STARHUB'S RESPONSE TO IDA'S CONSULTATION PAPER –

REQUEST BY SINGAPORE TELECOMMUNICATIONS LIMITED FOR EXEMPTION FROM DOMINANT LICENSEE OBLIGATIONS WITH RESPECT TO THE INTERNATIONAL TELEPHONE SERVICES MARKET PURSUANT TO SUBSECTION 2.6.1 OF THE CODE OF PRACTICE FOR COMPETITION IN THE PROVISION OF TELECOMMUNICATION SERVICES

StarHub Pte Ltd ("**StarHub**") appreciates the opportunity to comment on the request by Singapore Telecommunications Ltd ("**SingTel**") for exemption from dominant licensee obligations with respect to the international telephone services ("**ITS**") market.

1 Introduction

1.1 This submission by StarHub is in response to IDA's invitation to comment on the request by SingTel for exemption from dominant licensee obligations with respect to the ITS market.

1.2 StarHub submits that SingTel's request for exemption should be denied for the reasons set out in this submission. StarHub is also extremely concerned that SingTel should make such a request given the clear absence of any legitimate justification.

2 Regulatory Framework

2.1 The regulatory framework for the assessment of dominance is set out in section 2 of the Code of Practice for Competition in the Provision of Telecommunications Services (the "**Code**"). Specifically section 2.2.1 provides that a licensee will be classified as dominant if it controls facilities providing a direct connection to end users and:

(a) those facilities are sufficiently costly or difficult to replicate so as to constitute a significant barrier to entry; or

(b) the licensee has the ability to restrict supply or raise prices above competitive levels for services provided on those facilities.

Thus, in order to have its dominance classification removed, a licensee must establish that **neither** of these two limbs of the test are satisfied.

2.2 Section 2.5.2 of the Code sets out the evidence that must be provided where a licensee seeks reclassification of its dominant status. Where the licensee is seeking reclassification based on it no longer controlling bottleneck facilities, it must provide verifiable data on the facilities it controls and the cost and ability of new entrants to duplicate these facilities (section 2.5.2.1).

2.3 Where the licensee is seeking reclassification based on its alleged inability to price above competitive levels (as is the case with SingTel's request for exemption), it must provide verifiable data on the scope of the market, the level of its market share, the level of market concentration in the market, the likelihood of competitors being able to respond effectively to price rises by the dominant licensee, and the likelihood that end users would respond to a significant non-transitory price increase by switching to a competing service provider (section 2.5.2.2). **SingTel's request fails to address many of these criteria, particularly those relating to market share and market concentration**.

2.4 Section 2.6 of the Code provides a mechanism for the exemption of specific services or facilities from specific dominant licensee requirements under the Code. It requires that the licensee seeking exemption submit an application identifying the specific provisions from which it seeks exemption **and** demonstrating how the continued application of each provision is not necessary to protect end users or to promote **and** preserve effective competition.

2.5 However SingTel, while seeking to rely on section 2.6 of the Code for the purposes of its request[1], fails to undertake any analysis of specific dominant licensee provisions. Rather it simply requests exemption from all dominant licensee obligations in the Code without providing evidence why each specific provision is no longer required. Furthermore the "without limitation" nature of SingTel's request in terms of the sections for which exemption is sought makes it unclear whether any RIO obligations that SingTel may have in connection with ITS are caught by the request. StarHub submits this is clearly not the approach contemplated by the Code.

2.6 StarHub submits that there are good grounds for IDA to reject SingTel's request on this basis alone, given SingTel's failure to comply with the terms of section 2.6.1 of the Code. However, if IDA wishes to consider the request notwithstanding these issues, StarHub submits that IDA should clearly take account of the criteria in sections 2.5.2.1 and 2.5.2.2 of the Code in determining whether or not continued application of the dominance requirements is necessary to protect end users or promote and preserve effective competition amongst licensees as set out in section 2.6.1.

2.7 StarHub submits that this is particularly the case given that:

(a) SingTel is seeking exemption from **all** its dominant licensee obligations for ITS and not merely a particular provision or provisions;

(b) the criteria in section 2.5.2.2 reflect internationally accepted criteria for determining dominance and also reflect the criteria employed by AUSTEL and OFTA in the dominance enquiries referred to by SingTel in its submission; and

(c) SingTel clearly retains control over bottleneck facilities providing a direct connection to end users and would therefore be unable to seek exemption under section 2.5.2.1 given the factors set out there.

3 Market Definition, Market Share and Market Concentration

3.1 StarHub agrees with the importance ascribed to SingTel to defining the scope of the relevant market for ITS as market definition is a necessary precursor to the assessment of market share, market concentration and other factors affecting the level of competition in that market.

3.2 StarHub also agrees that the ITS market includes international calls from mobile and fixed points as well as calling card, country direct and operator assisted calls at both the retail and wholesale levels. However StarHub does not agree that the market includes international private leased circuits (IPLCs) or what SingTel refers to as international hubbing services. StarHub submits that these latter services fit within a market better characterised as the external or international bandwidth services market.

3.3 It is hard to see how a switched product such as an international call, which is generally low cost and of a short duration, is substitutable for (and therefore in the same market as) a permanent service such as an IPLC, which is always available and of relatively high cost, particularly as the former are generally consumed by residential customers and small businesses whereas the latter are used by major corporates.

3.4 The distinction between international call services and international bandwidth services is well supported by other regulatory determinations on dominance in the Asia Pacific region. For example, AUSTEL, the former Australian telecommunications regulator, in the Report cited by SingTel in its submission stated that the "international hubbing market is not part of the international services market" [2]. Furthermore the Hong Kong regulator OFTA accepted the arguments of PCCW-HKT that switched or "on demand" services such as IDD, VPN and

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[1] *SingTel request for exemption, International Telephone Services* of 1 April 2003 at para 1.1.

[2] AUSTEL Final Report of August 1995 *Review of Telstra's Dominance in the International Telecommunications Services Market* at para 4.24.

Internet services were not in the external bandwidth services market. OFTA's decision is also referred to in SingTel's submission.

3.5 Having established the relevant market parameters it is then necessary to assess the dominant licensee's share of that market consistent with the criteria in section 2.5.2.2 of the Code and international best practice in assessing the dominance of incumbent telecommunications operators in particular markets.

3.6 The criteria in section 2.5.2.2 of the Code are set out in paragraph 2.3 above. As far as international best practice is concerned, StarHub submits that the decisions of AUSTEL and OFTA referred to by SingTel in its submission provide clear evidence of the paramount importance of assessing market share and market concentration in this context. For example, AUSTEL equated dominance in a market (also the ITS market in that case, a further reason for the relevance of the comparison) with a "commanding influence" and stated that the well accepted indicators of dominance included market shares, degree of market concentration, the ability to determine prices independently, barriers to entry and the character of corporate relationships and integration[3].

3.7 Furthermore AUSTEL indicated that Telstra's **retention of a commanding market share lead and a very high strategic concentration was a key factor in AUSTEL determining that Telstra remained dominant in the ITS market**[4].

3.8 OFTA applied similar criteria in assessing PCCW-HKT's dominant status in the review referred to above in accordance with the applicable Hong Kong legislation. For example, section 7L of the Telecommunications Ordinance (Hong Kong) states that when considering whether a licensee is dominant, the TA must take into account matters including, but not limited to:

(a) the market share of the licensee;

(b) the licensee's power to make pricing and other decisions;

(c) any barriers to entry to competitors into the relevant telecommunications market;

(d) the degree of product differentiation and sales promotion; and

(e) such other relevant matters as may be stipulated in guidelines referred to in section 6D(4)(a).

3.9 The question that must be determined is what level of market share is likely to constitute dominance in the absence of strongly countervailing factors. The Hong Kong experience is also useful in this regard and consistent with international best practice. For example, the Competition Guidelines issued by OFTA in Hong Kong ***provide that a licensee with a greater than 75% market share will be presumed to be dominant***[5]*.* OFTA has also applied an additional set of criteria since August 1999, namely that if a firm has a market share persistently above 50% it is likely that it is dominant[6]. The European Court of Justice has also held that a market share of over 50% will lead to a presumption of dominance,

[3] AUSTEL Final Report of August 1995 *Review of Telstra's Dominance in the International Telecommunications Services Market* at para 3.9.

[4] AUSTEL Final Report of August 1995 *Review of Telstra's Dominance in the International Telecommunications Services Market* at para 7.25.

[5] OFTA June 1995 *Guidelines to Assist the Interpretation and Application of the Competition Provisions of the FTNS Licence* at para 38.

[6] OFTA Statement of 4 August 1999 *Application for a Declaration of Non-dominance in the International Call Services Market for Non-China Routes by Cable & Wireless HKT Telephone Limited* at para 44.

unless there are exceptional circumstances demonstrating otherwise[7]. StarHub submits that, in SingTel's case, there are no exceptional circumstances of this kind, especially given SingTel's persistently high market share over a number of years.

3.10 Based on the publicly available information at StarHub's disposal, **SingTel's market share in the ITS market appears to be in the region of 80-87%, a figure substantially in excess of the 75% threshold for presumed dominance in Hong Kong and other similar regimes**. This assessment of SingTel's market share is based on SingTel's own most recent annual report which states at page 7 that "As at March 2002, SingTel had about 87% share of the international telephone services market, and half of the mobile market".

3.11 Furthermore, recent advertisements by SingTel on 1 April 2003 for its International Calling Services state that:

> "No wonder 8 out of 10 people choose us to carry their voices around the world."

3.12 By comparison PCCW-HKT's share of the international telecommunication services market in Hong Kong for the 2001/02 financial year was a mere 36.4%, less than half that of SingTel in the corresponding period[8]. Despite this obvious discrepancy and the other issues referred to in paragraph 4.2 below, SingTel still chooses to cite the removal of the dominance restrictions on PCCW-HKT in Hong Kong in support of its request.

3.13 With such a substantial degree of market share and a consequent high level of market concentration, **it is very difficult to see how SingTel could be characterised as anything other than clearly dominant in the ITS market**. However StarHub will set out further reasons for this characterisation in section 4 below.

4 Other Factors Affecting Competition in the ITS Market

4.1 In addition to the compelling evidence of dominance on the ITS market provided by SingTel's huge market share, there are, StarHub submits, a number of other factors which indicate that the retention of the dominant licensee requirements and, in particular, those requirements in sections 5.8.1 to 5.8.3 and 7.2 to 7.2.2.2, of the Code are necessary to promote and preserve effective competition (which are the key tests set out in section 2.6.1). These include:

(a) SingTel's degree of vertical integration and its consequent ability to impede effective retail competition by limiting the availability of wholesale services or providing them on less favourable terms and conditions;

(b) SingTel's control over the bottleneck infrastructure necessary to access ITS as set out in paragraph 4.3 below; and

(c) the extent to which the current level of competition in the ITS market depends on resale which is inherently low margin and consequently sensitive to small movements in wholesale pricing.

4.2 In the Report referred to above AUSTEL commented[9] that it was highly likely that Telstra would derive significant economies of scope and scale from elements of vertical integration including:

(a) advertising, particularly relating to brand;

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[7] AKZO [1991] ECR I - 3359 at para 60. The European Court of Justice held, with regard to a market share of 50%, that "very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position".

[8] Telegeography 2003 at page 24.

[9] AUSTEL Final Report of August 1995 *Review of Telstra's Dominance in the International Telecommunications Services Market* at para 5.91.

(b) bundling; and

(c) shared costs and billing.

Furthermore the structural separation of REACH (a joint venture between PCCW-HKT and Telstra) and PCCW-HKT was a key factor in PCCW-HKT's application for non-dominant status with OFTA still considering any "over-arching benefit" that REACH may enjoy through its **previous** structural relationship with PCCW to be significant, notwithstanding that PCCW and REACH were already separated[10]. Unlike PCCW-HKT (but like Telstra) SingTel is a fully and vertically integrated provider of ITS. **Importantly, SingTel failed to mention this critical factor in its submission.**

4.3 The significance of SingTel's control over the PSTN access infrastructure arising out of its former monopoly position in assessing dominance is reflected in section 2.2.1 of the Code which recognises that the control of bottleneck facilities automatically leads to a classification of dominance. SingTel and its subsidiaries control all the major means of accessing ITS. These include the local PSTN where SingTel has almost 100% market share, mobiles (where SingTel Mobile has approximately 50% market share) and payphones (where SingTel is again the major provider). Furthermore, even though SingTel's market share in mobiles is "only" some 50% (which is still enough to make it clearly the number one player), the retention of dominant licensee regulation is essential, even in the area of the ITS market relating accessed via mobiles, to ensure that SingTel complies with obligations such as those in section 5.3.5.1 of the Code (Absolute Prohibition on Discrimination in Favour of Affiliates).

4.4 StarHub submits that SingTel's control of these facilities and its consequent ability to bundle services with ITS, when considered in the light of SingTel's huge market share in the ITS market, means that, absent the dominant licensee obligations and, in particular, those in section 7.2 relating to abuse of dominant position in the Singapore market, **SingTel would be in a position to significantly damage competition by absorbing substantial retail price reductions in that market**. This would have a particularly damaging impact on competition in circumstances where SingTel was no longer obliged to tariff wholesale ITS pursuant to section 5.8.3 of the Code (which would be the case if SingTel's request were accepted).

4.5 As far as SingTel's submission that the number of cables now landing in Singapore means that there is effective competition in the ITS market is concerned, StarHub submits that this ignores the fact that SingTel:

(a) retains control of the PSTN, which is the key method of accessing the cables; and

(b) remains the landing party for the majority of these cables.

As the landing party SingTel retains substantial control over access to the cable infrastructure and hence the supply of international minutes and IPLCs provided over these cables. SingTel's degree of control means that, absent dominant licensee regulation (particularly section 7.2 of the Code), SingTel would be in a position to constrain access to the cables by competing licensees, particularly given its high degree of control over backhaul infrastructure as well.

4.6 Although StarHub submits that the current tariff filing processes could be improved, consistent with the goals of the Code to achieve open and transparent regulation, SingTel's obligation to file tariffs for wholesale services, and the visibility of any anti-competitive conduct this affords IDA, is essential to promote competition in an environment where SingTel has the ability to leverage off its dominant position in so many areas of the market. It also provides an independent record of SingTel's conduct in the event that IDA is subsequently required to consider enforcement requests made by competing licensees and enables IDA to monitor SingTel's conduct with a view to pre-empting anti-competitive behaviour.

4.7 Furthermore, SingTel subscribers (both Direct Exchange Line and Mobile) who want to use the ITS services of other service providers need to pre-register with such providers which affects the ability of those subscribers to switch to an alternative provider. This in itself is a

[10] OFTA Statement of 15 March 2002 *Application by Reach Limited for Declaration of Non-dominance in the Market for External Bandwidth Services* at para 120.

barrier to entry due to reasons of inertia, a reluctance to establish a new relationship with another service provider and a resistance to receiving multiple bills. SingTel's incumbency status also manifests itself in an inherent branding advantage which still needs to be countered by regulation. AUSTEL in its review of Telstra's dominance in the ITS market also noted that brand effects probably play a significant role in IDD[11].

4.8 While SingTel's submission focuses on the extent to which it is currently able to raise prices of ITS above competitive levels, StarHub submits that one of the most significant impacts on effective competition arising out of the removal of dominant licensee obligations would be an **increased ability on the part of SingTel to engage in predatory pricing and price squeezes** which are now prohibited under section 7.2.1 of the Code (Pricing Abuses), in particular given SingTel's control over the bottleneck infrastructure necessary to access ITS. It should be remembered that the Code provides virtually the only form of regulatory protection against these forms of market conduct in the absence of a more general competition law in Singapore. StarHub submits that SingTel's control of facilities and infrastructure and its incumbent status ensures that SingTel enjoys the lowest cost amongst all ITS operators. This means that SingTel has the ability to lower its retail prices to a level that will drive other operators out of the market and then raise them again subsequently.

4.9 The dominant licensee obligations in section 3 of the Code are also crucial to ensure that the interests of end users are protected and SingTel is not able to selectively "cherry pick" customers of competing licensees by offering them lower prices while maintaining higher prices for its wholesale services and services to other end users. For example section 3.3.3 of the Code requires a dominant licensee to provide services to end users at prices, terms and conditions that are non discriminatory and prohibits discrimination in favour of a subsidiary, affiliate or related entity. SingTel's request for exemption fails to establish that continuation of such regulation is **not** necessary to preserve competition and protect end users.

4.10 Furthermore, as a former monopoly and an incumbent, SingTel has clearly built up sufficient financial reserves to sustain it through any losses it may occur through the lowering of its prices to predatory levels. This alone is a sufficient reason to ensure that SingTel's dominant licensee obligations remain.

5 Misleading Aspects of SingTel's Submission

5.1 There are a number of aspects of SingTel's submission which are misleading. For example, SingTel claims that ITS traffic has grown by 172% over the period from April 2000 to January 2003 in support of its argument that there is already effective competition in the ITS market[12]. However SingTel's reference to IDA statistics fails to take account of the fact that the total April 2000 minutes it refers to excluded both calls to Malaysia and transit and regional traffic, whereas the January 2003 minutes include traffic from all of those sources[13].

5.2 When transit and regional minutes are added to the figure quoted by SingTel, the total is 254.27 million minutes for April 2000, as compared with the January 2003 figure of 235.7 million minutes. This shows a **decrease** in traffic volume of some 7% over the period, rather than the 172% increase quoted by SingTel. Even if SingTel's claims were accurate, they may simply serve to demonstrate a growth in the overall market (due to factors such as globalisation) rather than an increase in competition, given SingTel's retention of its commanding market share.

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[11] AUSTEL Final Report of August 1995 *Review of Telstra's Dominance in the International Telecommunications Services Market* at para 5.42.

[12] *SingTel request for exemption, International Telephone Services* of 20 March 2003 at para 5.21.

[13] IDA, *Statistics on Telecom Services for 2003*: "As Singapore continues to develop as a hub for international voice traffic, including transit and regional traffic in our published statistic will provide a more holistic picture of the vibrancy and growth of the entire international telephone services market in Singapore. For comparison purposes, figures from previous years will also be adjusted accordingly. This change has been applied retroactively from January 2001."

5.3 SingTel claims further support for its argument from the apparent decline in revenue attributable to ITS post liberalisation. Specifically it states that "Two (2) years before the advent of the liberalisation, international telephone services contributed 41.6 per cent to SingTel's operating revenues. Two (2) years after, by March 2002 this proportion has declined to 22 per cent". However what this statistic fails to indicate is that revenue from ITS had **already** fallen to 34% prior to the advent of liberalisation[14]. This suggests that the decline in revenues may have been due, in part at least, to factors **other than** an increase in competition. (For example other parts of SingTel's business may have rapidly expanded.)

6 No Evidence that Dominant Licensee Regulation is Damaging SingTel or Consumers

6.1 StarHub submits that, in contrast to the compelling arguments set out above for retaining dominant licensee regulation over SingTel in the ITS market, **SingTel has not made any compelling arguments why the existing level of regulation is damaging to it or to consumers of ITS**. Rather, StarHub submits, the benefits to consumers set out in SingTel's submission have only occurred as a result of that regulation on SingTel and would almost certainly have not occurred without it.

6.2 Rather than contemplate the removal of the dominant licensee obligations, IDA should consider imposing a greater degree of transparency on the wholesale and retail tariffing process for dominant licensees under sections 3.3 and 5.8 of the Code (including visibility of any "one-off" discounts) so as to better enable competing licensees to ensure that the dominant licensee is complying with its obligations under the Code. This could be achieved by imposing an obligation on the dominant licensee to publish its tariffs.

6.3 Finally, StarHub submits that the gains which consumers of ITS have enjoyed since liberalisation as a result of increased competition introduced by the Code will easily and quickly be lost if SingTel is exempted from dominant licensee regulation. The extent of SingTel's market share in the ITS and other markets shows that competition is still in its infancy in Singapore and therefore asymmetric regulation is still required to promote and preserve competition and protect the interests of end users.

7 Conclusions

7.1 For the reasons set out above StarHub submits that IDA should not exempt SingTel from any of the dominant licensee obligations in the Code in relation to the provision of ITS. StarHub submits that a vertically integrated incumbent which controls the access infrastructure for ITS and which has a market share of between 80% and 87% is clearly in a dominant position in the ITS market and therefore needs to be remain subject to the dominant licensee obligations in the Code. Retention of those obligations is therefore clearly necessary to protect end users of ITS and to preserve effective competition amongst licensees.

7.2 Furthermore, any further consideration of such a request should, StarHub submits, be deferred until at least:

(a) there is a reduction in SingTel's market share to a point consistent with international norms as to what constitutes "non-dominance"; and

(b) SingTel no longer controls the bottleneck infrastructure necessary to access ITS, or that control no longer creates a barrier to entry for new entrants.

Otherwise the reduction in prices for ITS that has occurred to date as a result of dominant licensee regulation on SingTel will soon be lost, to the detriment of end users and Singapore's international competitiveness.

[14] SingTel *Annual Report,* 1997/1998 at page 8; SingTel *Annual Report* 2001/2002 at page 18.