

ASIA PACIFIC CARRIERS' COALITION

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February 27, 2009

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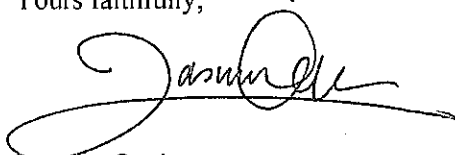
Dear Mr. Haire

Re: Submission by the Asia Pacific Carriers' Coalition in Response to the IDA's Revised Preliminary Decision on SingTel's Request for Exemption from Dominant Licensee Obligations

Please find enclosed the submission by the Asia Pacific Carriers' Coalition in response to the IDA's revised preliminary decision on SingTel's request for exemption from dominant licensee obligations.

Should iDA wish to discuss any of these matters in greater detail please do not hesitate to contact us: secretary@asiapacificcarriers.org.

Yours faithfully,



Jasmine Quek
Secretary, Asia Pacific Carriers' Coalition

Submission
by the Asia Pacific Carriers' Coalition
in Response to
the IDA's Revised Preliminary Decision on SingTel's Request for Exemption from
Dominant Licensee Obligations

Dated: February 27, 2009

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STATEMENT OF INTEREST

This submission is provided by the Asia Pacific Carriers' Coalition (**APCC**) in response to the 30 January 2009 invitation by the InfoComm Development Authority of Singapore (**IDA**) to comment on its "Revised Preliminary Decision on the Request by Singapore Telecommunications Limited for Exemption from Dominant Licensee Obligations with respect to the Business and Government Customer Segment and Individual Markets" ("**Revised Preliminary Decision**").

The APCC is an industry association of global and regional carriers operating in Asia Pacific, formed to work with Governments, National Regulatory Authorities and Consumers to promote open market policies and best practice regulatory frameworks throughout the Asia Pacific region that will support competition and encourage new and efficient investment in telecommunications markets.

APCC submissions reflect the consensus of opinion among at least a majority of its members. Therefore none of the views expressed in this submission should be attributed to any individual member of the APCC.

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1. SUMMARY OF MAJOR POINTS

- 1.1 The APCC is generally in agreement with most of the IDA's draft findings in relation to SingTel's continuing market power and supports the IDA's proposal in its Revised Preliminary Decision that it should decline to grant SingTel's proposed Customer Segment Request.
- 1.2 The APCC is extremely disappointed, however, to observe that the IDA's Revised Preliminary Decision, like the August 2008 Preliminary Decision, does not adequately disclose the basis on which the IDA proposes to make its determination. Specifically, the Revised Preliminary Decision describes the IDA's reasoning in qualitative terms but discloses *virtually none of the quantitative data* provided by either SingTel or the numerous respondents to the IDA's "Provision of Information" requests. Nor does the Revised Preliminary Decision describe the quantitative analysis carried out by the IDA or its external consultants.
- 1.3 While the APCC notes the IDA's direction to parties to "**confine their comments to new evidence and arguments**" and to "**not repeat the comments submitted during the First and Second Public Consultations**" (IDA's emphasis) the APCC remains deeply concerned that the IDA has not heeded those comments and has not disclosed the data or analysis on which the decision is proposed to be made. Hence, the APCC considers it vital to repeat its prior submission:

In order that the operators, their customers and the public at large can have confidence in the IDA's decision-making process and the decisions it reaches, it is imperative that both the quantitative data and the analysis of that data must be exposed to comment, the APCC respectfully submits. Operators' legitimate confidentiality interests can be protected by various means, including disclosure of aggregated quantities only and by publication of analysis with particular figures redacted.

- 1.4 Although the APCC strenuously resists SingTel's application and disagrees with its arguments that it lacks market power, we agree with SingTel's observations in its submission on the Preliminary Decision that:

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- “[T]he IDA has produced a Preliminary Decision that is not only very short on detail, but which also fails to adequately explain the basis for the IDA’s decision making...”¹
 - “The IDA has not published its market research, nor has it disclosed the methodology applied in undertaking such research. This is contrary to international best practice. Regulators, such as Ofcom, publish extensive market research of both the outcomes of customer surveys and the methodologies used in conducting their analysis.”²
- 1.5 That SingTel and the APCC agree on the need for enhanced transparency of the IDA’s market analysis, despite having opposed views on most of the issues the IDA is required to decide, is telling. This is a matter which goes to public and industry confidence in the regulatory decision making process.
- 1.6 All licensed operators in Singapore are required routinely to submit extensive information to IDA. Much of that data would be of value to operators and the public in connection with proceedings such as the present. It should therefore be published, the APCC submits. Operators’ legitimate interests in commercial confidentiality can be protected by aggregating the amounts reported in each category. This is the procedure applied by other regulatory authorities, such as Hong Kong’s Office of the Telecommunications Authority.³
- 1.7 The APCC also reiterates its concern that the Revised Preliminary Decision might incorrectly analyze the role of “self-provided backhaul” in the market for backhaul service in Singapore and may consequently fall into error in proposing to conclude that there is a “...competitive market environment...” for Backhaul.”⁴ Because the IDA has *withheld all quantitative data* from the Preliminary Decision, it is not possible for the APCC, or anyone else, to form a meaningful view as to the validity or otherwise of the finding that SingTel’s share of the Backhaul market has declined “...to approximately 30 percent in 2007, making it the number two operator in this market.”⁵

¹ SingTel “Response to IDA’s Preliminary Decision on the Request by Singapore Telecommunications Limited for Exemption from Dominant Licensee Obligations with respect to the Business and Government Customer Segment and Individual Markets” (undated) para 3.3.

² Ibid, para 3.10.

³ See <<http://www.ofla.gov.hk/en/datastat/main.html>>.

⁴ IDA Revised Preliminary Decision, para 103.

⁵ IDA Revised Preliminary Decision, para 95.

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- 1.8 The APCC supports the IDA in its concern regarding SingTel's ability to leverage its dominance in the LLC market to adversely affect competition in the Backhaul market and, specifically, IDA's recognition that "[c]ompeting operators continue to rely on SingTel LLCs to provide backhaul services to customers that are not co-located in a data centre."⁶ SingTel's continuing dominance in the bulk of the fixed network assets within Singapore, particularly the access network, continues to hamper Singapore achieving fully competitive markets for telecommunications services. The IDA must be vigilant, the APCC submits, to guard against all opportunities for SingTel to leverage that advantage into other markets, to the detriment of competition and consumers.

2. LACK OF TRANSPARENCY OF ANALYSIS

- 2.1 The APCC is deeply concerned that the Revised Preliminary Decision, though appearing on the surface to reach correct conclusions for the most part (except in relation to Backhaul), does not set out the normal evidentiary and analytic foundation that would typically be provided by a regulatory authority in a decision of this significance.
- 2.2 In the absence of any transparency as to the data relied on and the methods by which it was handled, interested parties necessarily are unable to understand how key conclusions were reached and therefore are unable to form a meaningful view as to the correctness or otherwise of those conclusions. Nor can any party contribute constructively regarding means by which the analysis might be refined or improved.
- 2.3 Specifically, the APCC repeats its earlier submission that interested parties should have the opportunity to review for themselves, and to comment on, the following kinds of information:
- the data-gathering processes undertaken, including:
 - the survey methods used to obtain market information;
 - the data extracted by the IDA from routine carrier filings;
 - market statistics and other quantitative data relied on by IDA (aggregated to protect confidentiality);
 - the sensitivity analysis and other methods applied to ensure reliability of the data;

⁶ IDA Revised Preliminary Decision, para 102(c)(i).

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- the methods of calculation employed to determine market shares (particularly in relation to the backhaul services market) and to reach other material conclusions; and
- the analytic methods and reasoning applied (e.g. how “self-provided backhaul” and “third party backhaul” capacity figures were factored into market analysis).

2.4 The APCC welcomes the opportunity to contribute relevant industry data but, at the same time, notes that there are two substantial constraints on competitors' ability to provide “independent assessments” of the market:

- First, each competitor only knows what it buys and sells; it does not know the extent of the market as a whole. Only the IDA has information about the market as a whole. That is why the IDA must disclose that information and subject it to the discipline of public scrutiny.
- Secondly, due to its unique position as the sole dominant operator in Singapore, SingTel enjoys significant information asymmetries in its favour. Apart from being a persisting source of competitive advantage for SingTel, as a dominant operator, it means that the other operators have less information than SingTel to contribute to regulatory decision-making.

2.5 That one operator was able to provide some market data is commendable but that fact does not validate the IDA's process. As matters stand, the IDA has apparently based its decision on evidence which has not been subject to any consultative scrutiny to test its veracity. The operators can usefully assist the IDA to identify gaps and inaccuracies in both data and analysis, but only if those data and that analysis are disclosed in the course of consultation, as regulatory best practice requires.

2.6 The APCC does not, with respect, accept that the IDA has in fact used the consultative process which commentators have urged it to adopt. Merely exposing draft findings to comment does *not* constitute adequate consultation, when those papers fail to set out the data and methodology on which proposed findings are based. Those should properly be the subject of consultation.

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3. ANALYSIS OF "MARKET 3: BACKHAUL"

- 3.1 The IDA rightly recognized in its Preliminary Decision that there is a real danger that the lack of competition in the LLC market could be leveraged into the backhaul market, stating that it "remains concerned about SingTel's ability to leverage its dominance in the LLC market to adversely affect competition in the backhaul market." The IDA concludes in the Revised Preliminary Decision that *ex ante* regulation is no longer necessary but the *ex post* rules should continue to apply in the LLC market.⁷ The difficulty in proving *ex post* infringements, however, means that *ex-ante* tariff obligations should continue to apply to SingTel's backhaul services.
- 3.2 To prove *ex post* an abuse of dominant position under section 8 of the Competition Code is, in reality, notoriously difficult. The APCC therefore submits that Section 8 provides, by itself, inadequate protection against SingTel's ability to abuse its market power. It would therefore be inappropriate to grant SingTel a blanket exemption from the Section 4 *ex-ante* obligations on backhaul in the current environment. Rather, the APCC submits, SingTel should remain subject to the section 4.4 obligation to file and publish tariffs. Pricing transparency under tariffs would greatly enhance the ability of the IDA and industry to monitor and, if necessary, enforce SingTel's compliance with the *ex post* competition rules which continue to apply. Were IDA to grant SingTel an exemption from the section 4 *ex-ante* provisions, IDA should subject its grant to a condition that SingTel continue to comply with the tariff requirements in section 4.4.
- 3.3 The APCC agrees with the definition of a national wholesale market for backhaul service, which includes self-provided backhaul, but is deeply concerned that the extent of competition within this market may have been seriously over-estimated, perhaps because the effect of "self-provision" of backhaul has been incorrectly analysed. The Revised Preliminary Decision reports that "IDA estimates that SingTel's market share had declined by close to 10 percentage points between 2006 and 2007, to approximately 30 percent in 2007, making it the number two operator in this market."⁸ That SingTel could be the "number two" backhaul provider in Singapore, with "approximately 30 percent" of that market is an extremely surprising estimate. The evidence on which this estimate is based is undisclosed.

⁷ IDA Revised Preliminary Decision, para 103.

⁸ IDA Revised Preliminary Decision, para 95.

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3.4 While the APCC believes that SingTel faces some degree of competition in the wholesale Backhaul market, we find it difficult to accept, in the absence of quantitative evidence, that 70 percent of Backhaul capacity in Singapore is provided by FBOs other than SingTel. We are therefore very much concerned that some form of error may have intruded on the analysis, such as:

- misunderstanding by operators of the IDA's questions and consequent inconsistency in their responses;
- double-counting of capacities; or
- incorrect analytic treatment of self-provided capacity.

3.5 Although the concept of 'backhaul' is superficially a simple one (e.g. "capacity from a cable landing station in Singapore to the Licensee's international gateway or point-of-presence (POP) in Singapore"), there are in fact a large number of variables involved in its measurement. The amount of backhaul capacity in use cannot be read directly off a piece of network equipment or a contract, but has normally to be extracted from billing system data which necessarily records sales of diverse kinds of products, by different companies in each carrier's group, in different countries. There is significant risk that respondents may have construed the IDA's questions differently, applied different parameters in calculating backhaul capacities and hence provided inconsistent information. The APCC hopes this is not the case but notes that the Preliminary Decision does not include sufficient information to allow this possibility to be ruled out.

The IDA's definition of a "backhaul market" dates to the "ICS Decision" of 12 April 2005, in which the IDA stated: "The Backhaul market includes both self-provided backhaul (i.e. the provision of backhaul, by a Licensee, to itself) and third-party backhaul (i.e. the provision of wholesale backhaul, by a Licensee, to another Licensee.)"⁹ It is not apparent from the Revised Preliminary Decision just how the "self-provided backhaul" information gathered from operators by the IDA has been interpreted and used. It seems possible, though it is not explicit

3.6 from the Revised Preliminary Decision, that "self-provided backhaul" might perhaps have been counted as directly competitive with "third-party backhaul" sold to FBOs. Such an analysis would be consistent with the proposition stated in the IDA's April 2005 decision that self-provided backhaul and third-party

⁹ IDA Explanatory Memorandum on the ICS Decision, para 49.

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backhaul "...are in the same market because self-providing backhaul is a substitute for purchasing backhaul from another carrier".¹⁰ The difficulty is that for most carriers self-provided backhaul *is* purchased from another carrier, usually SingTel. That is, SingTel "self-provides" backhaul by *diverting* it away from sale to other FBOs to use for its own services, such as IPLC, whereas *other carriers usually have to purchase the very backhaul which they "self-provide" as an input to their IPLC and other services.*

- 3.7 Backhaul purchased by operators other than SingTel is predominantly used by them as an input to production of end-to-end services that are offered in other markets (e.g. in the Terrestrial IPLC market) and only a fraction of it is re-supplied in the Backhaul market. That is, operators who self-provide backhaul participate *on the demand side* of the Backhaul market only: their "self-provided backhaul" does not enhance competition in the Backhaul market, which is dominated by SingTel. The APCC hopes and expects that the IDA has not fallen into the error of conflating the two different sides of the market, but is concerned that the text of the Revised Preliminary Decision does not rule out that possibility.
- 3.8 The APCC requests explanation by the IDA as to the method by which it has factored data on "self-provided backhaul" into its estimate of market shares in the Singapore market for backhaul services.

4. CONCLUSIONS

- 4.1 In light of the concerns outlined above, the APCC submits that it is highly desirable in all parties' interests, and the public interest in sound and transparent regulatory processes, that the IDA release a Further Revised Preliminary Decision that sets out:
- the data-gathering processes undertaken, including:
 - the survey methods used to obtain market information;
 - the data obtained by IDA pursuant to routine filings;
 - market statistics and other the quantitative data relied on by IDA (aggregated to protect confidentiality);
 - the sensitivity analysis and other methods applied to ensure reliability of the data;

¹⁰ IDA Explanatory Memorandum on the ICS Decision, para 50.

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- the methods of calculation employed to determine market shares (particularly in relation to the backhaul services market) and to reach other material conclusions; and
- the analytic methods and reasoning applied (e.g. how “self-provided backhaul” and “third party backhaul” capacity figures were factored into market analysis).

4.2 The disclosure of the above information should enable the public generally, and interested parties in particular, to have greater confidence in the correctness of these important determinations by the IDA.

* * *