PCCW Limited Comments on the Draft Communications Authority Bill

PCCW welcomes the opportunity to provide preliminary comments to the Bills Committee on the Communications Authority Bill. This Bill proposes to merge the existing TA and BA to create a single regulator, the Communications Authority ("CA"). It is PCCW's view that this is a useful proposal.

At the same time, it is important to recall why the Bill is now before LegCo. This process started in 2006, with the view that rapid advancements in technology was blurring the traditional boundaries between telecommunications and broadcasting, leading to the convergence of the two markets, and thus necessitating this bill to merge the regulators and critically to up-date the two relevant statutes the TO and the BO. The distinctions between telecommunications and broadcasting have in some cases become blurred. Indeed, distinctions within these two sectors have become even more blurred, with the internet adding another level of complexity.

Importantly, the staff merger and creation of the CA is just step one of the required two steps in this process. The second step is a revision of the statute to actually reflect convergence and market changes. This applies to both the telecommunications and broadcasting sectors. This up-dating and merging of the statutes is the core of the exercise. From 2006 this up-dating will not likely occur until step two is completed, perhaps six or seven years after 2006. For those who on a daily basis witness rapid technological and market changes, as well as convergence, this is a very long time.

PCCW would place more importance on step two as this is where the substance of this exercise is located. Thus PCCW would have preferred a single comprehensive solution or the swapping of steps one and two.

As to the Bill itself, there are several points to note, where the bill could be strengthened.

First, under clause 17 the power of the CA may be broadly delegated: to a committee (which will have as its membership a majority of CA members but decisions may be without a majority of CA members), the DG (who has broad powers) or any public officer (why the CA should delegate its powers to a broad and undefined category of public officers is not disclosed). Importantly, one of the clear advantages of the CA is to have multiple views and experiences reflected in the decision making process which a Commission structure enables. This is lost when broad delegations of authority exist to individuals. Equally important, there are no limitations on this delegation of authority or a description of what can or cannot be delegated. Certainly decisions related to the more important issues should not be delegated. These might include any decisions relating to interconnection, facility sharing, rate structures and rate levels, penalties, consumer matters, competition, mergers and acquisitions, significant waivers, disqualified persons and license changes just to name a few. This may also apply to decisions taken under certain statutory provisions (eg, TO sections 36A, 36AA, 36B, 7K, 7L, 7M, 7P, or any future section 7Q, BO sections 13 and 14) and license conditions. PCCW would note that the BA currently delegates certain tasks to TELA but these are limited. Delegations can be important when dealing with day to day 'minor' issues, but should not occur in penalty, major, controversial or novel matters. There is also the question of whether the DG can further delegate authority to OFCA personnel. In sum, the bill should provide more guidance as to delegations of authority, with the goal of delegating day to day matters but not other matters, and even in such a delegation to create a system that efficiently uses committees and the DG without giving too much power to either (or to any CA member).

Second, the powers of the Director General are substantial as the DG runs the CA, is a voting CA member and will no doubt have some level of delegated authority. This must be done in a considered way as to not concentrate too much power and discretion in one official. The primary role of the DG should be to implement policy, not to make it. Having full time members of the CA would act to offset the powers of the DG and enhance decision making. *Third*, under the bill meetings of the CA need not be public and the work of the CA may be done by circulation. The absence of public meetings and the use of a circulation process for significant issues may inadvertently limit the debate of important issues, result in less considered decisions

and decrease public confidence in the decision making process. There would seem to be little reason for a less transparent decision making process. *Fourth*, there are no term limits, but term limits generally allow new members and new thinking.

Fifth, the confidentiality provisions found in clause 21 are not as strong as they should be, especially in comparison with the status quo and global examples. The CA will in its normal course of operation and investigations obtain a substantial amount of commercially sensitive information. This information should not be released to the public absent a strong public interest showing. The effected party or parties should also be notified and allowed to comment as a matter of due process on any proposed release of confidential material.

In more detail, the definition of confidential information found in clause 21(5) is too narrow. Confidential material is broader than trade or business secrets, or information classified by the Government as confidential (clauses 21(5) (a) and (b)). The clause will merely encourage a party to say that all information is confidential per 21(5)(c) and thus create unhelpful satellite debates on confidentiality issues. It is noted that a public officer is omitted from clause 21(5)(c) thus not allowing any confidentiality to apply to material requested by a public officer (eg, a committee member who requests information) unless it falls within subsections (a) or (b). The clause does not require a weighing of interests and nor does it allow disclosure only when there is a strong public interest showing.

Clause 21(2) raises several issues. As a preliminary point, because it allows disclosure of confidential information, this clause should be drafted tightly with the purpose of not allowing disclosure except in very clear and defined situations, and that the material disclosed is just that necessary for the stated and required purpose. Issues arising in the drafting:

(b)….this section is too broad and should be amended to make clear the narrow set of individuals to whom confidential information may be given (eg, legal counsel, forensic accountants). Subsection (d) is narrowly drafted, subsection (b) should be too in this respect.

(b) and (c)…should be limited to proceedings taking place in Hong Kong.

(d) and (f)…the material disclosed should only be broad enough for the stated purposes.
(l)…the 'in belief' language is too weak when dealing with confidential information. Certainly a public officer has a high duty of care and can obtain the advice of counsel. This applies to clause 21(4) (a) and (b) as well. Negligence, an unwillingness to inquire or indifference should not be an arguable defenses.

It may also be useful to review the confidentiality requirements which apply to exiting CA, OFCA and committee members.

This Bill may be more significant for what it does not do. Briefly: *First*, the telecommunications market is extremely competitive. Indeed it is one of the most competitive markets in Hong Kong. Regulation, logically, should exist only where market forces cannot provide benefits to the public. This is the essence of the Government's market driven approach to all sectors: market driven, limited regulation, targeted regulation. Thus this Bill should have initiated the debate on the level of competition, the need for a sector specific regulator and the sunsetting the regulator (in whole or in part). A sector specific regulator is generally needed only when a sector is not competitive and abuses of market power are anticipated. This is not the case in the telecom sector anymore and yet this fundamental issue is not addressed.

Second, the Bill could have addressed areas of overlapping jurisdiction with other sectors. For example, why do telecommunications licensees have clauses relating to data privacy when there is a general date privacy ordinance? These sections were useful prior to the enactment of the privacy ordinance, now they are inconsistent and discriminatory, and create inconsistent policy approaches. Another example is the competition provisions of the TO and BA, which are different. Inconsistencies in decision making is therefore possible. In a converging market where both statutes could be engaged raises the question as to which statute applies.

Third, it is expected that the CA will be more efficient than the separate TA and BA. Yet nothing in the accompanying documents suggests that these savings will be passed through to those (ie, the licensees) who pay millions of dollars in license fees.

The size of the OFTA trading fund would also suggest fee reductions are more than timely.

Fourth, there are a number of amendments that need to be made to the TO and BO, to modernize them and to fix old drafting. Nothing is done to address these issues as they must await step two.

This bill represents an opportunity to generally up-date the TO and BO. Unfortunately, this opportunity will be lost until step two in several years time. For an industry subject to convergence, rapid change and hyper-competition, several more years of status quo is not the best way forward. Nevertheless, PCCW supports this modest step forward.

Respectfully submitted by

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