



Hutchison Telecom
Hong Kong

HUTCHISON TELEPHONE COMPANY LIMITED

SUBMISSION

in response to

CONSULTATION

on

“PROPOSED SPECTRUM POLICY FRAMEWORK”

31 January 2007

Submission of Hutchison Telephone Company Limited (“HTCL”) in response to the Government’s Consultation Paper on Proposed Spectrum Policy Framework

HTCL welcomes the government’s initiative to undertake the proposed policy review on spectrum framework. We are pleased to provide our preliminary thoughts regarding the various questions posed in the consultation document as follows.

1. Overview – the Importance of a Comprehensive Spectrum Policy Review and the “Policy First” Approach

This initiative originates from the government’s undertaking made in November 2004 to carry out a spectrum policy review on the future allocation and assignment of radio spectrum for telecommunications and related services. According to the statement dated 29 November 2004 of the Telecommunications Authority (“TA”), the government undertakes not to further allocate or assign radio spectrum for telecommunications and related services until after the completion of the spectrum policy review.¹ We therefore believe that the current consultation on the licensing of various frequency bands for CDMA 2000 service (“CDMA Consultation”)², broadband wireless access (“BWA”)³ and mobile TV (“Mobile TV”)⁴ should all be put on hold until the completion of the spectrum policy review. The government should act consistently in accordance with its own stated policy statement.

Indeed, these other consultations on CDMA 2000, BWA and Mobile TV would require the inputs from the results of the spectrum policy review on the various aspects that have been put forward for consultation, namely spectrum policy objectives, guiding principles in spectrum management, spectrum rights, spectrum supply (including spectrum trading and liberalization), spectrum for government services and spectrum pricing.

If any of these separate consultations is completed prior to the outcome of the spectrum policy review, the integrity of the relevant decision in respect of such consultation would be tainted because the decision was not made with the benefits of, nor in congruence with, the result of the spectrum policy review. If the outcome of any of these consultations is

¹ Paragraph 42 of the Statement: “The Government intends to initiate a separate spectrum policy review on the allocation and assignment of radio spectrum for telecommunications and related services. In the light of the outcome of the review, the Government will initiate the necessary legislative and administrative procedures to implement the revised spectrum policy. The TA will then determine the way forward for the allocation and assignment of the spectrum vacated by the existing IS-95 CDMA system and other available spectrum for mobile and other telecommunications services. If any operators or parties have any plan to use the spectrum for the deployment of advanced mobile networks, they may submit their proposals to the Government during the spectrum policy review. The Government will consider such proposals in the context of the policy review.”

² Consultation Paper on “Licensing of Spectrum in the 850MHz Band to Enable the Provision of CDMA2000 Service” dated 27 October 2006 issued by OFTA (“CDMA Consultation Paper”).

³ Consultation being carried out by OFTA under 2 consultation papers on the Licensing Framework for Deployment of Broadband Wireless Access” respectively dated 20 December 2004 and 31 August 2005.

⁴ Consultation currently carried out by Communications and Technology Branch of Commerce, Industry and Technology Bureau under the Consultation Paper dated 26 January 2007.

not in line with the outcome of the spectrum policy review, that particular licensing exercise would become a legacy exercise not in harmony with the new spectrum policy. If the outcome of the consultation is the same as the new spectrum policy, that consultation may be seen as pre-determining the outcome of this spectrum policy review.

This consultation on spectrum policy review and the other on-going consultations on CDMA2000 service, BWA and Mobile TV must therefore follow the proper due process and logical sequence of a “policy first, then implementation” approach. The government must complete the spectrum policy consultation first before further conducting any specific licensing of other mobile services.

2. On Spectrum Policy Objectives

Do you agree that the [above] considerations, i.e. future shape of radiocommunications, international developments, encourage investment, strategic considerations and fair compensation for the community, should be factored in Hong Kong’s spectrum policy framework and the supporting spectrum management arrangements? Are there any other factors or considerations that should be taken into account?

Do you agree with the proposed spectrum policy objectives, namely:

- (a) To facilitate the most economically and socially efficient use of spectrum with a view to attaining maximum benefit for the community;*
- (b) To achieve technically efficient use of spectrum to facilitate the introduction of advanced and innovative communications services and strengthen Hong Kong’s position as a telecommunications and broadcasting hub?*
- (c) To fulfill Hong Kong’s regional and international obligations relating to the use of spectrum?*
- (d) To strengthen Hong Kong’s strategic position as a world city and the gateway between the Mainland of China and the world by facilitating the provision of key services in Hong Kong which are deployed, or will be deployed, globally or in the Mainland of China; and*
- (e) To ensure that necessary spectrum is reserved for government services.*

Are there other spectrum policy objectives that the TA should take into account when making spectrum management decisions?

The policy objectives stated above are too general. The consultation does not discuss their order of importance either. Which policy objective would prevail in case of conflict? The Consultation Paper was silent on this point.

If there is no clarity as to how the possible conflicts amongst these objectives are to be resolved, it will just give rise to regulatory uncertainty to telecom investors. For example, the pursuit of the policy objectives to strengthen Hong Kong's strategic position as a world city and the gateway between the Mainland and the world (by facilitating the provision in Hong Kong of key services which are deployed, or will be deployed, globally or in the Mainland) would conflict with other stated policy objectives, such as the other important policy objective to facilitate the most economically and socially efficient use of spectrum. This is because the introduction to Hong Kong of the so-called "key service" which are deployed, or will be deployed, globally or in the Mainland would highly likely lead to market fragmentation for a small economy like Hong Kong.

These statements of policy objectives must be accompanied by a guideline as to (i) how the government would in such circumstances analyze the costs and benefits of a given proposal and decide on the trade-off in adopting one policy objective instead of the other, as well as (ii) the methodology and approach, quantitative and/or qualitative, that it would adopt in the analysis.

In terms of the other spectrum policy objectives that the TA should take into account when making spectrum management decisions, we believe that regulatory stability to facilitate telecom investment is itself an important spectrum policy objective. It is not sufficient to merely state that the consideration of "encouraging investment" is one of the many considerations for factoring into Hong Kong's spectrum policy framework.

In particular, the government must respect all past commitments made, or adequately address the impact on the existing incumbents in the market in attempting any change of regulatory approach. Regulatory risk must be minimised in such an environment and a competitive level playing field must be provided. Failure to do so will reduce investment incentives and reduce competition, ultimately to the detriment of the consumers.

These 'legacy' issues are not just about respecting past commitments and ensuring a fair treatment of past investors. They are also of great importance for future investors in Hong Kong. If investments based on one regulatory framework are going to be undermined by the introduction of a new framework, it will increase the risk of investing in Hong Kong. It will also undermine the credibility of future commitments that the government make.

Given that the government's approach to spectrum management will directly impact on dynamic investment incentives and the promotion of competition, it must embrace a clear policy objective of regulatory stability for investors as an integral part of its spectrum strategy.

3. On Guiding Principles in Spectrum Management

We propose, as a published guiding principle under the spectrum policy framework, that the TA should use market-based approach in spectrum management when there are competing commercial demands for the spectrum, unless there are overriding public policy reasons to do otherwise. Those public policy reasons should be published for transparency to the industry.

Do you agree with the proposed guiding principle in spectrum management, especially that market-based approaches should be considered first for spectrum where there are competing commercial demands?

The above proposition suggested the government's preference for the "market-based" approach as the default principle in spectrum management except where there are some overriding public policy reasons. We are not in the position to accept such approach because of the following queries:

- a. As to whether the proposed market-based approach should be adopted as the default approach, the government has not explained in the consultation document what "market-based" approach is. Does it essentially mean regulatory withdrawal? What economic benefits would this approach (over and above the other approaches) bring to the economy? It seems arbitrary to suggest that it is necessarily the best approach.
- b. As to the public policy reasons that may replace the market-based approach, the government has neither identified clearly nor explained such exceptions in the consultation document. It is not acceptable that such public policy reasons are only made known and published after the fact, as that would render the whole process non-transparent. Even assuming that this "market-based" approach is adopted, the possible variations together with the policy reasons that justify such variations must now be clearly spelled out as part of the policy to be announced.
- c. As to the government's interpretation and proposed application of the approach, the government has not explained the implementation details that such an approach would entail when applied to each respective candidate frequency band.

In order for the consultation to be meaningful, these questions must be carefully analysed and the government's answers to these questions must be presented to the public and the industry for proper review and debate.

In our assessment, the adoption of a "market-based" approach would result in the following adverse effects:

- i. The government's introduction of the "market-based" approach without due consideration to the particular circumstances relevant to individual frequency

bands will create unnecessary economic and technical risk. Would it impede the development of economies of scale for a small economy like Hong Kong? Would the risks raise financing costs and reduce the case for further investment on the part of the telecom investors?

- ii. The adoption of the “market-based” approach without taking into account legacy issues that arise from the change of regulatory approach could have serious negative consequences that would be irreversible.
- iii. Market failure (for example, negative externalities in the form of interference problems) may happen in the operation of the “market-based” approach. It would create inefficient use of the spectrum and impediments to competition, innovation and investment. The government must advise the public and the industry the economic costs that the “market-based” approach would entail?

In summary, it is necessary to strike a balance between market mechanisms and regulatory actions. The government's statutory duties to promote, inter alia, efficient allocation and use of the spectrum will not be achieved by simply adopting the "market-based" approach. The government's characterization of the issue as a choice between the “market-based” and "command and control" is too simplistic. There are a range of combinations of different spectrum management tools that can be employed. The appropriate balance between market mechanisms and regulatory actions in order to deliver objectives such as the efficient use of the radio spectrum is always a practical empirical matter rather than one of principle. We recommend a more cautious approach. The government must give time to consider all the issues and to ensure it gets the approach(es) and rules right. The government should explain the different approaches in details and evaluate all the applicable options (whether categorized under the “market-based” approach, the “command and control” approach or other approaches) in the consultation for subsequent consultation on the release of each particular frequency band.

4. On Spectrum Rights

Do you agree with the proposal to prescribe the circumstances under which spectrum assignment may be varied or withdrawn before the assignment expires? Are there other circumstances for variation or withdrawal of spectrum assignment before expiry that should be taken into account? What are your suggestions on the appropriate minimum notice periods?

Given the severe impact on the affected licensee, the procedures and criteria for the exercise of the power to vary or withdraw an assignment before its expiry should be rarely exercised. In case of its exercise, it must be based on a detailed guideline that has undergone consultation with the industry. The guideline must clearly specify the applicable grounds and circumstances and the procedure to follow in exercising such power including the applicable notice period.

For regulatory certainty, the guideline must set out all the relevant triggering circumstances exhaustively. General description of the grounds such as public interest, or government policies and international obligations are too vague and may lead to arbitrary interpretation.

For the applicable notice period, at least 5 years should be required in the case of the existing mobile carrier licence (the term of which is 15 years). Since this amounts to expropriation or variation of property rights, the government should also address the issue of compensation.

Do you agree with the proposal of status quo for spectrum right after the expiry of a spectrum assignment, i.e. no legitimate expectation for renewal? What is your suggestion of the minimum notice period for the intention to change or not to renew the spectrum assignment of a licence where substantial investment in the underlying infrastructure is required?

We found that the above proposition does not accord with the existing laws and policies of Hong Kong. Nor is it in line with international best practices. Besides, this proposition may not attain constructive objectives and could be counter-productive. It would only have the effects of significantly undermining investors' incentive to invest after the lapse of the initial investment period during any given licence period. It would also directly impact on an operator's capability to raise capital and invest in new services or in maintaining service quality for existing services.

To start with, it is *a wrong* statement of the current status quo. The government's past policy and conduct in relation to spectrum management has been time-honoured and consistent with a policy of licence renewal expectancy. The frustration of such a legitimate expectation would be contrary to law.

Looking back at the history, the government has just completed in 2005-2006 the 2G licence renewal exercise. Pursuant to his statement⁵, the TA concluded the renewal exercise by granting the "right of first refusal" to all nine incumbent GSM and PCS licensees. The decision was on account of the importance of providing a stable investment environment and ensuring continuity of customer service⁶.

In 1990's when the government was preparing for the migration from analogue to digital service, it referred to a reasonable expectation of licence renewal. In November 1990 the Hong Kong Telecommunications Board (predecessor of the TA) published a Consultation Paper on migration to the GSM and CDMA standards from the analogue standards then in use. That Consultation Paper acknowledged that:

⁵ Statement of the Telecommunications Authority dated 29 November 2004 on "Licensing of Mobile Services on Expiry of Existing Licences for Second Generation Mobile Services".

⁶ Paragraph 6 of the above Statement

*"... As long as the operators are providing a good and satisfactory service, it would be unreasonable not to renew their licence [after expiry] on 30 June 1995."*⁷

It is established jurisprudence that the courts recognize and protect legitimate expectations created by government actions and the law of legitimate expectation can confer procedural or substantive rights on the affected persons.⁸

Accordingly, frustrating a licensee's legitimate expectations of licence renewal based on the government's past policy and conduct would be an abuse of power in respect of which an affected licensee would be entitled to seek judicial relief.

Article 105 of the Basic Law also provides that:

"The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right of compensation for lawful deprivation of their property."

The constitutional provision reinforces the licensees' legitimate expectation of an extension or renewal of their licence. The licensees have a legitimate expectation that their licence would be extended or renewed in accordance with its constitutional rights guaranteed by Article 105 of the Basic Law.

Furthermore, the government's proposition of no legitimate expectation for renewal is clearly against international best practice. According to a policy paper in 2005 on mobile licence renewal issues published by the World Bank's Global Information and Communication Technologies Policy Division:

*"As much as possible, policy makers and regulators should strive to promote investors' confidence and give incentives for long-term investment. They can do this by favouring the principle of 'renewal expectancy', but also by promoting regulatory certainty and predictability through a fair, transparent and participatory renewal process."*⁹

Indeed, the policy of licence renewal expectancy is prevalent in many other developed economies, such as US and Canada.

In United States, the "renewal expectancy" policy is built into the regulations of various radiocommunications/telecommunications licences.

For example, The Code of Federal Regulations (CFR) on Personal Communication Services (PCS) licences stipulates that:

⁷ Hong Kong Telecommunications Board, Development of Digital Public Mobile Radio Services, 16 Nov.1990 at page 5.

⁸ R v North and East Devon H, Ex parte Coughlan (1999) 2 All ER 225 and Ng Siu Tung and Others v The Director of Immigration (FACV Nos 1-3 of 2001, 10 January 2002).

⁹ World Bank (2005) "Mobile Licence Renewal: What are the Issues? What is at Stake?", [www document] http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2005/09/23/000016406_20050923113019/Rendered/PDF/wps3729.pdf (accessed 30 November 2006).

“A renewal applicant involved in a comparative renewal proceeding shall receive a preference, commonly referred to as a renewal expectancy, which is the most important comparative factor to be considered in the proceeding, if its past record for the relevant licence period demonstrates that the renewal applicant:

- (a) Has provided “substantial” service during its past licence term. “Substantial” service is defined as service which is sound, favourable, and substantially above a level of mediocre service which might just minimally warrant renewal; and*
- (b) Has substantially complied with applicable Commission rules, policies and the Communications Act.¹⁰*

Similar renewal expectancy provisions appear in the CFR concerning Wireless Communication Services¹¹, Public Mobile Services¹² and Fixed Microwave Services¹³ licences.

The Federal Communications Commission (FCC) stated that in developing its secondary market policies, it intends to apply a number of principles including but not limited to the following:

Licensees should generally have clearly defined usage rights to their spectrum, including frequency bands, service areas, and licence terms of sufficient length, with reasonable renewal expectancy, to encourage investment.¹⁴

In Canada, similar policy is adopted. It provides the mobile telecom licences with a high expectation of licence renewal.¹⁵

Do you agree that the TA should be required to undertake impact appraisals before initiating spectrum refarming exercise? What other arrangements should be put in place for spectrum refarming exercises?

A refarming exercise that would involve vacating existing spectrum users should rarely be carried out because it amounts to the government expropriating or varying a licenced

¹⁰ 47 CFR 24.16.

¹¹ 47 CFR 27.14.

¹² 47 CFR 22.940.

¹³ 47 CFR 101.1011.

¹⁴ Federal Communications Commission (2000) “In the Matter of Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets: Policy Statement”, [www document] http://www.fcc.gov/Bureaus/Engineering_Technology/Orders/2000/fcc00401.pdf (accessed 30 November 2006).

¹⁵ Among the conditions common to all cellular and incumbent PCS licences are the following provisions:

Licence Term At the end of this term and any subsequent terms, licensees will have a high expectation of renewal for a ten-year term unless a breach of a licence condition has occurred, a fundamental reallocation of spectrum to a new service is required, or an overriding policy need arises.

Industry Canada (2003) “Spectrum Licensing Policy for Cellular and Incumbent Personal Communication Services (PCS)”, [www document] [http://eduspecs.ic.gc.ca/epic/internet/insmt-gst.nsf/vwapj/pcspolicy_dec16_e_final.pdf/\\$FILE/pcspolicy_dec16_e_final.pdf](http://eduspecs.ic.gc.ca/epic/internet/insmt-gst.nsf/vwapj/pcspolicy_dec16_e_final.pdf/$FILE/pcspolicy_dec16_e_final.pdf) (accessed 30 November 2006).

right in the relevant frequency band. Besides an impact appraisal, the government must assess the compensation payable to the affected licencees.

Our observations regarding the TA's power to vary or withdraw a frequency assignment before its expiry would also apply here.

For non-licensees under the TO, do you have demand for spectrum rights? If so, what kind of spectrum rights would you seek? For licensees under the TO, what are your views on our proposal not to cover spectrum rights for non-licensees in the spectrum policy framework?

Many types of service using radio spectrum cannot effectively be provided through a license exempt method as this will raise service quality, interference and co-ordination issues. Future clearing of a licence exempt band will also be difficult.

Broadly, licence exempt usage of the spectrum will never be substitute for licensed use of the spectrum. Therefore, there will always need to be a very strong justification for any further increases from the current arrangement. Such a justification will need to establish why a licence exempt use of the spectrum is preferable to licensed use.

Do you support the proposal to publish 3-year rolling spectrum release plans for spectrum to be released to the market through open, competitive bidding processes? What types of information would you propose to include in the plans?

We in general support the preparation and publication of a 3-year rolling spectrum availability plan, which would take into account of a host of relevant factors such as the availability of spectrum for assignment, the international spectrum allocation, technology and equipment availability, feedback and proposals from the industry as well as policy objectives and strategies.

As we observed above, the assignment exercise of a particular frequency band is a practical empirical process rather than one of principle. The publication of the availability plan is for the purpose of informing the market and fulfilling the policy objective of regulatory transparency. However, we stress that the release of the spectrum availability plan does not relieve the requirement on the part of the TA to conduct separate consultation exercise for the release of individual frequency bands in the plan, including a consultation on the options for, and manner of, releasing the relevant frequency band.

Do you agree that the introduction of secondary trading of spectrum in Hong Kong can improve the efficient use of spectrum? How should potential anti-competitive behaviour in the spectrum market be addressed? How should gains in spectrum trading be treated? What are your views on other implementation issues identified by the consultant?

We do not in principle object to the proposal for spectrum trading, which would permit licencees to sell all or part of their spectrum usage rights and/or lease access to the spectrum covered by these rights to third parties. However, we agree with the government that it is necessary to conduct cost and benefit analysis as well as implementation feasibility study. We note the government consultant's projected benefits of implementing spectrum trading and liberalisation are by and large pure projections and do not address in details the possible implementation costs, such as the economic costs of interference and the transactional costs of managing the problems.

Do you agree that we should further monitor developments in other jurisdictions regarding spectrum liberalisation before considering whether we should introduce it to Hong Kong?

We share the government consultant's view that spectrum liberalisation is not yet proven in a small, densely populated place like Hong Kong. We agree that the government's suggestion not to introduce spectrum liberalisation at this juncture, but to monitor its development in other jurisdictions and consider further study on its costs and benefits as well as implementation feasibility.

5. On Spectrum for Government Services

Do you agree that the command and control approach for spectrum management should continue to be applied to spectrum for government services?

We do not object to the government maintaining the "command and control" approach in applying spectrum for government services. Such use shall however be subject to regular review with the participation of the industry.

6. On Spectrum Pricing

Do you agree that spectrum utilisation fee ("SUF") should be applicable to commercial use of spectrum irrespective of whether there is competing commercial demand? Do you agree that SUF for spectrum not released through auction should be set to reflect the opportunity costs of the spectrum?

We do not agree that commercial use per se should attract SUF.

The more relevant and important concept that should underlie SUF policy is the principle of harmonisation that aims at equalising the economic burdens amongst the applicable classes of licencees which are providing competing services. That principle was followed in the 2G licence renewal exercise in 2004 which aligned the SUF rate for both 2G and

3G licences at 5% of network turnover as from year 2010. For future spectrum licensing of competing services, the SUF level for the new licences must align with the existing licences in order to ensure that competition is on level playing fields amongst the licences.

The existing 3G licences are subject to a further SUF component, which does not apply to any other class of spectrum licences. 3G SUF at the rate of 5% of annual network turnover is subject to a floor of minimum annual fees payable (which amount in total to HK\$1.3billion for the entire 15-year licence term for each licensee). This floor level of SUF was set by the government 5 years ago on the basis of an exceedingly robust 3G business model that no longer reflects current market conditions. Consistent with the objective of giving consumers access to attractive data services at efficient prices, we request for a review of this minimum floor payment with the view for possible reduction.