

Telecommunications (Competition Provisions) Appeal Board

Appeal No. 16

PCCW-HKT Telephone Limited v The Telecommunications Authority

Date of appeal	:	6 January 2004
Appellant	:	PCCW-HKT Telephone Limited
Nature of appeal	:	Against the Decision of the Telecommunications Authority dated 23 December 2003 to disapprove PCCW-HKT's application under General Condition 21 of its FTNS Licence for an offer to the Fire Services Department in response to the latter's tender for telecommunications services.
Hearing	:	<ul style="list-style-type: none">• The Appeal Board conducted hearing on 6 May 2004 to hear TA's application of 8 April 2004 (copy attached) to state the case to the Court of Appeal. TA's application was rejected. The Decision of the Appeal Board dated 10 May 2004 is attached.• Consolidated hearing for Cases 15 and 16 had commenced on 26 July 2004 and adjourned on 30 July 2004. The hearing will be resumed on a date to be fixed.
Adjournment of appeal	:	The Appellant sought leave to adjourn the case on 11 October 2004
Decision	:	The Appeal Board approved the Appellant's application to adjourn the case on 13 October 2004
Outcome of appeal	:	Appeal was withdrawn on 5 August 2005.

IN THE MATTER OF THE
TELECOMMUNICATIONS
ORDINANCE (CAP. 106)

AND

IN THE MATTER OF AN APPEAL
TO THE TELECOMMUNICATIONS
(COMPETITION PROVISIONS)
APPEAL BOARD PURSUANT TO
SECTION 32R OF THE
TELECOMMUNICATIONS
ORDINANCE (CAP. 106)

BETWEEN

PCCW-HKT TELEPHONE LIMITED

Appellant

and

THE TELECOMMUNICATIONS AUTHORITY

Respondent

NOTICE OF APPLICATION

TAKE NOTICE that the Respondent (the "TA") will apply to the Telecommunications (Competition Provisions) Appeal Board (the "Board") in relation to the Notices of Appeal issued by the Appellant ("PCCW-HKT") on the 30th day of December 2003, 6th day of January 2004 and 21st January 2004 for the following orders and reliefs: -

1. That the Board state a case to the Court of Appeal pursuant to Telecommunications Ordinance (Cap. 106) ("TO") section 32R(1) as to the following questions:
 - (a) Whether, on a true construction of General Conditions ("GC") 44 and 21 of

the Appellant's Fixed Telecommunications Network Services ("FTNS") Licence set out in the Telecommunications Regulations (Cap. 106A), a licensee is assumed in law to be in a dominant position until a declaration to the contrary effect is made by the TA under GC44;

- (b) Whether, on a true construction of GC44 and 21, and in light of PCCW-HKT's current application to the TA pursuant to GC44 for a declaration of non-dominance in the market for Business Direct Exchange Line ("BDEL") services, the Appeal Board is legally and procedurally entitled to reach an independent and concurrent determination as to whether PCCW-HKT is dominant in the relevant BDEL market prior to the exercise by the TA of his discretion pursuant to GC44 of the FTNS Licence; and
 - (c) Whether, on a true construction of GC44 and 21, and in light of PCCW-HKT's current application to the TA pursuant to GC44 for a declaration of non-dominance in the market for BDEL services, under section 32O(2) of the TO, PCCW-HKT is entitled to advance and/or rely on its submissions as stated in paragraphs 36 to 99 of its Submission dated 3 March 2004 in seeking to challenge the decisions of the TA to which the Appeal relates.
2. That the proceedings of the Appeal be stayed pursuant to sections 32O(7) and 32R(3) of the TO pending the determination of the Court of Appeal of the case stated in respect of paragraphs 1(a),(b) and (c) above.
 3. That the costs of this Application be to the TA.

AND TAKE NOTICE that the facts and matters on which this Application is based are as follows:-

Background

1. The Appeal (Nos. 15 to 17) concerns three decisions of the TA dated 18 December 2003, 23 December 2003 and 15 January 2004 pursuant to GC21 of PCCW-HKT's FTNS Licence. By its decisions, the TA refused to approve PCCW-HKT's proposed tariffs for certain BDEL services on the grounds that the proposed tariffs would have anticompetitive effects contrary to GC15 of PCCW-HKT's licence and would constitute abuse of a dominant position contrary to GC16 of PCCW-HKT's licence.

As to Proposed Order §1

2. Prior to 1995, the Appellant's predecessor, Hong Kong Telephone Company Limited ("HKTC") held an exclusive concession to provide FTNS in Hong Kong. With effect from July 1995, the FTNS market was opened to competition and the TA issued FTNS licences to three new operators in competition with HKTC. Having regard to the then existing market power of HKTC as the dominant incumbent, the TA categorized HKTC as being "in a dominant position" for the purposes of the *ex ante* regulatory regime.
3. In order to ensure that fair competition can develop in the FTNS market, an operator categorized as being in a dominant position is subject to more stringent requirements under the *ex ante* regulatory regime than non-dominant operators. The framework for the regulation of a dominant operator is laid down in the FTNS licence conditions as set out in the Telecommunications Regulations. Obligations on a dominant operator include, among other things, the tariffing measures contained in GC 20 to 23 of the FTNS licence with which the Appeal is concerned. By virtue of these provisions, the TA's approval is required for the following :-
 - discount against the approved tariff of an existing service (GC 20(4));
 - revision of the tariff of an existing service (GC 21);
 - the tariff of a new service (GC 22);
 - the tariff of a trial service (GC 23); or
 - the introduction of new charging options or billing schemes for existing services (GC 23).
4. PCCW-HKT seeks in the Appeal to challenge decisions reached by the TA in applying the tariff measures set out above on the grounds *inter alia* as set out in paragraphs 36-99 of its Submission that it is not in a dominant position in the relevant market.
5. The above tariff measures are currently included in all FTNS licences issued by the TA and are applicable to all operators. However, GC 44 of the FTNS licences allows the TA to waive the applicability of these rules if the TA forms the opinion that the licensee is not in a dominant position within the meaning of GC16(2) of the Licence with respect to any market for telecommunications services provided. The TA may direct that, for such period and on such conditions as the TA may

determine, either one or any combination of GC17, 20, 21, 22 and 23, either completely or as to particular obligation imposed thereunder, shall not apply to the licensee. The TA has duly waived the bulk of these tariffing rules under GC44 for all the new entrants upon the issue of the FTNS licences to them since they are clearly non-dominant.

6. On issue of a licence to HKTC in 1995, the TA did not waive the tariff approval rules under GC44 because as the former monopoly, HKTC was clearly dominant and, in the opinion of the TA, likely to remain so for some time into the future. However, the TA accepted that at a future date HKTC or its successor might make submissions to the TA that it was no longer dominant. The TA would consider such a case on its merits and in accordance with the "Guidelines to Assist the Interpretation and Application of the Competition Provisions of the FTNS Licence" issued in March 1995.
7. The TA submits that until HKTC or its successors made a successful application for a declaration of non-dominance, or until such time as the TA of its own motion considered that it was necessary to reassess HKTC's dominant position following changes in the market, the TA was entitled by virtue of GC44 to regulate HKTC under the *ex ante* regime for dominant licensees on the presumption that HKTC was in a dominant position. In particular, the TA was entitled to proceed to assess PCCW-HKT's proposed tariff revisions under GC21 on the statutory presumption that PCCW-HKT is dominant in the relevant market.
8. If, contrary to the TA's proposed construction, the TA were obliged to undertake an assessment of dominance every time PCCW submits a tariff revision, the *ex ante* regulatory system would be administratively unworkable. GC21(3)(b) and (5) impose a timeframe of 30 days within which the TA must decide whether to approve or disapprove a proposed tariff revision. A determination of dominance in the market cannot responsibly be undertaken within such a time limit.
9. These principles are well understood by the industry at large and by PCCW in particular. PCCW-HKT and its predecessors have on numerous occasions utilized the procedure set out in GC44 to apply for a declaration of non-dominance on the basis of which certain *ex ante* obligations might be waived. In particular, PCCW-HKT made an application for a declaration of non-dominance with respect to the BDEL and Residential Direct Exchange Line (RDEL) markets in late 2003. The application remains under consideration by the TA after a period of

consultation with the public and the industry.

10. In addition to the applications for non-dominance in the BDEL and RDEL markets, PCCW-HKT and its predecessors have made the following applications for declarations of non-dominance under GC 44 of its FTNS licence in respect of different areas of the telecommunications market:
 - (a) In May 1999, HKTC applied for a declaration of Non-Dominance in the international call services market for non-China routes;
 - (b) In January 2000, Cable & Wireless HKT Telephone Limited (“CWHKT”) applied for a declaration of Non-Dominance in the external call services market for Mainland China routes;
 - (c) In September 2000, CWHKT applied for the extension of the Direction issued to it on 4 August 1999 pursuant to General Condition 44 of its FTNS Licence on an earlier application for declaration of Non-Dominance in the international call services market for Non-China routes;
 - (d) In February 2001, PCCW-HKT applied for an application for a declaration of Non-Dominance in the retail external call services market for Category B Observation List Routes;
 - (e) In June 2001, PCCW-HKT applied for a declaration of Non-Dominance in the market for External Bandwidth Services;
 - (f) In April 2002, PCCW-HKT applied for a declaration of Non-Dominance in the retail external call services markets;
 - (g) In August 2003, PCCW-HKT applied for a declaration of Non-Dominance in the market for BDEL Services;
 - (h) In October 2003, PCCW-HKT applied for a declaration of Non-Dominance in the market for RDEL Services.
11. It is notable that in the instant case PCCW did not include in its application for approval of the proposed tariff revisions under GC21 any submission that it was not dominant in the relevant market or any materials on which such a conclusion

might be reached. Rather, PCCW has made a separate application to the TA seeking a declaration of non-dominance in the relevant market under GC44.

12. By seeking in this Appeal to challenge the TA's decision on the basis that it is not in a dominant position, PCCW-HKT is addressing its submissions to a matter not in issue in the Appeal with the intention of pre-empting the TA's decision in respect of PCCW-HKT's application for a declaration of non-dominance. In the TA's submission, this is inappropriate and an abuse of process. It is respectfully submitted that in the light of the true construction of GC44 and 21, and in the light of PCCW-HKT's concurrent application for a declaration of non-dominance under GC44, the Appeal Board lacks jurisdiction to reach a determination as to whether or not PCCW-HKT is in a dominant position, and PCCW-HKT should not be permitted to rely on its submissions in respect of its factual dominance.
13. The appropriate time for PCCW-HKT to seek to put in issue its factual dominance in the relevant market is by means of a challenge to the TA's eventual decision on PCCW-HKT's application for a declaration of non-dominance in the event that the TA reaches the conclusion that PCCW-HKT remains in a dominant position.

As to Proposed Order §2

14. It is submitted that it is apparent, not least from the breadth of PCCW-HKT's submissions in paragraphs 26 to 99 of its Submission, that consideration of the substantive issue of dominance will entail considerable time and resources, both in terms of preparation of evidence in advance of a trial and trying the issues raised. If the TA's construction of GC44 is correct, then it will not be necessary for the issue of factual dominance to be determined in the Appeal. It is therefore submitted that it would be to the advantage of all parties to resolve the question of the correct construction of GC44 and GC21 as a preliminary matter.
15. Further, it is submitted that the matters to be stated raise important matters of principle of fundamental relevance to the duties and powers of the TA in the regulation of FTNS licensee. Guidance from the Court of Appeal would provide valuable clarification of the TA's duties in approving tariffs under GC20 to 23 and the reviewability of the TA's decisions by the Board for the future cases. Additionally, in answering the questions posed, the Court of Appeal will set out the scope and limits of the Board's power and jurisdiction over the matters regarding the determination of the dominance against the backdrop of the *ex ante*

regulatory regime. The Court of Appeal's response will also enable the Board to determine whether or not it should hear the present Appeal as presently framed by PCCW-HKT.

16. The TA would therefore respectfully request the Board to stay the proceedings of the Appeal pending the outcome of the case stated to the Court of Appeal. The Board would then be able to apply the guidelines enunciated in the case stated to decide whether or not to hear the Appeal as framed by PCCW-HKT. The Deputy Chairman of the Board has jurisdiction to stay its own proceedings under TO section 32O(7). Further and in the alternative, the Board shall stay the proceedings where a case is stated under section 32R(1) of TO until the Court of Appeal determines the relevant point of law.

Dated the 8th day of April 2004



Newton Chan

Government Counsel for the Respondent

**IN THE MATTER OF THE
TELECOMMUNICATIONS ORDINANCE
(CAP. 106)**

AND

**IN THE MATTER OF AN APPEAL TO
THE TELECOMMUNICATIONS
(COMPETITION PROVISIONS) APPEAL
BOARD PURSUANT TO SECTION 32N OF
THE TELECOMMUNICATIONS
ORDINANCE (CAP. 106)
APPEALS 15 AND 16 OF 2003 AND
APPEAL 17 OF 2004**

BETWEEN

PCCW-HKT TELEPHONE LIMITED

Appellant

and

THE TELECOMMUNICATIONS AUTHORITY

Respondent

DECISION

Background

1. The Board has before it three appeals, numbered respectively 15, 16 and 17.
2. The Board has fixed the hearing of these appeals to commence on 25 May 2004, with four days reserved.
3. On Thursday 6 May 2004, the Board heard a number of applications relating to these appeals. The Deputy Chairman sat in London. Mr Peter Roth QC, leading Ms Kassie Smith, instructed by Jones Day appeared in London on behalf of PCCW-HKT Telephone Limited ("PCCW"). Mr Nicholas Green QC, instructed by the Department of Justice, on behalf of the Telecommunications Authority ("TA"), appeared in London. A video link connected those in London with the Hong Kong International Arbitration Centre at which attended Mr Benjamin Yu SC and Professor Peter Malanczuk as members of the Board. Also in Hong Kong was Mr Douglas Lam, junior to Mr Green, together with all instructing solicitors, clients, and the Board secretariat.

The hearing commenced at 1:00pm London time, and finished approximately 5:45 pm (8:00 pm, and 12:45 am Hong Kong time.) It goes without saying that the Board is extremely grateful to all those in Hong Kong for agreeing to attend at such unsocial hours.

4. The applications before the Board were as follows:
 - (1) PCCW's application to withdraw appeal 17;
 - (2) TA's application for the Board to state a case for determination by the Court of Appeal, pursuant to section 32R of the Telecommunications Ordinance (CAP. 106) ("the Ordinance");
 - (3) TA's application for the adjournment of the May hearing;
 - (4) PCCW's application for further discovery;
 - (5) TA's application for further discovery.
 - (6) Consequential directions

Due to the lateness of the hour applications (4) to (6) were dealt with by the Deputy Chairman alone, and are the subject matter of a separate order.

Withdrawal of appeal 17 of 2004

5. PCCW sought leave to withdraw appeal 17 of 2004. This order is made by consent. It is unlikely that there are any additional costs involved in this matter, but the Board gave TA liberty to apply with regard to the costs (if any) of this appeal.

Application for case stated

6. This application is made by TA, under the provisions of section 32R of the Ordinance, which provides as follows:
 - "(1) *The Appeal Board may refer any question of law arising in an appeal to the Court of Appeal for determination by way of case stated.*
 - (2) *On the hearing of the case, the Court of Appeal may –*
 - (a) *determine the question stated; or*
 - (b) *remit the case to the Appeal Board, in whole or in part, for reconsideration in the light of the Court's determination.*

(3) *Where a case is stated under subsection (1), the Appeal Board shall not determine the relevant appeal before the Court of Appeal determines the relevant point of law.*"

7. The background to these appeals is well known. The Appeals here, Nos. 15 and 16, concern two decisions made by TA dated 18 December 2003 and 23 December 2003. These decisions were made in relation to two applications made to TA by PCCW under GC21 of PCCW's Fixed Telecommunications Network Services License ("FTNS License") to vary its tariffs in relation to certain business direct exchange line services ("BDEL services") in order to submit two tenders, a tender to supply services to the Immigration Department and a tender to supply services to the Fire Services Department. Both applications were refused by TA on the grounds that the tariff changes would have anticompetitive effects, contrary to GC15 of PCCW's license, and also would constitute an abuse of a dominant position, contrary to GC16 of PCCW's license.
8. Prior to 1995 the Appellant's predecessor, Hong Kong Telephone Company Limited ("HKTC") held a monopoly over the provision of FTNS in Hong Kong. In July 1995 the industry was opened up to competition and three new FTNS licenses were issued to new operators placing them in direct competition with HKTC.
9. In TA's decisions relating to the above mentioned tender proposals TA treated PCCW (as HKCT's successor) as dominant in the relevant market which was defined as the BDEL market in Hong Kong. The effect of being treated as dominant was that PCCW, unlike other competitors in the telecommunications industry, was required to comply with the requirements of GC16, a clause which TA found the proposed tenders to contravene.
10. TA has taken the position that due to HKTC's former monopoly it was clearly dominant at the time of the issuing of licenses to PCCW's competitors, and that this dominance continues until a declaration of non-dominance under the procedure outlined in GC 44 takes place.
11. PCCW's appeal against TA's decision essentially revolves around four issues:
 - (1) That the relevant product market is the BDEL market;
 - (2) That PCCW is in fact dominant;
 - (3) That the proposed tender would be an abuse of a dominant position contrary to GC16;
 - (4) That the proposed tender would be conducted with the purpose or effect of substantially restricting competition contrary to GC15.

12. An application for a declaration of non-dominance by PCCW, under GC 44, is currently being considered by TA, with TA indicating that a finding may be made sometime in July or August of 2004.
13. TA has taken the position that it is not for the Board to ascertain whether PCCW is in fact dominant, and it has requested that the Board state a case to the Court of Appeal in order to clarify issues relating to their construction of the law, namely:
 - (1) Whether a licensee is assumed to be in a dominant position unless a declaration to the contrary is made under GC44.
 - (2) Whether the Board is legally and procedurally entitled to make an independent and concurrent determination on the dominance of PCCW in the BDEL market, in light of the ongoing investigation of the same by TA.
 - (3) Whether on a true construction of GC44 and 21 it is an abuse of process for PCCW to raise the issue of non-dominance in these proceedings when it has launched separate proceedings for a declaration to that effect.
14. PCCW contend that it is not appropriate to state a case for the Court of Appeal. They contend that it would be most unusual for any Board or Board to state a case in the abstract, without finding any facts and without giving its view, albeit provisional, on the point of law involved. Further, PCCW rely upon the lateness of this application which, if granted, they fear will postpone the hearing of these appeals for some considerable time. The indication is that it would take at least six months for the matter to be determined by the Court of Appeal, during which times these appeals would certainly have to be stayed.
15. Furthermore, PCCW contend that these appeals may be able to be disposed of without reference to what the TA characterise as a threshold legal point. As stated above, PCCW's appeal against two of TA's decisions is based on four separate grounds:
 - (1) That the relevant product market is the BDEL market;
 - (2) That PCCW is in fact dominant;
 - (3) That the proposed tender would be an abuse of a dominant position contrary to GC16;
 - (4) That the proposed tender would be conduct with the purpose or effect of substantially restricting competition contrary to GC15.

PCCW takes the position that all of the grounds of appeal, bar (2), can be determined without reference to PCCW's alleged dominant position.

No useful purpose can be served by repeating the helpful and detailed written and oral submissions addressed to the Board.

16. The Board has given this matter the most careful consideration and has come to the conclusion that it would not be a proper exercise of its discretion, under the Ordinance, to state a case at this stage for the determination of the Court of Appeal. The Board considers that the Court of Appeal, which is likely to be seized of this matter at some stage, come what may, would prefer to consider the matter in the light of the findings of fact made by the Board following an evidentiary hearing, together with any legal conclusions which the Board may make. Shortcuts, such as preliminary issues, are always tempting but appellate courts have frequently expressed the view that their task would be easier and a more efficient use made of the parties time and money, if the matter had come to them in the normal way. Further, the Board is concerned about delay. The Court of Appeal would not be able to rule on this matter for at least six months, and if the Court of Appeal took the view that the Board should hear the case first and then state a case an even further delay would ensue. The Board takes into account that it has been set up as a specialist tribunal with a small team to react speedily and efficiently in a fast moving and complex field. Finally, there may be some merit in Mr Roth's submission that these appeals could be decided without reference to the point of law which TA would like to refer to the Court of Appeal. Mr Roth was careful not to exaggerate this point – he simply submitted that it was a possible outcome.
17. Taking all these matters into account, the Board considers that the interests of justice require the dismissal, at this stage, of TA's application to state a case for consideration by the Court of Appeal.

TA's application for adjournment

18. At the hearing, the Board announced that it granted the application to adjourn the May dates and the Deputy Chairman gave brief reasons which will appear on the transcript. The crucial reason why these dates were vacated was that the case was just not ready for a hearing to commence in just under three weeks time. The case appears to revolve around detailed expert accounting evidence and the expert reports have not yet been exchanged, nor have the experts met in order to attempt to reduce their differences and to confirm the matters upon which they are agreed. The original order for directions was designed to have all the documentation ready for service on the Board in early May so that, in the light of the Board members other commitments, time could be set aside to read in and prepare for the hearing. If the May dates were to stand the Board would not receive the experts' reports until the commencement of the hearing. This would place an unfair burden on the Board, as well as making cross examination very difficult to prepare.

19. The Board explored with leading counsel when they were both available and a five day period was found, commencing 26 July 2004. The present members of this Board were not able to confirm, at this stage, their availability. The matter was left on the basis that counsel will confer to see if there were any other one week periods free, not earlier than a month from today, and that they would consult with the Board secretariat. If the week in July is the earliest available time and if members of the Board are unavailable, consideration will have to be given to a reconstitution of this Board.

Costs

20. Both counsel helpfully agreed that the costs of these various applications, and the video hearing, should be reserved until such time as the costs of these appeals falls to be determined.

Dated this 10th day of May 2004.

Signed

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Neil Kaplan CBE, QC
Deputy Chairman of the Board

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Mr Benjamin Yu SC
Board Member

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Professor Peter Malanczuk
Board Member