

BY FAX (No. 2121 0420)

Your Ref.: CB1/BC/11/01

2nd October, 2002

The Bills Committee
Legislative Council
Legislative Council Building,
8 Jackson Road,
Central,
Hong Kong

Attn: Ms. Rosalind Ma

Dear Madam,

**Submission to the Bills Committee on
Telecommunications (Amendment) Bill 2002**

Please find attached the Submission to the Bills Committee on Telecommunications (Amendment) Bill 2002 by New World PCS Limited. Softcopy of the same will be sent to you by e-mail.

If you have any questions, please feel free to contact the undersigned at 2133-7296 or fax no. 2133-2019.

Yours faithfully,
For and on behalf of
New World PCS Limited

Kingsley Yuen
Associate Director, Legal Affairs

Atth.

SUBMISSION TO THE BILLS COMMITTEE

ON

TELECOMMUNICATIONS (AMENDMENT) BILL 2002

2nd Oct., 2002

1. INTRODUCTION

In response to the publication on 17th April, 2001 of the consultation paper on regulation of mergers and acquisitions of the telecommunications market, New World PCS Limited (“New World Mobility”) made submissions jointly with its affiliated company, New World Telephone Limited on 12th June, 2001. Subsequently, the Telecommunications (Amendment) Bill (“the Bill”) was published in the Hong Kong gazette on 3rd May, 2002.

In this position paper, New World Mobility reiterates its position that the TA should not be put in a position where it assumes the role as the policy maker as well as judicial authority regarding competition. In addition, New World Mobility would make its comments on other clauses in the Bill.

2. NEW WORLD MOBILITY’S POSITION AND COMMENTS

Application of Regulatory Framework

We do not find such sector specific regulation justifiable although ITBB has given its explanation in paragraph 11 of the Legislative Council Brief (“the Brief”). If the TA insisted that the Bill be implemented, as explained in the aforesaid joint submission, we believe that any merger and acquisition regulatory framework should apply not only to carrier licensees but to all licensees, including service providers and be assessed within a market segment (not a carrier licensee context only). The application of the rules should be done by reference to market definition rather than based on the type of license held given the potential overlap of services that might be provided by licensees (carrier or not).

TA’s role

We note in paragraph 5 of the Legislative Brief that ITBB aims at giving “the TA an effective regulatory tool to intervene where he has regulatory concern, that is, the relevant transaction may substantially lessen competition in the telecommunications market”.

We would reiterate that TA’s role is to make policies that favour competition. From a policy point of view, New World does not believe the TA should have the double role of being policy maker and ruling authority on competition. The TA’s concern should be solely to establish policies that foster competition to the benefit of the consumers and result in a healthy, vibrant and dynamic telecommunication sector. M&A activity may occur as a result of, or in reaction to, some policies drafted by the TA, having an unforeseen effect on the realization of the objectives the policies were aiming at, or even neutralizing the policies. TA shall not be put in a position to rule over merger

and acquisition activities, thus artificially adjusting the results and consequences of its policies. New World Mobility's position is that merger and acquisition control should be left to an independent third party that could objectively evaluate TA's as well as the merging parties' arguments for or against the proposed merger and acquisition transactions. It is inadvisable for the TA to be the policy maker and the judge of the effectiveness of such policies.

Substantially lessen competition

New World Mobility noted that the Bill has imposed a new threshold of "substantially lessen competition in a telecommunications market" before the TA will issue directions. However, clearer definition of this concept is necessary.

Further, it is not clear to us as to the meaning of "likely to have". How "likely" will fulfil the test? Will the test of "on a balance of probability" test suffice or does it require "beyond reasonable doubt"?

Compliance obligations on carrier licensees

The Bill suggests that prior to a proposed change in ownership or control, a carrier licensee may on a voluntary basis seek the consent of the TA to the proposed change. It was also proposed in the Bill that it is the carrier licensee which shall take such action as the TA considers necessary to eliminate any such anti-competitive effect.

The above wrongfully assumes that the licensees are always privy to shareholder ownership transactions. Transfer of control of ownership may occur a few levels above the licensee or be a result of contractual agreements to which the licensee might not be a party. New World believes that the principles would be best served if the obligation to get clearance from the ruling body resided with the seller and/or purchaser of the direct or indirect interest in a licensee. The sanctions for non-compliance should not be imposed upon the licensee but rather on the persons who acquired or divested the interest without complying with the rules. As for obligations of the licensees, New World believes that it should only be one of notification to the TA to the extent it has knowledge of ownership transfers that are above prescribed levels.

Carrier Licensees

It is not clear to us as to the meaning of "carrier licensees". Note to paragraph (f) of Clause 6 of the Brief may give us some hint. In any event, such a definition shall be included in the amended Ordinance.

Costs

We note from paragraph 7P(10) of the Bill that the carrier concerned will have to bear the costs and expenses incurred by the TA in making and/or processing a decision. It

is preferable that such a fee shall be a fixed one. Or, if the TA opt for a variable fee, the heads of charges in calculating this figure shall be specified clearly in the amended Ordinance.

Appeal

Should our view regarding the involvement of the TA in the administration of the competition rules be disregarded and the TA be still viewed as the appropriate body to apply the competition test, New World agrees that any decision by the TA should be subject to appeal to the Telecommunications (Competition Provisions) Appeal Board. On the other hand, if an independent ruling body is established to administer and judge upon competition issues, we do not believe an appeal process would be required.

3. CONCLUSION

LegCo should embed in the Bill the general framework to ensure regulations are not over reaching as current drafting is board. The current uncertainties and proposed subjective guidelines will likely be detrimental to the telecommunications sector, potentially deter required market consolidation in the mobile industry and likely distract foreign investments from being made in Hong Kong's telecommunications sector.