary of the initial facts to facilitate the public's understanding of the subject matter on condition that the commercially sensitive information should be excluded.

25. As it has been clearly explained in this Statement, the TA only intends to publish information relating to the progress of the proceedings. The publication of the date of the parties first negotiated, or short summary of the facts goes beyond the intended scope of the publication. In view of a number of the respondents' submissions that confidential information or commercially sensitive information should not be disclosed, the TA does not consider that it is appropriate for him to make a judgment of what constitutes a short summary of the facts not involving the sensitive details. There is also a danger that the date of first negotiation as claimed by a party may be disputed by the opposite party. It would ultimately complicate the whole publication process if the TA were to ask for the consent of both parties before a summary of the facts of a case or the date of first negotiation could be published. The suggestion will thus not be adopted.

26. New T&T proposes that the information published should be updated within two days in order to provide the latest information and current update to

the industry.

27. It has to be noted that the TA is handling a number of section 14(1A) applications and section 36A determination cases at one time. From an administrative point of view, it would not be efficient and effective deployment of resources if an update were made whenever (or within two days as suggested) a case made a certain progress. The TA considers that an across-the-board update on a weekly basis will serve the purpose.

### **Conclusion and Implementation**

28. The TA's proposal has received general support from the respondents. Any lingering doubts that some of the respondents may have as to the likelihood of the disclosure of details of the case or confidential information have been clarified by the TA. In the circumstances, the TA has decided to implement his proposal. The format of publication is as set out in the Appendices. The public may now access the OFTA website for information on the progress of all the section 14(1A) applications and section 36A determination cases currently handled by the TA<sup>3</sup>.

**Office of the Telecommunications Authority**

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<sup>3</sup> The public may access OFTA website: [www.ofta.gov.hk](http://www.ofta.gov.hk), click into "Proceedings in Progress" on the left hand column for the status of the proceedings.

## Appendix 1

### Format of Publication for Section 14(1A) Applications

|   |  |                            |
|---|--|----------------------------|
| Parties:  | licensee(s) _____<br>land owner(s) _____ |                            |
| Subject Matter: Placing and maintaining installation in [ <i>location</i> ] for [ <i>place</i> ]. |  |                            |
| <b>Procedures</b>   | <b>Date</b>                              | <b>Remarks<sup>4</sup></b> |
| Date of Application   | [ <i>date</i> ]                          | _____                      |
| Application [ <i>accepted / declined</i> ]  | [ <i>date</i> ]                          | _____                      |
| Representations by:-  |  |                            |
| land owner(s)   | [ <i>date</i> ]                          | _____                      |
| licensee(s) on the other party's representation   | [ <i>date</i> ]                          | _____                      |
| Preliminary Analysis  | [ <i>date</i> ]                          | _____                      |
| Comments by the parties on the Preliminary Analysis   | [ <i>date</i> ]                          | _____                      |
| Authorization [ <i>granted / not granted</i> ]  | [ <i>date</i> ]                          | _____                      |

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<sup>4</sup> The remarks column will, where appropriate, include information concerning the progress of the case, such as whether further investigation is being undertaken, extension has been granted to the parties to make representations, mediation is in progress etc.

## Appendix 2

### Format of Publication for Section 36A Determination Cases

|   |   |                            |
|---|---|----------------------------|
| Parties:  | Requesting party(-ies) _____<br>Requested party(-ies) _____ |                            |
| Subject Matter: _____   |   |                            |
| <b>Procedures</b>   | <b>Date</b>   | <b>Remarks<sup>5</sup></b> |
| Date of request for determination                                 | [ <i>date</i> ]   | _____                      |
| Whether request is within section 36A [ <i>yes / no</i> ]         | [ <i>date</i> ]   | _____                      |
| Representation of [ <i>requested party(-ies)</i> ] to the request | [ <i>date</i> ]   | _____                      |
| Request [ <i>accepted / not accepted</i> ]                        | [ <i>date</i> ]   | _____                      |
| Submissions by:-  |   | _____                      |
| the parties on the request  | [ <i>date</i> ]   | _____                      |
| the parties on the other party's submissions                      | [ <i>date</i> ]   | _____                      |
| Preliminary Analysis  | [ <i>date</i> ]   | _____                      |
| Comments by the parties on the Preliminary Analysis               | [ <i>date</i> ]   | _____                      |
| Determination [ <i>made / not made</i> ]                          | [ <i>date</i> ]   | _____                      |

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<sup>5</sup> The remarks column will, where appropriate, include information concerning the progress of the case, such as whether further investigation is being undertaken, extension has been granted to the parties to make representations, mediation is in progress etc.