

By Fax & by E-mail

19 January 2001

Senior Regulatory Affairs Manager (Services Licensing)
Office of the Telecommunications Authority
29/F, Wu Chung House
213, Queen's Road East
Wan Chai
Hong Kong

Dear Ms. Lam,

**Submission to the Office of the Telecommunications Authority on the Discussion Paper
“Open Network Regulatory Framework for Third Generation Public Mobile Services”**

This submission is made by CLP Telecommunications Ltd. (CLP TeleCom) in response to the discussion paper “Open Network Regulatory Framework for Third Generation Public Mobile Service in Hong Kong” and the industry forum held on 5 January 2001.

The following summarizes CLP TeleCom's comments on the discussion paper and specific issues discussed in the industry forum.

“Open Network” Requirement

CLP TeleCom fully supports the objectives of “Open Network Requirement” (ONR). CLP TeleCom believes the requirement is imperative to fulfil the objectives stipulated in the second industry consultation paper, namely:

- To introduce more competition at the content and service level
- To enable small and medium sized service or content providers to provide more innovative services in the market
- Existing 2G network operators may continue in 3G market even if they fail to obtain 3G network licences

CLP TeleCom firmly believes the successful development of a 3G market in Hong Kong is highly dependent upon the presence of service providers, in particular small and medium enterprises with creative ideas and innovative products and services which are able to offer genuine choice to consumers. These small and medium sized service providers have proven themselves in the liberalization of external telecommunications in Hong Kong by expediting the reduction in IDD tariffs. CLP TeleCom believes ONR is well suited to create an environment that is conducive to competition among MNOs, MVNOs and service providers and thereby for the benefit of personal and business consumers. CLP TeleCom also believes that ONR will promote successful mobile broadband development in Hong Kong SAR.

ONR made Mandatory

CLP TeleCom agrees that it is essential to make ONR a mandatory requirement for 3G MNOs such that:

- The 3G mobile network is available on a non-discriminatory basis to innovative content and service providers
- MNOs cannot impose unreasonable conditions on Non Affiliated Service Providers that may suffocate innovations and creativity
- MNOs cannot extract monopoly rents by exploiting spectrum shortages

CLP TeleCom supports the TA's view to require MNOs and NSPs to conduct commercial negotiations and to make the regulation on ONR a reserve mechanism for OFTA to intervene. We strongly recommend the issuance by the TA of Guidelines or a Statement to lay out the TA's expectations of the economic and technical policies that will apply in any intervention or determination.

Effective Enforcement of ONR

In CLP TeleCom's view, for the "Open Network" regulation to be enforceable, the TA must specify in the 3G licenses a minimum percentage of network capacity that the licensee must be obliged to open to non-affiliated service providers (NSPs).

Without such clear and measurable indicators, MNOs may delay provision of the required network capacities thus deferring the launch of NSPs' services and development of 3G mobile services in Hong Kong SAR. CLP TeleCom reiterates and supports the proposed percentage split for opening up the network as follows:

- Up to a maximum of 50% for MNOs or their associated companies
- Up to 30% for forward sales (or long term contracts) to non-affiliated service providers
- At least 20% to be made available on a short-term tariffed basis, possibly supported by a capacity trading exchange

To provide proper incentives for the MNOs and NSPs to resolve matters through commercial negotiation and to avoid the commercial process being prolonged by MNOs, CLP TeleCom repeats our strong recommendation that the TA should issue Guidelines or a Statement setting out the procedures and the TA's expectations of the economic and technical policies that will apply in making any determination. The TA has previously issued similar Guidelines and Statements covering fixed network interconnection and arbitration of mobile access fees in concealed areas, which provides useful information to operators.

CLP TeleCom suggests the Guidelines or Statement should include at least the following:

- Relevant factors to consider when intervening to resolve deadlocked commercial negotiation;
- Reasonable period of time for commercial negotiation after which the TA will intervene and make any determination; and
- Evidences and / or documentations to be used by the parties in presenting the cases to the TA for mediation.

Defining Non-affiliated Service Providers

CLP TeleCom agrees there is a need to define clearly non-affiliated service providers (NSPs) in the licensing arrangement to minimize the risk of MNOs entering into agreements with related companies to abuse the Open Network requirement.

A clear distinction between service providers and pure resellers is the ownership of customers. Instead of merely reselling the service of the MNO, the service providers are responsible to add value to the service and perform marketing, sales, distribution, billing and other operations support functions. Customers subscribing the service of the service providers must perceive themselves as using the service of the service providers rather than the underlying MNO that supplies the network resources.

As such, CLP TeleCom does not consider the current dealership arrangement deployed by most 2G operators meets the definition of service provider, as the dealers do not manage the subscriber relationship. The dealers are neither responsible for the network service nor billing. They are merely the sales agent of the MNO.

Another important aspect of implementing the Open Network requirement is to define what constitutes non-affiliated service providers. CLP TeleCom considers that affiliation should be assessed based on whether the MNO is able to exercise significant influence over the service providers. As the influence on the service provider is rather vague and often difficult to interpret, a more measurable indicator would be the equity ownership (including through subsidiaries) in the respective service provider.

CLP TeleCom suggests that the TA adopts a definition of 5% equity ownership to presume influence for the purpose of defining non-affiliated NSPs.

Regular Reporting on “Open Network Percentage”

In order to administer fair competition, CLP TeleCom supports the TA’s proposal to have all MNOs reporting their open network percentage. This will ensure that the TA has representative information and that he is able to take prompt action against MNOs should he form the view that they are violating or abusing the ONR.

CLP TeleCom recommends that the Open Network percentage should be expressed on actual utilization of the NSPs rather than capacity reserved as some MNOs have suggested

to discourage anti-competitive pre-emption by service providers against their rivals and to promote more effective utilization of network capacity by MNOs. To prevent unnecessary hoarding of network capacity by service providers and facilitate monitoring by the TA, CLP TeleCom suggests the TA to require MNOs to include in their reports actual and committed utilization of each NSP with whom the MNO have contracted.

With respect to the reporting interval, CLP TeleCom submits that the reporting interval should be as frequent as possible, especially in the early stage of implementation and suggests such utilization reports should be filed on a monthly basis. CLP TeleCom further recommends that the TA to publish such percentages by operators to increase market transparency on the supply side.

Regarding the unit of measurement, CLP TeleCom agrees that utilisation should be measured based on small geographical units to ensure the relative network usage of MNOs and NSPs is properly reflected; we recommend that a weighted utilisation be introduced to take account of heavy traffic cells.

Wholesale Pricing

In setting wholesale pricing, CLP TeleCom sees the merits of ‘retail-minus’ approach to ensure network operators, who use cut-throat pricing to attract customers, cannot act in a predatory manner towards NSPs. To determine wholesale price based on the “retail minus” approach, it is necessary to clearly define the concept of ‘retail pricing’ based on the following considerations:

- Should it be with reference to the MNO or the market average of all MNOs? CLP TeleCom’s view is that the wholesale price should be determined based on the retail prices of individual MNOs.
- Should it be with reference to the standard price and acquisition offer? CLP TeleCom considers that the wholesale price should be based on a broad average of retail tariffs offered by the respective MNO, in particular the corporate plans offered to large corporations and special offers for customer acquisition programmes.
- Whether to include license fee in wholesale price calculation. CLP TeleCom opines that since the auction fee is a sunk cost incurred by the MNO irrespective of whether the NSPs use the network service of the MNO, the wholesale price charged by MNOs should exclude the auction payment.

CLP TeleCom finds that a clear and specific definition on the price and cost elements in the 3G licenses is essential in speeding up the whole process of any TA intervention if commercial negotiation breaks down. In the longer term when the market situation has normalised, the lower of cost or retail-minus approach should be gradually replaced by the Long Run Average Incremental Cost (LRAIC) approach.

Wholesale of network capacity by Service Providers

Depending on market demand and commercial conditions, CLP TeleCom supports that service providers should not be restrained from further sub-selling its committed traffic volume with any MNO to other service providers.

CLP TeleCom noted the concern of some respondents about making network capacity a tradable commodity subject to speculative trading. CLP TeleCom considers that concern to be unfounded not least because there is no evidence that the introduction of such a practice would be detrimental to consumers or the industry. As resale of services is generally allowed under the current regulatory framework, CLP TeleCom sees no reason why 3G network capacity should be excluded. Regarding the concern about speculative trading of MNO's capacity, CLP TeleCom suggests the TA to review the situation if speculative trading becomes a reality.

Traffic Commitment by NSPs

CLP TeleCom supports that NSPs should commit on capacity if required in their commercial contracts with MNOs and be responsible to pay for the committed volume. However, this should only be the case in the event that the TA agrees with our view that resale of capacity will be allowed. The terms and conditions on the capacity commitment should be subject to commercial negotiations between MNOs and NSPs. Such commitment not only provides proper safeguards to MNOs to maintain their network and expand their capacity but also deters MVNOs from over-booking capacity from the MNOs.

With respect to the allegation of some MNOs that the failure of service providers to provide accurate forecasts may result in deterioration of overall network quality, CLP TeleCom considers that the operations and maintenance of networks for effective service provision is a normal business process for the MNOs. Since service providers, as with other retail customers of the MNO, are entitled to similar quality of service, it should be the duty of the MNO to forecast market demand and dimension its network accordingly to ensure optimal capacity is available to support MNO, MNO associated companies and NSP's traffic. Nevertheless, CLP TeleCom agrees that the MNO should devise proper review mechanisms together with the service providers to ensure efficient provision of network capacity.

CLP TeleCom also wishes to highlight a relevant point on this matter that it may sometimes be possible that a service provider will utilize network capacity in excess of its committed level due to short-term traffic fluctuation. Under that scenario, the MNO should endeavour to cater for the temporary upsurge in traffic of the service providers if the MNO has sufficient network capacity. Should the MNO have insufficient capacity to handle the additional traffic, the MNO should dimension its network in a way that traffic from MNO customers and NSP customers is treated in a non-discriminatory manner. In other words, retail customers of the MNO and the NSP should have equal priority in using the common pooled network capacity. CLP TeleCom believes that such pooling of network resources would ensure non-discriminatory treatment of NSPs vis-à-vis the MNO itself. It also

provides proper motivation to the MNO to plan an effective network for itself and other service providers.

Quality of Service (QOS) Commitment by MNO

CLP TeleCom disagrees some MNOs' argument that non-discriminatory treatment will necessarily mean depriving them of the ability to provide differentiated quality of services. Instead, it is necessary to ensure fair treatment in terms of QOS as compared to the service level enjoyed by customers of MNOs or their affiliated service providers / resellers. A fair and equitable treatment is to require MNOs to offer network services to NSPs at a quality that is no worse off than the MNO offers to its own retail customers.

Mandatory Roaming and Number Portability between 2G and 3G networks

CLP TeleCom noted some respondents in the industry forum have voiced out their opinion that roaming and Number Portability between 2G and 3G networks should not be made mandatory. CLP TeleCom remains of the view that mandatory roaming and MNP between 2G and 3G networks is imperative to the successful operation of 3G mobile services and to the development of the market by minimizing customer inconvenience in switching network operators.

Mandatory Provision of Essential Support Facilities by MNO to Service Providers

In addition to basic network facilities offered by MNOs, it is also customary for service providers to request essential support services from MNOs to offer to their own customers, for example International Roaming and other value added features. In the interests of customers having access to a wide array of services, CLP TeleCom opines that MNOs should be mandated to offer essential supporting facilities at the lower of cost or retail-minus to service providers if necessary.

Application of Mobile Network Code (MNC) by service providers

In light of the fact that it is possible for MVNOs or service providers to acquire their own MNC, CLP TeleCom advises that the TA should clearly specify the criteria on how a provider can apply for a MNC for the provision of services.

Monitoring on Implementation of 3G Network by MNOs

To allow MNOs and NSPs to provide 3G services to the public with minimum delay, the TA should introduce proper mechanisms to require MNO awarded 3G licences to build out their network in a timely manner. A logical mechanism is to put rollout commitments of 3G

MNOs in their respective licence conditions. To further secure MNO's compliance to the ONR, it is also advisable to require 3G MNOs to take up performance bonds with respect to opening up of their networks.

Conclusion

CLP TeleCom welcomes the TA's firm decision to implement a mandatory open network requirement for the benefit of consumers. CLP TeleCom believes the successful implementation of the Open Network requirement requires a robust measurement and monitoring mechanism; appropriate intervention and clear enforcement by the TA. CLP TeleCom trusts that with these arrangements in place, a level playing field between MNOs, MVNOs and other service providers can be created and Hong Kong will emerge as one of the most prosperous and vibrant 3G markets in the world.

Yours sincerely

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