

# **Hong Kong Broadband Network Limited (“HKBN”)**

Comments to the  
Consultation Paper on Licence Fees Reduction for Five Types of  
Licences Issued under the Telecommunications Ordinance (Cap.  
106) and Introduction of a New Fee Component under Unified  
Carrier Licences dated 8 June 2018 and the Additional  
Information and Clarification dated 16 July 2018  
 (“Consultation”)

6 August 2018

1. HKBN welcomes the Secretary for Commerce and Economic Development (“SCED”) and the Communications Authority (“CA”)’s initiative on licence fee review, and is pleased to submit its comments to the Consultation.

### **Previous CEDB/CA Statement and Court of Final Appeal’s Judgment**

2. On 27 November 2012, the Commerce and Economic Development Bureau (“CEDB”) and the CA issued a joint statement on the setting of the licence fees payable by holders of unified carrier licences, public radiocommunications service licences and services-based operator licences.

[http://www.cedb.gov.hk/ccib/eng/paper/pdf/ucl\\_statement.pdf](http://www.cedb.gov.hk/ccib/eng/paper/pdf/ucl_statement.pdf)

3. PCCW-HKT Telephone Limited and Hong Kong Telecommunications (HKT) Limited appealed the joint decision made by the CEDB and the CA. On 27 December 2017, the Court of Final Appeal handed down its judgment (FACV No. 11 of 2017) (“CFA Judgment”).

[http://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=112877](http://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=112877)

HKBN is an Interested Party to the said court action.

4. Paragraph 77 of the CFA Judgment states that:

*“(a) the decision of the Respondents expressed in their Joint Statement dated 27 November 2012 to proceed with the proposed fixing of licence fees in exercise the power conferred by s 7(2) of the Telecommunications Ordinance (Cap 106) (“the TO”) was made upon the errors of law specified below.*

*(b) it was an error of law to fail to construe s 7(2) of the TO as not permitting the prescribing of a licence fee which included an element of what in substance was a tax upon the licensee.*

*(c) it was an error of law to construe the Trading Funds Ordinance (Cap 430) (“the TFO”) as permitting the inclusion in budgets of the OFTA Trading Fund of projections for notional tax or dividends to be treated as surplus funds under s 10(1) of the TFO.”*

### **Relationship between the CFA Judgment and the Consultation**

5. Following the CFA Judgment, it is expected that the CEDB and the CA would promptly rectify the previous unlawful acts. Regrettably, the CEDB and the CA issued the Consultation merely proposing future licence fees reduction without proposing any rectification in respect of the previous unlawful acts, and has been silent towards the CFA Judgment.

### **The Consultation Adopts an Unsustainable Approach**

6. The Consultation uses profit figures “Retained earnings brought forward” which contains the **unlawful** elements. Calculation stemming from those figures is **fundamentally wrong**. This is evidenced in paragraph 2 of the CA’s Additional Information and Clarification dated 16 July 2018, “...almost all the surplus (including interest income) is retained in the Office of the Communications Authority Trading Fund (“OFCATF”) as “retained earnings” and subsequently utilised for licence fees reduction.”
7. The Consultation should have dealt with how to address or refund the unlawful portions to the affected licensees, instead of merely proposing future licence fees reduction. If by proposing future licence fees reduction, the Consultation seeks to “indirectly” refund the unlawful portions of licence fees previously charged, this creates various problems.
8. Such “indirectly” refunding poses problems, for instance, creating unfairness; some licensees who have paid the unlawful portions for many years may not receive sufficient refunding. Vice versa, some other licensees who have not paid the unlawful portions at all or only for a shorter period may benefit excessively.
9. The Consultation proposes to reduce the licence fee from \$700 to \$500 due to projected increase in customer connections. Let aside whether the projection figure is fair or not, this rationale of reduction should be applicable regardless of the CFA Judgment. Therefore, the proposed future fee reduction (which HKBN submits has further room for reduction, as explained below) should apply **in addition to** any steps (e.g. by way of refund) to rectify the unlawfulness of the previous licence fees charged.

### **Costs Inefficiencies in OFCA**

10. The Trading Funds Ordinance stipulates the requirement of cost-recovery for

calculation of licence fees. In theory, any incurred costs will be recovered through licence fees. Hence, there is little incentive for OFCA to minimize costs, which in turn leads to inefficiency and unnecessarily and unjustifiably high expenditure level.

#### Headcount

11. This is reflected in the almost ever-increasing number of headcounts in OFCA staff force. Among the 21 reported operation years, only 6 years have mild reduction in headcounts. Details are shown in Appendix 1.

#### BA/OFTA Merger

12. In the reported year ended 31 March 2013, there is a record-high increase of 68 headcounts. This could be due to the merger between the former Broadcasting Authority (“BA”) and the former Office of the Telecommunications Authority to form OFCA. While OFCA has taken over all former BA’s functions, it has off-loaded the function of entertainment licences issuance to the Home Affairs Department. As a rule of thumb, merger will achieve synergy and cost savings. Given the sharp headcount increase and the functions off-load, yielding of planned synergy and cost savings would be in doubt.
13. Nevertheless, with the absence of the headcount information of the former BA, it would be hard to determine if the planned synergy and cost savings could have been yielded.

#### Excessive Requirements under Licences

14. The telecommunications licences stipulate an excessive list of requirements for licensees’ compliance. These unnecessary requirements constitute costs inefficiencies in OFCA. Streamlining by removing these unnecessary tasks could eliminate OFCA efforts in these areas, improve cost inefficiencies thus getting rid of these avoidable costs. Details are shown in Appendix 2.

#### High Office Rent

15. To date, headquarters of most telecommunications licensees have moved out from core commercial districts where high rent prevails to other districts like Kwun Tong, Kowloon Bay, Kwai Chung and Tsing Yi.
16. On the contrary, for the past two decades, OFCA headquarters remains at Wu Chung House in the heart of Wan Chai. Although office rent only commands a

portion of OFCA's total expenditure, it does display the cost inefficiency of OFCA. Significant cost savings could be achieved by moving to a lower-grade office, a lower-rent district, or a combination of these.

17. The property market statistics of the Rating and Valuation Department - "Private Offices – Average Rents by Grade and District" indicates the relevant rental information. Details are shown in Appendix 3. For example, moving from Wan Chai to the same grade building in North Point or Tsim Sha Tsui could yield 10+% savings; while moving to a lower grade building could yield another 10+% savings too.

### **Inappropriateness for No Accounts Separation between Functions within OFCA**

18. While the Communications Authority Ordinance and the Trading Funds Ordinance contain no express requirement for the separation of accounts by OFCA in the performance of its respective telecommunications and broadcasting functions, the existing practice of no accounts separation between telecommunications and broadcasting functions does create possible cross-function subsidization, where over- or under-charged across telecommunications and broadcasting licences will result. The CFA Judgment states clearly that the telecommunications licence fee, to the extent that it exceeds the administration of the licensing scheme, may be seen to be a tax. Paragraph 59 of the CFA Judgment states that:

*"In general, where used in public law a "fee" identifies a payment for or in respect of services rendered or for the administration of a legislatively based licensing scheme to control particular activities by licensees, whereas a tax is rather a means of obtaining revenue for governmental purposes. When the power to license is an element in a regulatory scheme, the power does not extend to authorise the imposition of a fee which in substance is a tax upon the activity to be conducted under cover of the licence[15]. If the licensee as a practical matter has no choice in the conduct of its affairs as to whether it acquires the licence and there is an insufficient relationship between the "fee" for the licence and the administration of the scheme, then, at least to the extent of the excess, the "fee" may properly be seen as a tax[16]."*

### **Conclusion**

19. HKBN submits that:-

- a. for fairness sake, the previously overcharged unlawful portions should be promptly refunded to the licensees who were overcharged instead of the SCED/CA proposing indirectly refunding by reducing future licence fees.
- b. the proposed licence fees reduction based on the rationale of projected increase in customer connections should be applicable **in addition to** the aforesaid refund.
- c. cost inefficiencies in OFCA should be eliminated such that pressure for increasing licence fees could be relieved.
- d. separate accounts between telecommunications and broadcasting functions should be established to avoid cross-subsidization.

Hong Kong Broadband Network Limited

6 August 2018

**Appendix 1**  
**Number of Headcounts in OFCA Staff Force**

As at	Civil Servants (a)	Contract Staff (b)	Total OFCA Staff (c) = (a) + (b)	Increase Year-on-Year
31-Mar-17	330	118	448	3
31-Mar-16	330	115	445	14
31-Mar-15	309	122	431	16
31-Mar-14	315	100	415	20
31-Mar-13	282	113	395	68
31-Mar-12	202	125	327	2
31-Mar-11	204	121	325	1
31-Mar-10	205	119	324	-3
31-Mar-09	207	120	327	8
31-Mar-08	212	107	319	6
31-Mar-07	214	99	313	-5
31-Mar-06	220	98	318	-3
31-Mar-05	223	98	321	-9
31-Mar-04	235	95	330	-5
31-Mar-03	246	89	335	-5
31-Mar-02	253	87	340	21
31-Mar-01	269	50	319	16
31-Mar-00	279	24	303	10
31-Mar-99	280	13	293	5
31-Mar-98	288	0	288	19
31-Mar-97	269	0	269	NA
Source: OFTA / OFCA Trading Fund Reports				

**Appendix 2**  
**Streamlining Excessive Requirements in Telecommunications Licences**

Requirement	Illustration	Benefits
Filing and publication of interconnection agreements	Filing to and publication by OFCA becomes unnecessary, as there is no compelling need to do so. This requirement is suggested to be waived.	Save OFCA efforts in managing the arrangement.
Filing and publication of tariffs	Filing to and publication by OFCA becomes unnecessary under the fully competitive market environment. The public can access to tariff-type information from various sources easily and instantaneously. This requirement is suggested to be waived.	Save OFCA efforts in managing the arrangement.
Financial accounts reporting	The same subject matters have been dealt with under the Companies Ordinance and by other government authorities. Reporting the same to OFCA constitutes unnecessary overlap. This requirement is suggested to be waived.	Save OFCA efforts in managing the arrangement.
Statistics reporting	There are numerous reports to be submitted monthly, quarterly, half-yearly, yearly. The report frequency should be reduced, while some other unnecessary reports should be abandoned.	Save OFCA efforts in managing the arrangement.



### Appendix 3

#### Private Offices – Average Rents by Grade and District, from Rating and Valuation Department

私人寫字樓 — 各區不同級別平均租金  
PRIVATE OFFICES - AVERAGE RENTS BY GRADE AND DISTRICT

(每平方米月租 \$/m<sup>2</sup> per month)

( 每平方米每月租 \$ 7 m per month )																					
級 別 Grade		甲 A						乙 B						丙 C							
年 Year	上環 中區		灣仔/ 銅鑼灣	北角/ 鰂魚涌	尖沙咀	油麻地/ 旺角	九龍灣/ 觀塘#	上環 中區		灣仔/ 銅鑼灣	北角/ 鰂魚涌	尖沙咀	油麻地/ 旺角	九龍灣/ 觀塘#	上環 中區		灣仔/ 銅鑼灣	北角/ 鰂魚涌	尖沙咀	油麻地/ 旺角	九龍灣/ 觀塘#
	Sheung Wan	Central	Wan Chai/ Causeway Bay	North Point/ Quarry Bay	Tsim Sha Tsui	Yau Ma Tei/ Mong Kok	Kowloon Bay/ Kwun Tong#	Sheung Wan	Central	Wan Chai/ Causeway Bay	North Point/ Quarry Bay	Tsim Sha Tsui	Yau Ma Tei/ Mong Kok	Kowloon Bay/ Kwun Tong#	Sheung Wan	Central	Wan Chai/ Causeway Bay	North Point/ Quarry Bay	Tsim Sha Tsui	Yau Ma Tei/ Mong Kok	Kowloon Bay/ Kwun Tong#
1999	269	406	289	219	267	233	n/a	181	311	224	190	234	213	n/a	183	243	228	212	232	209	n/a
2000	324	411	301	220	266	262	n/a	180	288	212	168	224	209	n/a	166	235	215	205	226	207	n/a
2001	331	474	329	257	261	308	n/a	177	319	218	163	244	207	n/a	164	248	211	201	235	202	n/a
2002	252	342	239	204	224	223	n/a	149	241	185	142	208	192	n/a	146	212	187	179	206	184	n/a
2003	233	266	192	162	198	211	n/a	131	219	163	135	204	179	n/a	128	188	169	161	182	169	n/a
2004	222	290	194	155	214	( 193 )	n/a	135	224	172	128	205	191	n/a	131	197	180	167	196	168	n/a
2005	267	414	279	192	279	296	n/a	160	288	198	150	238	224	n/a	146	234	202	186	240	191	n/a
2006	418	557	373	244	338	364	n/a	197	359	249	177	275	253	n/a	162	279	233	203	262	204	n/a
2007	510	719	448	291	360	370	n/a	238	436	304	206	293	264	n/a	193	318	262	236	298	221	n/a
2008	680	945	526	338	401	417	n/a	286	545	367	249	320	297	n/a	223	380	309	269	338	245	n/a
2009	533	743	464	310	333	387	n/a	238	478	321	238	282	275	n/a	203	346	275	239	297	226	n/a
2010	609	772	484	322	367	477	n/a	273	521	353	251	322	309	n/a	234	408	329	282	327	252	n/a
2011	695	996	571	382	431	542	n/a	311	611	394	283	344	328	n/a	268	438	364	308	359	286	n/a
2012	833	1 057	661	407	460	546	n/a	352	643	427	314	382	384	n/a	303	503	397	345	396	312	n/a
2013	811	1 012	709	462	505	589	329	382	681	465	345	414	412	315	344	526	428	377	419	354	265
2014	750	1 013	689	475	530	661	345	437	686	492	378	434	434	347	367	556	450	405	449	374	296
2015	892	1 033	717	469	538	693	370	476	741	522	381	461	463	358	415	592	477	421	475	408	268
2016	976	1 114	746	506	552	703	372	476	747	528	380	475	471	382	415	616	479	427	474	409	( 289 )
2017 *	958	1 197	787	515	566	656	375	518	785	543	405	478	487	365	437	610	494	436	477	427	-

Source: [https://www.rvd.gov.hk/en/property\\_market\\_statistics/index.html](https://www.rvd.gov.hk/en/property_market_statistics/index.html)