REPUBLIC OF SINGAPORE
INFO-COMMUNICATIONS DEVELOPMENT AUTHORITY OF SINGAPORE

MODIFICATIONS TO THE PROPOSED MODEL CONFIDENTIALITY AGREEMENT PUBLISHED PURSUANT TO SUB-SECTION 5.3.3 OF THE CODE OF PRACTICE FOR COMPETITION IN THE PROVISION OF TELECOMMUNICATION SERVICES

1. INTRODUCTION

1.1 Pursuant to section 5.3.3 of the Code of Practice for Competition in the Provision of Telecommunication Services ("Telecom Competition Code"), Singapore Telecommunications Ltd ("SingTel") submitted its proposed Model Confidentiality Agreement ("MCA") to the Info-communications Authority of Singapore ("IDA") on 13 October 2000.

1.2 Following the industry consultation on SingTel's proposed MCA, the IDA acting in accordance with section 5.3.3 of the Telecom Competition Code, has required SingTel to modify particular provisions of its MCA. This document outlines the significant modifications made by the IDA, and the rationale for the modifications.

2. PUBLIC CONSULTATION

2.1 On 13 October 2000, the IDA invited interested parties to submit their written comments to the IDA regarding the MCA.

2.2 A total of 7 responses were received from parties in the course of the 10-day consultation period which ended on 23 October 2000. The 7 parties that responded were (1) WorldCom ("WorldCom"), (2) MobileOne Asia ("M1"), (3) Singapore CableVision ("SCV"), (4) Harmony Telecommunications ("Harmony"), (5) Pacific Internet ("PI"), (6) The StarHub group of companies ("StarHub"), and (7) Asia Global Crossing Ltd & East Asia Crossing Singapore Pte Ltd ("Global Crossing").

2.3 The IDA thanks all the 7 parties that submitted written comments.

2.4 Some respondents noted that the MCA was generally fair and would provide adequate protection for both SingTel and licensees that desired to negotiate with SingTel for the adoption of an individualised Interconnection Agreement. It was also acknowledged by one respondent that the MCA was appropriately drafted in a manner so as to provide for mutuality of obligations, thus imposing the same duties of confidentiality on both parties.

2.5 The respondents also made comments in relation to specific provisions in the MCA. In particular, all the respondents had commented on one or more of clauses 7, 8 or 9, which collectively deal with disclosures to third parties (including professional and financial advisers). A majority of the respondents had also commented on what was felt to be an unduly protracted period during which confidentiality would need to be maintained under clause 20. Certain respondents had suggested that the scope of the confidentiality obligations of the MCA be extended to the confidential information disclosed during the term of the Interconnection Agreement itself. Most of the respondents also suggested certain editorial improvements to clauses that were regarded as ambiguous and uncertain.

3. Changes to the Model Confidentiality Agreement

3.1 The IDA has carefully considered all the comments and suggested amendments of the respondents, and where appropriate, has incorporated these amendments into the MCA. The IDA has also made several amendments which it has regarded as appropriate.

3.2 In considering all the amendments suggested by the respondents, and in reviewing and making amendments to the MCA, the IDA was guided by four main principles:

(a) That the MCA would ensure the due protection of proprietary or commercially sensitive information disclosed by either party during the negotiation of an Interconnection Agreement under the Telecom Competition Code;

(b) That the protection afforded under the MCA should be sufficient and adequate to allow the negotiating parties to comfortably disclose confidential information to the other, while at the same time, ensuring that the protection should not extend beyond what is necessary to protect the parties' legitimate commercial interests;

(c) That the provisions of the MCA should not go against the grain of IDA's regulatory requirements, including concerns relating to potential anti-competition; and

(d) That the protection afforded under the MCA would cease upon the execution of an Interconnection Agreement so as to enable the confidentiality provisions of the Interconnection Agreement to govern the protection for confidential information between the parties, following execution of the Interconnection Agreement. However, the IDA is mindful of the possibility that there may arise a situation where negotiations fail and an Interconnection Agreement is not executed for whatever reason, there would also be a need to cater for this possibility.

3.3 The following generally sets out the substantive amendments made by the IDA to the MCA, and the rationale for the amendments:

3.3.1 In relation to Clause 2, the words "holding company" and "subsidiary" in the definition of "Related Corporation" shall have the same meanings as defined in the Companies Act (Cap. 50). The amendment promotes clarity, without compromising the comprehensiveness and spirit and intent of the original formulation. It is the IDA's view that this reference to the definitions in the Companies Act would be acceptable to all parties as they are concepts which should be familiar to all corporations operating in Singapore, and are not concepts which are vague and unfamiliar.

3.3.2 Clause 3 has been amended to clarify that the Confidential Information is that which is disclosed, communicated or delivered by a Disclosing Party to the Receiving Party, and that the Interconnection Agreement is that which is to be made between the parties of the MCA. The amendments have been made for the purpose of promoting clarity.

3.3.3 Clauses 5 and 6 have been amended to allow for the use or copying of Confidential Information for any other purposes as may be agreed *in writing* between the parties

from time to time. This amendment is a modification of a proposal initially made by StarHub. It is the IDA's view that this amendment promotes flexibility, while still ensuring that the Disclosing Party retains control over the use or copying of Confidential Information by the Receiving Party. The insertion of an element of agreement between the parties ensures that any use or copying of Confidential Information must be agreed to by the Disclosing Party, while the requirement for such agreement to be in writing will work towards preventing potential disputes over whether such an agreement was procured in the first place. The element of reasonableness has not been adopted as it is the IDA's view that such a concept will, in the circumstances, encourage rather than mitigate uncertainty.

3.3.4 In relation to Clauses 8 and 9, the general consensus of the respondents was that Clause 9 should be deleted in its entirety, and that disclosures to the financial advisers/bankers of the Receiving Party should be covered under Clause 8. The IDA acknowledges that the Disclosing Party may have certain concerns regarding the particular specie of Confidential Information which would be disclosed to the financial advisers/bankers of the Receiving Party, and as such may have certain reasons for imposing stricter disclosure procedures for financial advisers/bankers. Be that as it may, the IDA is concerned that the original formulation would too easily allow for the Disclosing Party to oppose any disclosure of Confidential Information by the Receiving Party to its financial advisers/bankers. This could effectively deprive the Receiving Party of crucial financial advice and/or financial services which would aid in the Receiving Party's decision-making process. At the same time, the respondents' suggestion to delete Clause 9 in its entirety may result in the Disclosing Party's confidential information not being adequately protected under the MCA where such information is disclosed to professional and financial advisors/bankers. Therefore, the IDA has consolidated Clauses 7, 8 and 9, so as to remove the requirement of written consent in relation to financial advisers/bankers, while still subjecting all employees, and professional and financial advisers/bankers of the Receiving Party to the requirement of executing a written undertaking under Clause 10. Again, the element of reasonableness in an approach where "consent should not be unreasonably withheld" has not been adopted as such a concept will not promote certainty. The amendment by the IDA here also acknowledges the possibility that financial advisers/bankers may merely be involved in the provision of financial services to the Receiving Party, and not in the broader purpose of negotiating an Interconnection Agreement or protecting the rights of the Receiving Party under the MCA.

3.3.5 In relation to Clause 10, the proposal by SCV to (i) require the Receiving Party to inform Authorised Persons in writing of their obligation to protect the Disclosing Party's Confidential Information, (ii) to require the Receiving Party to obtain a written undertaking from Authorised Persons to comply with the terms of the MCA before any disclosure of Confidential Information to Authorised Persons, and (iii) to make the Receiving Party always liable for any unauthorised disclosure by Authorised Persons, has been adopted with modifications. The IDA agrees with SCV's reasons for requiring that Authorised Persons should be made to execute a written undertaking prior to disclosures, and that the Receiving Party must be made liable for unauthorised disclosures by Authorised Persons.

3.3.6 The proposal by PI to insert references in Clause 13 to the Receiving Party and its Authorised Persons in Clause 13 has been adopted with modifications. The proposal by SCV to substitute Clause 13(c) with a new exception relating to the independent development of information has also been adopted with modifications. The reference to the Receiving Party and Authorised Persons has been added for the purposes of promoting clarity. The insertion of a new exception to non-disclosure is to provide for the situation where the information has been independently developed by the Receiving Party.

3.3.7 The phrase "emergency organisation" in Clause 14(d), which was previously undefined, has been defined, and the proposal by WorldCom, Global Crossing, and PI to restrict Clause 14(e) to disputes under an Interconnection Agreement between the Disclosing Party and the Receiving Party has been adopted. The amendments to restrict the ambit of Clause 14(e) to disputes under an Interconnection Agreement between the Disclosing Party and the Receiving Party have been made for the purpose of promoting clarity.

3.3.8 In relation to Clause 15, the proposal by WorldCom and Global Crossing to require the Receiving Party to notify the Disclosing Party prior to any disclosure to a third party has been adopted with modifications. Clause 15 has also been amended to state that only in instances where there is an intended disclosure by the Receiving Party to third parties under Clause 14, would the Receiving Party be required to notify the Disclosing Party. The IDA is of the view that the Disclosing Party should *at most* be apprised of the fact that there is to be a disclosure to a third party under Clause 14.

3.3.9 The second and third sentences of Clause 17 have been deleted. It is the IDA's view that the issue of warranties in relation to the accuracy and correctness of information provided during negotiations for an Interconnection Agreement under the Telecom Competition Code should not be dealt with under the MCA. It should be noted that under the Telecom Competition Code, the parties are obliged to negotiate in good faith (section 5.5.1 of the Telecom Competition Code).

3.3.10 In relation to Clauses 20 and 21, it is the IDA's view that the parties' obligations of confidentiality under the MCA should cease upon the execution of the Interconnection Agreement under the Telecom Competition Code. However, the IDA is mindful of the possibility that there may arise a situation where negotiations fail and an Interconnection Agreement is not executed for whatever reason. In such a situation, the parties' obligations of confidentiality will continue for a period of 2 years from the date of termination of the MCA. Clauses 20 and 21 have been amended to reflect this.

3.3.11 The proposal by PI to make Clause 29 subject to Clause 21 has been adopted for the purpose of promoting clarity and consistency.