

11 March 2011

Aileen Chia (Ms)
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Dear Ms. Chia,

Public Consultation on the Second Review of Singapore Telecommunications Limited's Reference Interconnection Offer

I write this paper in response to IDA's invitation to comment on its proposed positions on the key issues to be addressed in the second review of the RIO. My comments are restricted to a discussion on access to co-location space at SingTel's submarine cable landing stations and I hope they will be useful to the IDA.

Yours sincerely

Andrew Ngiam

1. INTRODUCTION

A proposal to allow third party operators to access SingTel's submarine cable landing stations ("SCLS") for the sole purpose of building backhaul connectivity and providing backhaul services for other licensees may be considered with reference to IDA's regulatory principles and its facilities-based licensing philosophy. The backhaul market is competitive and does not warrant further access regulations at SingTel's SCLS. It is possible to consider a proposal to align SingTel's RIO to achieve coherence within IDA's facilities-based licensing framework. IDA's facilities-based licensing framework is premised on a licensee's right to build telecommunications infrastructure including a backhaul facility. The RIO conditions for IRU, long term lease or cable ownership limit a licensee's right to build backhaul infrastructure and should be removed accordingly.

2. IDA'S REGULATORY PRINCIPLES

IDA regulates Singapore's telecommunications sector using key principles of a reliance on market forces for effective and sustainable competition¹, promotion of facilities-based competition², and proportionate regulation.³ IDA declines to intervene in competitive markets, but instead regulates to protect consumers and to prevent anti-competitive conduct.⁴ IDA intervenes only if there is a market failure.⁵

IDA regulates using *ex ante* and *ex post* regulations. *Ex ante* regulations govern licensees that are inadequately constrained by competition. These regulations anticipate a licensee's ability to exercise market power created from market concentration, barriers to entry and other market structure factors.⁶ Conversely, *ex post* regulations are directed at licensees in competitive markets but may nevertheless engage in anti-competitive conduct. IDA applies *ex ante* regulation by designating a licensee as dominant if it controls difficult to replicate facilities or has the ability to exercise significant market power⁷ in all telecommunication markets in which it participates.⁸

¹ *Code of Practice for Competition in the Provision of Telecommunications Services, 2010*, s. 1.5.1, s.1.5.2

² *Ibid.* s. 1.5.3

³ *Ibid.* s. 1.5.4

⁴ *Ibid.* s. 1.5.1

⁵ IDA, "IDA's Contribution to GSR Consultation" International Telecommunication Union" <http://www.itu.int/ITU-D/reg/Events/Seminars/GSR/GSR08/contributions/GSR%20Consultm_IDA.pdf>. at para.2

⁶ ICT Regulation toolkit, International Telecommunication Union, <<http://www.ictregulationtoolkit.org/en/Section.1678.html>>

⁷ *Supra* note 1 at s. 1.9(w)

⁸ *Supra* note 1 at s. 2.2.1

Ex ante regulations impose heavy obligations on a licensee. A dominant licensee must offer interconnection related services and mandated wholesale services to other licensees on terms and conditions approved by the IDA.⁹ The licensee must also file tariffs¹⁰, offer services on a non-discriminatory basis¹¹, unbundle services¹², and permit resale of end user services¹³. *Ex ante* regulations are lifted when the conditions for dominant firm conduct no longer exist.¹⁴ However *ex post* regulations will continue to apply to the license.¹⁵ *Ex ante* regulations may be imposed on the licensee should dominant firm conduct reoccur, through control of difficult to replicate bottleneck facilities or if it regains market power, or both.¹⁶

3. IDA'S MARKET REGULATION ACTIVITIES

IDA has intervened to address market failures for backhaul services¹⁷ and local leased circuits¹⁸. To address an absence of effective competition for local leased circuits, IDA directed SingTel to amend its RIO to offer wholesale leased circuits and tail local leased circuits at retail-minus and cost-based rates respectively.¹⁹ To address an absence of effective competition for backhaul services, IDA directed SingTel to amend its RIO to offer connection services at SingTel's SCLS.²⁰ Further SCLS regulations were introduced in 2004 to allow Facilities-Based Operators ("FBO") with pre-existing backhaul facilities to provide backhaul and transit services to third parties. Prior to the 2004 decision, licensees were unable to access SingTel's SCLS to provide third party backhaul and transit services if they do not have Indefeasible Rights of Use ("IRU"), long term leased capacity or cable ownership.

⁹ *Supra* note 1 at s. 6.2.1

¹⁰ *Supra* note 1 at s. 4.2.1.1

¹¹ *Supra* note 1 at s. 4.2.1.2

¹² *Supra* note 1 at s. 4.2.1.3

¹³ *Supra* note 1 at s. 4.2.2.2

¹⁴ Ian Walden and John Angel, *Telecommunications Law and Regulation*, 2d. Ed, Oxford University Press. 2005, 293- 294

¹⁵ These regulations take the form of general prohibitions not to engage in unfair methods of competition, broadly defined as an improper practice to gain a competitive advantage for itself for reasons unrelated to the availability, price or quality of the service. Furthermore the licensee is prohibited from entering into agreements involving licensees that unreasonably restrict competition including price fixing/output restrictions, bid rigging, and exclusive dealing.

¹⁶ *Supra* note 1 at s. 2.3(a).

¹⁷ Explanatory Memorandum issued by the IDA, "*Final 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*", 2 June 2009, at 94.

¹⁸ *Ibid.* at 67.

¹⁹ IDA, "*Designation of SingTel's Local Leased Circuits as a Mandated Wholesale Service*", 16 December 2003 s

²⁰ IDA, "*Proposed Amendments to SingTel's Reference Interconnection Offer (RIO) to offer Connection Services at Submarine Cable Landing Stations*", 24 June 2002.

4. MARKET FAILURE ARGUMENT FOR FURTHER SCLS REGULATION

We can examine a proposal to allow third party backhaul operators access at SingTel's SCLS by referencing it against IDA's regulatory principle for market intervention. IDA intervenes only if there is market failure. SCLS access regulations can be premised on a market failure argument but this requires a declaration of a market failure for backhaul services. This is an untenable proposition because Singapore's backhaul market is competitive.²¹ Notably, while IDA's deliberations for third party backhaul operator access at SingTel's SCLS bear similarity to its cable landing station decision of 2004, the 2004 decision predates IDA's 2008 declaration of a competitive backhaul market and its decision to remove dominant licensee obligations on SingTel. Accordingly, a proposal for third party backhaul operators to access SingTel's SCLS cannot be premised on a market failure argument.

5. SINGTEL'S SCLS AS A CRITICAL SUPPORT INFRASTRUCTURE

In considering access facilities at SingTel's SCLS as a Critical Support Infrastructure ("CSI")²², IDA will look to Section 7.3.1 of the Code of Practice for Competition in the Provision of Telecommunication Services ("Code") which states:

7.3.1 Critical Support Infrastructure

..IDA will deem the infrastructure to constitute CSI if it concludes that:

- a) the infrastructure is required to provide Services;*
- b) an efficient new entrant would neither be able to replicate the infrastructure within the foreseeable future, nor obtain it from a third-party through a commercial transaction, at a cost that would allow market entry;*
- c) the License that controls the infrastructure has sufficient capacity to share with other Licensees;*
- d) the Licensee that controls the infrastructure has no legitimate justification for refusing to share the infrastructure with other Licensees; and*
- e) failure to share the infrastructure would unreasonably restrict competition in any telecommunications market in Singapore.*

²¹ *Supra* note 17 at 98.

²² *Supra* note 1 s. 7.3.1

Prima facie the test appears broad but the operative provision may be found in Section 7.3.1 (e): an unreasonable restriction of competition because of a licensee's failure to share its infrastructure.

6. A RESTRICTIVE INTERPRETATION OF THE CSI EXCEPTION

A CSI designation may be imposed a licensee's access infrastructure at the SCLS if Section 7.3.1 of the Code is satisfied. The expression "*unreasonably restricts competition*" is undefined in the Code but IDA will interpret it in a manner that is consistent with its ordinary meaning, and in the case of any ambiguity, will interpret it in a manner most consistent with its regulatory principles.²³ The use of the word "*unreasonably*" in Section 7.3.1 suggests that a mere restriction of competition is insufficient to meet the test. The degree of restriction must exceed the limits of any reasonable claim or expectation.²⁴ The test should be set sufficiently high on grounds that CSI, as an exceptional form of market intervention, interferes with a licensee's proprietary rights. CSI designation is therefore rarely imposed on a licensee except for radio distribution systems for mobile coverage in trains or road tunnels; in-building cabling; and lead-in ducts and associated manholes.

The CSI provisions should be narrowly construed to effect a broad interpretation of IDA's general rule on infrastructure sharing. As a general rule, IDA requires licensees to build or lease the use of the infrastructure that it requires.²⁵ This supports an argument for a restrictive reading of Section 7.3.1(e)-that a mere restriction of competition is insufficient for a CSI designation. A restrictive reading is also preferred for the Code's Rule of Construction requires any ambiguity in the provisions to be interpreted in a manner most consistent with IDA's regulatory principles. A restrictive reading of Section 7.3.1(e) is consistent with IDA's regulatory principle of promoting facilities-based competition.²⁶

While a public interest exception for infrastructure sharing is available under Section 7.3.2 of the Code²⁷, it is a discretionary power and a regulator should limit its application to exceptional circumstances.

²³ *Supra* note 1 at s. 1.8

²⁴ Singapore's Competition Act provides for a broader interpretation of anti-competitive conduct by using a test of a prevention, restriction or distortion of competition.

²⁵ *Supra* note 1 at s. 7.1.2

²⁶ *Supra* note 1 at s. 1.5.3

²⁷ *Supra* note 1 at s. 7.3.2

7. CSI DESIGNATION AND COMPETITIVE MARKETS

Barriers to entry are the main obstacles to a development of effective competition. These barriers, which may take the form of regulatory or scale barriers, prevent the entry of new firms in response market prices at levels above the competitive equilibrium price. Hard-to-replicate infrastructure is a barrier to entry for new firms and they may allow a licensee to unreasonably restrict competition in backhaul markets. Conversely, it is doubtful if a licensee can unreasonably restrict competition if it fails to share infrastructure in a market characterized by low entry barriers.

IDA has since lifted SingTel's dominant licensee obligations for backhaul services following an assessment of market entry conditions for backhaul services and SingTel's ability to exercise significant market power under Sections 2.6.1 and 2.6.2 of the Code respectively. IDA found a lowering of entry barriers and the availability of substitutes.²⁸ A failure by SingTel to share access facilities at its SCLS may no longer unreasonably restrict competition for backhaul services.

8. IRU, LONG TERM LEASE, OR CABLE OWNERSHIP CONDITIONS AND IDA'S FACILITIES-BASED LICENSING FRAMEWORK

A proposal to allow third party backhaul operators to access SingTel's SCLS for the sole purpose of building backhaul connectivity and providing backhaul services for other licensees cannot be properly supported by a market failure argument. Furthermore, a proposal for a sharing of SingTel's access facilities at the SCLS must satisfy Section 7.3.1 of the Code and exceptional circumstances are required for a public interest argument to succeed under Section 7.3.2 of the Code. It is possible to consider a proposal to align SingTel's RIO to achieve coherence within IDA's facilities-based licensing framework.

IDA's facilities-based licensing framework is premised on a licensee's right to build telecommunications infrastructure including a backhaul facility.²⁹ Accordingly, IRU, long term lease or cable ownership conditions in the RIO for access to co-location space at SingTel's SCLS contradicts a licensee's right to enter into facilities-based competition for backhaul services.³⁰ IDA's licensing

²⁸ *Supra* note 17 at 98 and 101

²⁹ IDA, "Guidelines on Submission of Application for Facilities-Based Operator Licence" at 2.1

³⁰ *Ibid.* at 2.3. Backhaul service may be considered a backbone/wholesale bandwidth capacity service to other licensed telecommunication operators.

framework does not envisage IRU, long term lease or cable ownership as a condition precedent to a FBO's ability to build backhaul infrastructure to offer international services.³¹ Conversely, the licensing framework considers access to international cable capacity as crucial for a provision of international telecommunication services.³²

IDA's facilities-based licensing framework does not deny a FBO entry into facilities competition for backhaul services. Accordingly, IRU, long term lease or cable ownership conditions in the RIO should be removed as SCLS access conditions for third party backhaul operators. It is possible to these conditions as a procedure to prioritise access to co-location space at SCLS, whilst not denying a licensee's right to enter into facilities competition for backhaul services.³³

A study of Hong Kong's experience at the SCLS is helpful when considering amendments to the RIO for third-party backhaul operators. Hong Kong's licensing framework does not require a facilities-based licensee to satisfy IRU, long term lease or cable ownership conditions to access a SCLS and offer backhaul services. A Local Fixed Service licensee is authorised by the Telecommunications Authority to build backhaul facilities to the SCLS and offer backhaul services to other unified carriers, fixed carriers or FTNS licensees.³⁴

IDA may consider removing IRU, long term lease or cable ownership conditions in SingTel's RIO for third party operators seeking to build backhaul facilities. As a corollary, a removal of the conditions in SingTel's RIO will not affect a FBO's obligation to engage in facilities-based competition for international services. IDA's facilities-based licensing framework for international services is premised on IRU, long term leases or cable ownership and these obligations are owed directly by the licensee to IDA.

9. SUGGESTED APPROACH FOR PRIORITISING CO-LOCATION ACCESS AT SCLS

IDA may consider Hong Kong's approach and address co-location space constraints at the SCLS on a case by case basis.³⁵ IDA may take into account

³¹ *Ibid.* at 6.1, Annex 2

³² *Ibid.*

³³ *Supra* note 22 at 9

³⁴ OFTA, "Guidelines for the Submission of Proposals for Applying Unified Carrier Licence", 1 September 2010 (Issue 4), at 4.5

³⁵ OFTA, "Access to and Co-location at Cable Landing Stations, Statement No. 2 on Issues Connected with the Implementation of External Facilities Market", 19 September 2000 at 9

account factors such as size of equipment, use of space at SCLS for purposes other than housing the equipment, and both long and short term SCLS expansion plans.

10. CONCLUSION

Singapore's backhaul market is competitive as a result of IDA's cable landing station decisions of 2002 and 2004. Current market prices for backhaul services may be indicative of its competitive equilibrium price levels. A regulator should not intervene in a competitive market in accordance with general competition regulation principles. However, IDA may consider a proposal to align SingTel's RIO to achieve coherence within IDA's facilities-based licensing framework. This will require a removal of IRU, long term lease or cable ownership conditions for these third party backhaul operators.

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