CONSULTATION ON THE TELECOMMUNICATIONS (AMENDMENT) BILL

6 AUGUST 2004

JOINT SUBMISSION OF TELECOMMUNICATION CARRIERS IN THE ASIA PACIFIC

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STATEMENT OF INTEREST

We appreciate the opportunity given by the Ministry of Communications, Information and the Arts ("MITA") to comment on the draft Telecommunications (Amendment) Bill, amending the existing Telecommunications Act ("TA").

The carriers involved in preparing this joint submission ("Submission") are BT Singapore Pte Ltd, Macquarie Corporate Telecommunications Pte Ltd, MCI WorldCom Asia Pte Ltd, Reach International Telecom (Singapore) Pte Ltd and T-Systems Singapore Pte Ltd.

Each of the above carriers (or a related company) holds a telecommunications licence granted pursuant to the TA and are required to comply with the relevant provisions of the TA. Each of the carriers therefore has an interest in how the amendments to the TA will affect existing business in Singapore.

COMMENTS

This part of the Submission provides more detailed comments on each of our key points.

Key Point 1: The TA Should Be Aligned With The Competition Bill And The Telecommunications Competition Code.

We note that the draft TA is closely inter-linked with two on going proceedings – The First Triennial Review of the Competition Code and finalizing the draft Competition Bill. With regard to timing of the consultation, we consider that it may have been more appropriate to conduct the Telecommunications Act review following the Ministry of Trade and Industry's ("MTI") finalisation of the Competition Bill and after the IDA completes its review and modification of the Competition Code.

As nothing has been finalised, we are concerned that we are commenting in somewhat of a vacuum as there are so many inter-dependencies in the legislation. For example, Section 10 of the Competition Code on consolidations has been drafted before the implementing legislation and we are being asked to comment on the legislation but are not permitted to comment further on the Competition Code. This does not allow our comments to be put in full context and they are unlikely to be as complete as they could otherwise be.

Paragraph 20 of the Consultation Document states that "MITA will work with MTI to review the feedback and make changes to relevant legislation and frameworks, if necessary, at a suitable time". While we are pleased that the Government recognises the need to align legislation for consistency of interpretation and application, we query:-

- How this process is likely to happen?
- Will this process take place before finalisation of the legislation or after?
- What is the framework and priority?
- Which piece of legislation is to be finalised first so that the other pieces can be aligned?

For the telecoms industry, while the last point remains unresolved, it is very difficult to understand how any alignment can take place, particularly as there are discrepancies between the competition law provisions of the Competition Code and the Competition Bill.

Key Point 2: The IDA Should Conduct Public Consultation On Codes of Practice And Performance Standards Before They Are Implemented.

As a general comment, in almost all jurisdictions, the general telecommunication legislation provides the overall legal framework for the telecommunications industry. While we agree that it is appropriate for the IDA to regulate those areas included in the

proposed Section 26, we are concerned that the TA does not first provide legislative guidance in these areas.

We propose that provision should be made in the draft TA requiring the IDA to conduct a public consultation on all codes of practice and performance standards before they are issued. This would enable the IDA to receive valuable commercial advice from interested parties which it may not otherwise have access to as a national regulatory authority.

Key Point 3: The Power For The IDA To Suspend Or Cancel A License In The "Public Interest" Should Be More Detailed And Include Due Process.

The proposed Section 8 of the TA provides the IDA with absolute powers to suspend, cancel or reduce the licence period, including where "(d) the public interest so requires".

The use of the words, "the public interest" is rather vague and gives the IDA what appears to be a very broad and discretionary power to suspend, cancel or reduce a licensee's licence period. We are concerned that without further guidance, the IDA will have too broad a power and will have the ability to influence investment and other commercial decisions. This may significantly affect a Licensee's on-going business. In order to avoid uncertainty, we would request MITA to give some examples of what may or may not be "in the public interest".

Any decision by the IDA to suspend, cancel or reduce a licensee's license period must be made with due process and allow for an appeal. Prior to the IDA making such a decision, a licensee must be given the opportunity to be heard and in making such a decision, the IDA should provide reasons for its decision. We urge MITA to include provisions outlining the process for the IDA to hear arguments and make a decision pursuant to the proposed Section 8.

In addition the TA should include the ability for a licensee to appeal such a decision by the IDA. As discussed in Key Point 7, we believe that appeals from IDA decisions should be brought first to an independent third party with a final appeal on points of law to the courts.

Key Point 4: All Exemptions To A Code Of Practice Should Be Gazetted And Reasons For Such Exemption Be Publicised.

The proposed Section 26(5) and (6) of the TA purports to permit the IDA to exempt any person from all or any provision in any code of practice or standard of performance and such exemption need not be published. This would allow the IDA to exempt a licensee from complying with, for example, a provision of a code of practice relating to an abuse of dominance without notice to the public. Clearly, this would be unacceptable and would be a compromise to the Government's commitment to enhance transparency. We submit that any exemption granted under the proposed Section 26(5) must be made public in line with the IDA's commitment on transparent decision-making and also so that licensees are aware

of each others' legal obligations. Moreover, we submit that the IDA should state reasons why it has granted an exemption to any particular person. Furthermore, increased transparency through publication of any IDA decision also promotes a level playing field and contributes toward business and investment certainty.

Key Point 5: Designated Licensees Should Only Be Required To Notify The IDA Of Changes In Its Shareholding Structure and Key Appointment Changes.

The proposed Part VA of the TA is stated to apply to "designated telecommunication licensees". A designated telecommunication licensee could include any category of licensee so designated by the IDA and declared by notification in the Gazette, including certain service-based operator licensees ("SBOs") and all facilities-based licensees ("FBOs"). We are concerned that an SBO, with a mere 10% market share, could be designated and consequently be subject to the onerous provisions laid down in Part VA of the TA and Section 10 of the proposed new Telecoms Code. These provisions may also deter licensees from applying for an FBO licence.

The proposed Section 32B provides that a person may not become a 12% controller or a 30% controller without the prior written approval of the IDA. If prior written approval is not obtained, the IDA has been given the enforcement power to order divestitures and other remedial action. Such power, particularly as regards the lower level of control, is unusual and we are unclear why the IDA would need (or want) to approve (or disapprove) the internal shareholding of a licensee. We believe that notification to the IDA of a person becoming a 12% controller or a 30% controller, particularly as regards a 12% controller, would be sufficient.

The proposed Section 32(f) provides that no designated licensee shall appoint a CEO, chairman or director unless it has approval of the IDA. In the case of a global carrier possessing a SBO/FBO licence, who has been declared a designated licensee, this provision is unprecedented and unacceptable. It would cause an unnecessary burden on such carriers and is an unnecessary interference by a national regulatory authority, particularly if it does not have substantial investments and/or core operations in a country.

Key Point 6: Penalties And Powers of Enforcement Should Be Aligned with The Final Competition Bill Provisions.

The draft TA does not propose to change the existing limit on administrative penalties of S$1 million. We are disappointed that the draft TA does not purport to align the penalty framework with that proposed in the draft Competition Bill pegged at a percentage of turnover. Many jurisdictions worldwide use this standard and we believe it serves as a sufficient deterrent to ensure compliance with the law. We maintain that for certain breaches of the TA (namely where these relate to competition provisions), the limit should

be raised to 10% of turn-over. This will align the TA to international best practice and the provisions of the Competition Bill.

Even given the proposed amendments in Section 59 of the draft TA, the investigatory and enforcement powers of the IDA are still weak relative to those of other regulators worldwide, and relative to those proposed for the new Competition Commission under the draft Competition Bill. We would urge MITA to take this opportunity to strengthen the IDA's powers of investigation and enforcement, along the lines of those proposed for the Competition Commission. For example, Section 64 of the draft Competition Bill et seq., provides for powers to enter premises with or without notice. Such a power would assist the IDA in investigating allegations of anti-competitive conduct. Also, IDA should have the power to issue guidelines on enforcement. This would be consistent with Section 61 of the draft Competition Bill.

<u>Key Point 7</u>: Appeals Should Be To An Independent Third Party Followed By A Judicial Review.

The proposed amendment to Section 69 provides for a two tier right of appeal from IDA's decisions – first to the IDA for reconsideration and then to the Minister. As we will discuss, we do not believe that this appeal mechanism is appropriate. We urge MITA to ensure the independence of appeals and compliance with Singapore's free trade commitments by providing for an appeal from IDA's decisions, firstly to an independent third party, such as a telecommunications ombudsman, followed by a judicial review. In addition, we are concerned that there are quite a number of decisions which the IDA has the power to make under the revised TA, which have no right of appeal.

First tier appeal: Independent Third Party

Given IDA's commitment to improve the transparency of its decisions by providing fuller explanations and the publication of preliminary decisions for industry comment, we do not believe that an appeal to the IDA for reconsideration would be useful. This is because matters on appeal are likely to have been raised and considered by the IDA during its more thorough and transparent consultation process. Moreover, as the IDA will be both making and reconsidering the decision, we do not believe anything further can be achieved during the reconsideration process. We would propose that appeals from IDA decisions should instead be made to an independent third party rather than the IDA, such as to a telecommunications ombudsman. This would also be in keeping with the approach proposed for appeals in the Competition Bill.

Second tier appeal: Judicial Review

Our second concern is the finality of an appeal to the Minister. We are concerned that the amended TA does not provide for the judicial review of decisions. We believe that this omission is inconsistent with Singapore's obligation under the US – Singapore Free Trade Agreement ("FTA"). Article 9.11 Section 3 of the Telecoms Chapter of the FTA is entitled

"Judicial Review" and requires Singapore to "ensure that any enterprise aggrieved by a telecommunications regulatory body has the opportunity to obtain determination or decision by an independent judicial authority." We would therefore propose that following an appeal to an independent third party, as discussed above, and pursuant to the FTA, the TA should make clear that aggrieved parties are permitted to appeal to a judicial authority.

IDA Decisions without appeal rights

In addition, we are concerned that a licensee aggrieved by an IDA decision on certain matters no longer has an appeal route. Such matters include modification of a licence condition (Section 7), the suspension or cancellation of a licence (Section 8), power to enter on other land for purposes of installation or plant (Section 14) and directions affecting telecommunication licensees (Section 27). By way of example, a decision to acquire a licence to operate and provide telecommunication services in a country is a strategic decision to invest in a country. Modifications of the conditions in a licence will affect a licensee's way of doing business. As such, any licensee's operations that are materially affected as a result of modifications to its licence condition should have an avenue of appeal.

<u>Key Point 8</u>: All Decisions Made By The IDA And On Appeal Should Be Made Within Set Timeframes And With the Participation of Affected Parties

There are no time limits by which the IDA or Minister must issue their reconsideration/decision, which has at times lead to long delays on important decisions. We would urge MITA to stipulate timeframes and provide more precise details of the processes to be followed in resolving appeals. Four months is increasingly becoming the standard timeframe and international best practice (adopted by the European Commission and OFTA, the latter proposing to complete 80% of investigations within four months from initiation).

In addition, we are concerned that the TA considers only the appellant a "party" in the adjudication of appeals by the Minister and that persons not a party may only provide "information" to the Minister if it appears to the Minister that the person has information that is relevant (See TA s69(9)(b)). We believe that this process must be broadened to recognize persons directly affected as parties in the appeal process. This would allow such parties to participate in the appeal, reviewing the submissions of the appellant and provide submission of their own to the Minister. This process of review and response is a fundamental part of an appeal process.

We also believe the TA should detail the process and standard by which the IDA will evaluate whether to stay one of its decision pending appeal. The common practice of independent regulators in other jurisdictions is that the filing of an appeal does not automatically stay implementation of a decision. For example, in the United States of America, the stay of an FCC decision pending appeal is granted only after consideration of

a four part test. A appellant seeking a stay must demonstrate that: (1) it is likely to prevail on the merits of its appeal; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay. The consideration of these four factors is done expeditiously, but in a transparent manner with the participation of both the appellant and other persons that may be directly affected by grant of a stay. We urge MITA to include a similar process and standard in the TA.

Finally, we are concerned that licensees affected by a decision may use appeals as a means of delaying their compliance with a decision. We believe that in certain circumstances, decisions made by the IDA, which were stayed and then affirmed on appeal, should be effective from the date on which the IDA made its initial decision. This is consistent with the practice of independent regulators in other jurisdictions and would help to prevent parties using delay tactics in order to delay compliance with a decision.

Key Point 9: The TA Should Not Be Modified To Deter Deployment of Network Infrastructure

We believe that the proposed modifications in s17(4) and s21(1) of the TA may make it more difficult for facilities-based operators to deploy network infrastructure in Singapore. For instance, s17(4) and s21(1) appear to modify the existing framework by expanding the ability of building owners to refuse telecom equipment that may be used in part to serve an adjacent building. Infrastructure deployment in Singapore remains in a nascent stage and we ask MITA not to modify the TA to make the rollout of facilities more costly or difficult than the status quo.