Telecommunications (Competition Provisions) Appeal Board

Appeal No. 24

PCCW-HKT Telephone Limited v The Telecommunications Authority

Date of appeal	:	21 November 2006
Appellant	:	PCCW - HKT Telephone Limited
Nature of appeal	:	Against the direction of the Telecommunications Authority (TA) dated 7 November 2006 that the Appellant should open access for number block "5804" allocated by the TA to a services-based operator licensee for the provision of voice over internet protocol services.
Hearings	:	• The Appeal Board heard the Respondent's Strike-out Application during 16 - 18 October 2007 and declined to strike out the Notice of Appeal, the Decision for which dated 27 March 2008 is attached. • The Appeal Board conducted a substantive hearing from 12 to 15 January 2009 and concluded in its Decision dated 13 February 2009 (as attached) that the Appeal Board had no jurisdiction to entertain the Appeal as the issue did not relate to or engage any of the competition provisions. • At the request of both parties, the Appeal Board allowed for submissions as to whether any questions of law arising from the substantive hearing Decision should be put to the Court of Appeal by way of a case stated within 21 days of the Decision. Having considered submissions from both parties, the Chairman of the Appeal Board ruled that none of the questions raised by the Appellant was suitable for the case stated procedures and refused leave to state a case. The Chairman's Decision dated 14 April 2009 is attached.

		• The Appeal Board's Decision dated 13 February 2009 is the final determination of the Appeal.
Outcome of appeal	:	The Appeal Board found no jurisdiction to entertain the Appeal.

Appeal No. 24 of 2006, by Notice of Appeal filed on 21st November 2006
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)

BETWEEN

PCCW-HKT TELEPHONE LIMITED **Appellant**

and

THE TELECOMMUNICATIONS AUTHORITY **Respondent**

JUDGMENT

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1. I sat as Chairman, together with the two Board members who have signed below, as the Telecommunication (Competition Provisions) Appeal Board on 16th, 17th and 18th October 2007 to hear and decide this appeal. There being in the evidence no serious dispute as to the facts, the documentary evidence being accepted by both parties and there being no cross-examination of Mr. Ha Yung Ku ("Mr. Ha"), Deputy Director-General of OFTA, upon his affidavit, the members sitting with me have had no part to play in my legal decision, which, pursuant to section 32 O(1)(b), I am bound to decide myself, the issue of jurisdiction being a question of law. The Tribunal is unanimous in finding the various facts relevant to the issue of jurisdiction, which said facts are referred to later in this judgment. I have

however discussed the appeal and the evidence in it with them during and after the hearing, though the legal decisions herein are made by me alone.

BACKGROUND

2. It is common ground between the parties, and I agree, that only section 7K ("*Anti-competitive practices*") is relevant in this appeal, and that sections 7L ("*Abuse of position*"), 7M ("*Misleading or deceptive conduct*") and 7N ("*Non-Discrimination*") do not now arise for decision.

3. I have been much assisted by written Skeleton Arguments from each side as well as by oral arguments in which they were amplified, and I thank both Mr. Green and Mr. Roth for their succinct and helpful submissions.

4. We are considering, and ruling upon, a submission by the above-named Respondent, ("the Authority"), with contrary submissions by the Appellant, ("PCCW") that this Appeal Board does not have jurisdiction to hear an appeal against a Direction which was made by the Respondent Authority on 7th November 2006. The intended effect of the Direction was to compel interconnection (at charges which were to be subject to later adjustment) between PCCW and Wharf T&T Ltd. for the benefit of Zone Ltd., a recently-formed Service-Based Operator ("SBO") using Voice over Internet Protocol ("VoIP"), (which technology enables customers to route calls over the Internet), and that the charge was to be initially the Local Access Charge ("LAC") as opposed to the Local Interconnection Charge ("LIC") which relates to local as opposed to external traffic.

Background to the Direction

5. The Authority has from time to time published documents giving guidance to the market on various relevant issues. On 20th June 2005 it issued the "IP

Telephony Statement" (see B1/13/550) and on 6th January 2006 the "SBO Statement" (B2/14/631). In each the Respondent stated it would, in the future, review and adjudicate upon the (contentious) issue as to whether the LAC was the appropriate charge basis, whether or not one or both telephones were out of Hong Kong, or whether the LIC was in fact the proper charge in the circumstances, such adjudication to have retrospective effect. Furthermore it issued Codes of Practice under section 32F(3) of the Ordinance. I have read the above and also the various Statements, Judgments, Licence and other documents contained in the Bundles.

6. On 25th May 2006 an SBO licence (E/4/1513) was issued to Zone. Shortly thereafter Wharf informed PCCW that Zone had chosen Wharf as its hosting network and requested a routing to be put in place to give access to the 5804 block, and to do so by 19th July 2006. Discussion took place between Wharf and PCCW as to charging, and PCCW requested payment of LAC for Zone's calls; Wharf refused, arguing that LIC was the applicable charge because the traffic was part of their local as opposed to external traffic.

7. In view of the difference of opinions as to the proper basis of charge Wharf on 28th June 2006 referred the matter to the Authority complaining that PCCW was not following the guidance in the SBO Statement (C/7/780). On 12th July 2006 OFTA informed PCCW that the charge they required was contrary both to the SBO Statement and to the Code of Practice (C/9/885), and also to condition 3 of their licence.

8. On 18th July 2006 OFTA met representatives of PCCW, and on 28th July 2006 the Appellant wrote to OFTA (C/21/812) setting out their views. OFTA then entered various consultations and discussions with Zone and Wharf. On 6th September 2006 OFTA confirmed to Wharf that it did not

consider it to be in the public interest for the Authority to process a determination under section 36A Telecommunications Ordinance (Cap 106) to lay down the terms for an interconnection, but encouraged instead further negotiation between the parties (C/27/824). On 23rd September 2006 Wharf informed OFTA of its view that further negotiation would not be productive. On 28th September 2006 the Authority issued a draft Direction demanding PCCW open up block 5804 at once (C/3/837), and on 7th November 2006 made the Direction in issue in this appeal (A/1/001).

Judicial Review

9. On 12th January 2007, some 8 weeks after lodging the appeal in this case, Notice of Application for Leave to apply for Judicial Review (A/2/007) was filed by PCCW; that application was dismissed by Mr. Justice Anselmo Reyes on 1st June 2007, but is (I am told) under appeal, and the hearing is expected to be in mid 2008. I have read the judgment and gratefully note and adopt herein the summary of facts and contentions and conclusions held in paragraphs 2 to 31 thereof, my findings of fact being the same; the evidence in that case and this one are similar. The final conclusion reached by the learned Judge (which unless and until successfully appealed is binding on me) was that

> *"PCCW has failed to establish either illegality or unreasonableness in relation to the Direction. Its judicial review is dismissed."*

Accordingly in the case before us we proceed on the basis that the Direction was lawful; no application to stay this hearing has been made.

10. It has been submitted that the factual findings and conclusions, particularly as to motivation, in that case are binding in this case. I do not agree. The issues in that case and in this appeal are quite different; that case proceeded on affidavit evidence of which some but not all is relevant in this appeal.

The learned Judge's conclusions of law where relevant to this case are of course binding upon me; but his factual conclusions, though insightful are not binding in view, on occasion, of the differing relevance of such evidence as is common, and the different relevant documentary evidence. The facts in this case require to arise from findings by me, which I have made above and elsewhere in this judgment.

This Appeal

11. On 21st November 2006 this appeal was lodged with the Board. Under Cap. 106 Part VC sections 32L to 32U the Appeal Board is set up and its jurisdiction and powers are delineated. Section 32N provides, *inter alia*, that:

> *(1) Any person aggrieved by –*
>
> *(a) an opinion, determination, direction or decision of the Authority relating to*
>
> *(i) sections 7K, 7L, 7M or 7N; or*
>
> *(ii) any licence condition relating to any such section; or*
>
> *(b) any sanction ….. etc ….*
>
> *may appeal to the Appeal Board against the opinion, determination, direction ….. (etc.) ….* (my emphasis)

12. It follows from the above section that for present purposes in this case the Appeal Board has jurisdiction to deal only with *"a …. direction relating to"* the mentioned sections, in this case section 7K.

13. The true meaning of the above wording was laid down in PCCW v. Telecommunications Authority CACV 274/2003 ("the PCCW case") where the Court of Appeal per Ma CJHC (with whom Rogers VP and Le Pichon JA agreed) held at paragraph 37(2) that :

> *"the person aggrieved …. must also establish that one or more of the sections 7K to 7N have been truly engaged. This means that the TA …. must expressly or by implication have arrived at an opinion that the licencee concerned has engaged or will … engage or continue to engage in conduct that contravenes one or more of sections 7K to 7N.…*
>
> *(3) Whether or not … the TA has arrived at such opinion is in any case a question of fact …."* (my emphasis)

Though a decision in the case was subsequently reversed by the Court of Final Appeal in (2005) 3 HKLRD 235 (CFA), the above statement was not commented upon nor did it arise for decision in that appeal, which concerned the nature of the discretion to suspend a Direction pending appeal. Consequently the ruling is binding on me, not being contrary to any ruling by a higher court.

14. One of the most important features required of telecommunications systems in Hong Kong, I find, is that interconnection between the various networks must be on an 'Any-to-Any' ("A to A") basis, as explained in the affirmation of Mr. Ha (e.g. paragraph 20) and mentioned in paragraphs 21 to 24 of the judgment of Mr. Justice Anselmo Reyes. This is because a refusal of interconnection will usually be anti-competitive, and because territory-wide interconnection has both social convenience for domestic users and, as importantly, helps to maintain Hong Kong's position as a regional hub, each being important aims of the Government and hence also of the Authority (Affirmation of Mr. Ha paragraph 20). The Authority stated in their letter of 12th June to Herbert Smith, paragraph 2, that the policy behind the making of the Direction was *"the enforcement of the 'Any to Any' connectivity policy"*. That policy is also an important tool in introducing and maintaining competition, particularly in early stages: see: Interconnection and Related

Competition Issues Statements 5 and 6. So that "A to A" principle is mandated both in paragraph 9(e) of the Code of Practice Relating to the Use of Numbers and Codes in the Hong Kong Numbering Plan, and in Special Conditions 3.1 and 3.2 of the PCCW Fixed Carrier Licence. This is to be seen against the background that PCCW had about 70% of all fixed telephone users at that time as its customers so that other licensees including Zone could not in practice operate successfully without "A to A" connectivity. The Respondent would have had this knowledge and these considerations in mind at the time (see paragraphs 76-79 of Affirmation of Mr. Ha).

15. It is clear to me, and I so hold, that an enforcement of the 'A to A' policy against a licensee not wishing to adopt it for any reason, usually will constitute an enforcement designed to prevent anti-competitive conduct, and I accept and hold that the proposed enforcement in this case was in part for that reason.

ISSUES

16. (a) The first issue, in this case, as to jurisdiction, therefore (since the abandonment of reliance on the other sections) is whether or not, objectively viewed, it is properly arguable on the factual evidence that the Direction "*truly engaged*" section 7K so that an appeal is justiciable under section 32N;

(b) The second issue argued by the Respondent Authority and to be decided is whether these proceedings should be stayed as being an abuse of process.

Respondents' Arguments

17. In their Skeleton Argument paragraph 9 the Respondents summarise their case as to why there is no jurisdiction in the Board, and, as I summarise, submit as follows:

(i) section 7K is not "*truly engaged*";

(ii) section 7K was not an issue in the discussion prior to the Direction, and formed no part of the TA's reasoning, nor is it mentioned in the Direction itself;

(iii) PCCW submitted to Mr. Justice Reyes that section 7K was not engaged, whereas in this appeal they now submit that it is;

(iv) PCCW now relied only upon section 7K but does not explain how it is "*truly engaged*";

(v) the suggestion in PCCW's Skeleton Argument seems to be that section 7K was impliedly relied upon to justify issuing the Direction, and not expressly relied upon; but this cannot be right because a decision cannot "*truly engage*" section 7K without expressly being relied upon. Hence PCCW's proposition fails both as a matter of law, and because there are no facts capable of supporting that proposition; I note however that this suggestion conflicts with the statement in the PCCW case that a section may be "*truly engaged*" if "*the TA have arrived at an opinion ….. by implication*" that a contravention of the section in question may occur.

(vi) consequently the Appeal Board does not have jurisdiction.

18. In paragraph 10 the Respondents summarise why they contend that this appeal should be struck out as an abuse of process, namely :

(i) PCCW failed to argue in the judicial review proceedings that the Direction did not "*truly engage*" section 7K, and consequently should not be permitted to do so in this appeal;

(ii) PCCW failed to argue in those proceedings that the Authority when issuing the Direction did not do so erroneously or on the basis of inadequate evidence or analysis, and should not be permitted to do so now;

(iii) the express position of PCCW in the judicial review proceedings gives rise to findings binding on the Board and/or an issue estoppel, against PCCW.

19. The Appellant disputes all the above contentions and contends that though, as it states on its face, the Direction was made under section 36B(1)(a)(i) and (iii), and did not expressly mention section 7K, nevertheless section 7K was, *"truly engaged"*, as described in the PCCW case, *"by implication"*.

EVIDENCE AND CONCLUSIONS

20. This is an interlocutory application to strike out this appeal for want of jurisdiction, and is made at an early stage, prior to discovery in the case, or the cross-examination of Mr. Ha (if any) or the completion of the filing of further or other evidence (if any). It can only be struck out at this stage for want of jurisdiction if it is *"plain and obvious"* that this should be the result at this early stage, for instance "*because the legal basis of the claim* (for jurisdiction) *is unarguable or almost incontestably bad"* but it must be remembered that : *"…. where the legal viability of the cause of action is sensitive to the facts, an order to strike out should not be made"*: per Litton V.P. in Yue Xiu Finance v. Dermot Agnew (1996) 1 HKLR 137 at 141.

21. It is inappropriate for me at this stage to decide on affidavit evidence, particularly where it is only from one side, finally what are the true facts relevant to the case; rather I am bound to assume in favour of the party seeking to uphold jurisdiction all the alleged favourable facts in the affidavit

and documents as being correct (facts which may later be disputed), and to consider, on that basis on the documentary and affidavit evidence, whether or not it is properly arguable that the Board has jurisdiction to hear the case: see cases cited in Hong Kong Civil Procedure (2007) paragraph 18/19/14. Moreover where the issue in a case is fact-sensitive an order to strike out should not be made at this stage : Yue Xiu Finance Ltd. v. Dermot Agnew (1996) 1 HKLR 137 at 141 D-E per Litton V.P.

22. This case on the issue of jurisdiction is clearly fact-sensitive, and consequently I should not strike the case out at this stage, prior to discovery and evidence etc., unless *"the legal basis of the claim is unarguable or almost incontestably bad"* on any view of the alleged facts.

23. The powers for the Authority to order interconnection are given by the Ordinance in section 36B. It is not necessary to prove any breach of duty before so ordering under section 36B(1)(a)(iii), in contradistinction to sub-sections (1)(a)(i) and (ii) which require there to be shown first a breach of condition, or failure to comply with the Ordinance or regulations thereunder, before interconnection can be ordered. Plainly the Authority may act under sub-section (1)(a)(iii) without waiting for any breach under the other sub-sections, or may act cumulatively under all the sections at the same time.

24. I consider it to be plain on the wording of subsection 36B(1)(a)(iii) that interconnection can be ordered thereunder by the Authority for any valid reason, including, but not restricted to, alleged anti-competitive conduct under section 7K. Whether or not it has done that, or has acted for some other valid reason such as to encourage the adoption of the 'A to A' policy, or has acted for an invalid reason (not relevant here in view of judicial review decision), is a factual question to be judged on the wording of the

Direction, and in the light of the surrounding facts leading up to it. As was pointed out by Ma CJHC in CACV 274 of 2003 the wording of the Direction may cast light on the Authority's reasoning, but I consider that the background to its issue, and the preceding discussion are relevant too.

25. It follows especially if the Authority is of the opinion based on evidence, such as in this case the failure of negotiations, and considers or states, expressly or impliedly, that a licensee's conduct or the situation is anti-competitive and in breach of section 7K, that then it may by Direction order interconnection under section 36B(i)(a)(iii). This is despite the fact that it may do so under that sub-section despite there being no breach, and it may so order cumulatively with other reasons.

The Direction

26. In paragraph 10 of the Direction the Authority expressly states that it is exercising its powers to issue a Direction *"under sections 36B(1)(a)(i), and (iii), and 32F(4) of the Ordinance"*, those being the sections respectively of the Ordinance which enable the Authority to seek to enforce compliance with licence conditions (i.e. herein especially Special Condition 3 which obligates interconnection), or in relation to a section 32A(3D) type of interconnection, or to enforce the observance of Codes of Practice (see paragraph 13 of the Judgment of Mr. Justice Reyes).

27. It follows that the Authority did not, in the manner explained in the PCCW case 274/2003, rely expressly upon section 7K of the Ordinance in the Direction itself or in the covering letters or preceding discussions. The remaining question is whether, within the meaning given in that case, it did, as a question of fact, and *"by implication "* so rely and consequently *"have arrived at an opinion"*, having regard to the wording of the Direction and

also to the preceding background to it, that section 7K was *"truly engaged"* in that there was a past, present or potential future breach of that section.

28. Section 7K is not directly mentioned in the correspondence or discussions leading up to the issue of the Direction. Rather the need to secure interconnection to further the policy of "A to A" connection is an obvious given reason for seeking to enable Zone with this help to commence its telephone service: see Judgment of Mr. Justice Reyes paragraphs 21 to 24.

29. Section 7K forbids a licencee to *"engage in conduct* (past, present or future) *which, in the opinion of the Authority, has the purpose or effect of preventing or substantially restricting competition…."* If there be no evidence at all of conduct to such purpose or effect, objectively viewed, then the section does not bite; but if there is some such evidence, then it is the expert *"opinion of the Authority"* which is paramount as to its *"purpose or effect"*, in the absence of evidence (of which there is none in this case) that the Authority acted perversely.

30. When considering this matter then, as laid down in the PCCW case paragraph 37/2, it is necessary to show that section 7K is *"truly engaged"*, that is that the relevant opinion involves an opinion on the part of the TA that *"the licencee concerned has engaged or will (if the relevant opinion … is not complied with) engage or continue to engage in conduct that contravenes one or more of sections 7K to 7N."*

31. It is important in this connection to bear in mind that nowhere in the Direction itself nor in the discussions and letters leading up to it is section 7K expressly relied upon for justification. The question is whether it was

impliedly so relied upon in the light of the background leading up to the Direction.

32. The wording of the Direction and its covering letter of 7th November 2006 makes clear that interconnection was required so as to enable and permit Zone to operate in a practical world and way. Zone's entry clearly would be likely to increase competition to some extent, negotiations on commercial and other terms could continue after interconnection, and if not agreed, a retrospective determination could be made by the Authority. The underlying objective to facilitating Zone's entry was in line with the Authority's often-expressed policy objective.

Decision on Jurisdiction

33. The question for decision (there being no express mention of section 7K) is whether or not section 7K has *"by implication"* been *"truly engaged"* by the Authority in the Direction and/or the circumstances leading up to its making. I find and hold that it has and that consequently the Appeal Board has jurisdiction under section 32N of the Ordinance.

34. Section 7K was not expressly mentioned in the Direction or the covering letter or the discussions leading up to it. Rather 'A to A' connectivity has been at the centre of the matter. But I observe and hold that whilst there may be in any decision one main theme, at the same time other relevant matters may exist and be considered in the background at the same time, and such subsidiary matters are capable of founding jurisdiction.

35. On the other hand what is clear is that an allegation of anti-competitive conduct was one important facet of the complaint by WT&T against PCCW, in that it was alleged that

"it has not opened the number block 5804 allocated by the Authority to Zone in May 2006 for operation of its VoIP services under its SBO licence" (paragraph 2 of the Direction).

This fact the Authority confirmed for itself (paragraphs 4 and 5 of the Direction). Such conduct was clearly, if proved and without technical or other excuse (which is not suggested in this case), prima facie a breach of section 7K as having the *"the purpose or effect of preventing or substantially restricting competition in a telecommunications market"*.

36. That conduct was alleged to be in breach of Special Condition 3.1 of the licence which obliged mandatory interconnection (*"shall interconnect"*), and of 3.2 which obligates that the interconnection be made *"promptly"*, and which interconnection is said to be *"an essential facility"* (paragraphs 8 and 9 of the Direction). Interconnection moreover is obviously essential to forward the 'A to A' policy, which both Government and the Authority espoused.

37. Section 7K forbids conduct which substantially restricts competition, and indeed in sub-section (2)(b) the Authority is to *"have regard"*, inter alia, to *"an action preventing or restricting the supply of … services to competitors"*.

38. The Authority would have had all these matters and considerations in mind when the complaint was made and considered, and the Direction made, because of the statutory framework of the scheme and the information in their possession.

39. Consequently, having regard to the matters mentioned above, I hold that the Board has jurisdiction to hear this appeal because, as set out above, section

7K was *"truly engaged"* in the Direction in the manner described in the PCCW/2003 case which *"related to section 7K"*.

40. It follows that section 32N is engaged and the appeal is justiciable.

41. Furthermore, following the decision in the Yue Xiu Finance case (paragraph 20 above) as the case on jurisdiction is fact sensitive this appeal should not be struck out as without jurisdiction at this early stage because the legal basis for the claim is not *"unarguable or almost incontestably bad"*.

Abuse of Process

42. In the earlier part of this judgment delivered on 17th March 2008 I dealt with the issue of whether or not this Board had jurisdiction to hear this appeal, and now I continue the judgment to consider the second issue raised, namely abuse of process.

43. The burden of proof on each issue rests upon the party putting forward that there is jurisdiction or that there is abuse. That burden is the civil standard but in view of the particular nature of those issues and what is alleged is at the higher end of that spectrum.

44. The Respondent Authority's Skeleton Argument at paragraph 42 to 48 summarise their submission as to abuse which are amplified in the oral submissions of Mr. Green, particularly at Transcript 17.10.07 Day 2 at page 101 et. seq. Essentially a party must raise its arguments in the first case before the Court, and if they fail to do so cannot then do so in a later case, unless in exceptional circumstances the Court exercises its discretion to permit it to do so. The second matter is that a party may not in a later case adopt a totally inconsistent position.

45. This legal position therefore raises the issue of what occurred in the judicial review case before Mr. Justice Anselmo Reyes.

46. In addition the Authority complains that it is an abuse frequently, as they allege PCCW do, to both commence judicial review proceedings and an appeal to this Board, and that this is harassment. Obviously each such case must depend on its facts. But in general I hold that to pursue each remedy contemporaneously is not an abuse. Each proceeding is lawful, and in fact bears upon different issues; judicial review looks to legality and reasonableness, but not merits; this Board is an appellate tribunal concerned with addressing whether findings are correct, and the consequent merits of the case. I do not regard this case as abusive for such reason, though it may be that on different facts such a finding might be proper. It is difficult to give general guidance as we are asked as to when it would be proper, and when not, and I do not intend to do so herein. I bear in mind of course the extra time and expense involved in contesting two proceedings, but neither party here are paupers. It is correct, as the Authority allege, that the evidence in both cases is very similar (though different issues arise) no cross-examination of Mr. Ha was requested; but this does not remove the essential legal difference between the two proceedings and the prima facie right of a litigant to follow each if they wished. In Harvest Good v. Secretary for Justice (2007) HKEC 1272 at paragraph 100 Mr. Justice Hartmann adopts the rule emanated by Lord Bingham in Johnson v. Core Wood to the effect that it is the duty of a court, where a claim or defence has not been raised in earlier proceedings to refuse as abusive to consider it later, - the rationale being to achieve finality in litigation. The person alleging abuse must prove it (paragraph 104). The case contains a helpful summary of the applicable legal principles, in particular that a party should not be “vexed” twice with the same matter, with the concomitant danger of conflicting judgments and waste of costs and court time. I do not consider in this case that the bringing

of the two separate cases constituted abusive procedure, especially in view of the different legal issues arising in each, and I so hold.

HOLDINGS

47. I hold that for the above reasons :

(a) This Board has jurisdiction to hear this appeal; and

(b) The Respondent Authority has failed to prove that the bringing of the two cases is abusive.

COSTS

48. I make an Order Nisi which is to become Final on 20th April 2008 unless either party before mid-day on that date requests a hearing on costs.

49. My Order Nisi is that the costs of and incidental to this appeal shall be paid by the Authority to PCCW, such costs to be taxed if not agreed.

50. Liberty to apply.

Dated this 27th day of March 2008.

John Griffiths S.C., C.M.G., Q.C.
Chairman

Mr. Kwong Kai Sun, Sunny
Member

Prof Dr. Peter Malanczuk
Member

Telecommunications (Competition Provisions) Appeal Board

Appeal No. 24

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)

BETWEEN

PCCW-HKT TELEPHONE LTD.

—Appellant—

AND

THE TELECOMMUNICATIONS AUTHORITY

—Respondent—

DECISION

Ms Jolene Lin
Prof Sunny Kwong
Neil Kaplan CBE QC SBS
(Chairman)

13 February 2009

A. INTRODUCTION

1 The Appeal Board (**"Board"**) has before it an appeal by PCCW-HKT Telephone Limited (**"PCCW"**) against a Direction of the Telecommunications Authority (**"TA"**) dated 7 November 2006 (**"Direction"**).

2 This Appeal is brought under section 32N of the Telecommunications Ordinance (Cap. 106) (**"TO"**):–

> *"(1) Any person aggrieved by—*
>
> *(a) an opinion, determination, direction or decision of the Authority relating to—*
>
> *(i) section 7K, 7L, 7M or 7N; or*
>
> *(ii) any licence condition relating to any such section; or*
>
> *(b) any sanction or remedy imposed or to be imposed under this Ordinance by the Authority in consequence of a breach of any such section or any such licence condition,*
>
> *may appeal to the Appeal Board against the opinion, determination, direction, decision, sanction or remedy, as the case may be, to the extent to which it relates to any such section or any such licence condition, as the case may be."*

3 The following brief description of the background to the Direction is gratefully taken from paragraphs 2-10 of the Judgment of Reyes J dated 1 June 2007 (**"Reyes Judgment"**) in which he dismissed PCCW's application for judicial review of the Direction:

> *"2. The Direction required PCCW to secure interconnection between its network and that of Wharf T & T Ltd. in relation to the telephone number block '5804'. Such interconnection would enable subscribers to a VoIP (Voice over Internet Protocol) telephony service offered by Zone Ltd. to call (and be called by)*

persons connected to PCCW's network. VoIP telephony is sometimes simply known as IP telephony.

3. PCCW's network is the largest in Hong Kong. In practice, this means that Zone's VoIP service would not be commercially attractive unless its subscribers could connect with PCCW's customers.

4. The Direction provided for the interconnection to be charged on an interim basis at the same level and direction as currently applied to traffic between PCCW and Wharf for end-users of a basic telephone service making use of numbers with the prefix '2' or '3'.

5. The latter numbers are allocated to users of IP telephony services provided by PCCW and Wharf. Currently PCCW and Wharf charge each other for such services at LIC (Local Interconnection Charge) rates, whether or not the relevant calls are local (that is, whether or not the calls originate from or terminate in Hong Kong).

6. LIC is to be contrasted with the higher LAC (Local Access Charge) typically payable to local operators by providers of ETS (external telecommunications services) involving connection with persons outside Hong Kong.

7. The charge imposed by the Direction accordingly meant that all external traffic (that is, calls originating from or terminating at places outside Hong Kong) between users of Zone's IP telephony service and persons linked to PCCW's network would be charged at LIC and not LAC.

8. The Direction explained that the charge imposed was 'interim' in the sense that it could be varied in two ways.

9. It could be varied through a later commercial agreement reached between PCCW and Wharf.

10. But it could also be varied by a final determination of terms of interconnection (including charges) by the Authority at the request of PCCW or Wharf under Telecommunications Ordinance (Cap. 106) (TO) s.36A. In that event, the Authority could direct the retrospective application of the terms and conditions determined."

4 PCCW is the holder of a Fixed Carrier (**"FC"**) Licence. Wharf T & T Ltd. (**"Wharf"**) is the holder of a Fixed Telecommunications Network Services (**"FTNS"**) Licence and like PCCW, Wharf has its own telecommunications network infrastructure in Hong Kong.

5 Since early 2006, the TA has granted new licences to what are termed Service-Based Operators (**"SBOs"**), allowing them, *inter alia*, to provide internet based telephony services in Hong Kong. The phrase *"Service-Based Operators"* is distinguished from *"Facility-Based Operators"* (**"FBOs"**) such as PCCW and Wharf. SBOs do not own the physical facilities (infrastructure) over which their services are provided.

6 Zone Limited (**"Zone"**) is one of the companies granted an SBO licence. Zone is an active provider of external (*i.e.* international or IDD) services.

7 Zone relies on Wharf's infrastructure to provide its services and has an arrangement with Wharf for that purpose. Wharf is therefore referred to as Zone's *"host"*.

8 The number block '5804' is used by Zone for IP telephony services.

9 PCCW's FC Licence No. 50 dated 14 January 2005 (**"PCCW's 2005 Licence"**) stipulates in Special Conditions 3.2 and 3.3 as follows:-

> *"**3. REQUIREMENTS FOR INTERCONNECTION***
>
> *3.1 […]*
>
> *3.2 The licensee shall use all reasonable endeavours to ensure that interconnection is effected promptly, efficiently and on terms, conditions and at charges which are based on the licensee's reasonable relevant costs attributable to interconnection.*

3.3 The licensee shall provide facilities and services reasonably necessary for the prompt and efficient interconnection of the service and the network with the telecommunications networks or services of the other entities referred to in Special Conditions 3.1. Such facilities and services include—

(a) carriage services for codes, messages or signals across and between the interconnected networks;

(b) those necessary to establish, operate and maintain points of interconnection between the licensee's network and the networks of the other entities, including the provision of transmission capacity to connect between the licensee's network and networks of the other entities;

(c) billing information reasonably required to enable the other entities to bill their customers;

(d) facilities specified by the Authority pursuant to section 36AA of the Ordinance; and

(e) ancillary facilities and services required to support the above types of interconnection facilities and services."

10 The relevant parts of the Direction which is the subject-matter of this Appeal read as follows:-

"[…]

Direction

10. The Authority, in exercise of his power under sections 36B(1)(a)(i) & (iii) and 32F(4) of the Ordinance and SC3 of the Fixed Carrier Licence and GC13 of the FTNS Licence, as the case may be,

having been satisfied that *PCCW and [Wharf] have not reached commercial agreement on the passing of traffic to and from the number block '5804' between PCCW and [Wharf];*

having been satisfied that *interconnection between PCCW and [Wharf] has not been effected so as to pass the traffic to and from the number block '5804';*

having considered that *PCCW is obliged under SC3.2, and [Wharf] is obliged under GC 13(3) to ensure that interconnection is effected promptly, efficiently and on terms, conditions and at charges which are based on the licensee's reasonable relevant costs attributable to interconnection in respect of the number block '5804';*

having been satisfied that *PCCW and [Wharf] have been given sufficient time to negotiate for reaching an agreement on the amount of charge to be paid in respect of interconnection of traffic to/from the number block '5804' but they have failed to reach any agreement as at date;*

having further been satisfied that *the parties are not likely to reach an agreement within a reasonable period of time;*

having considered *all representations made and information furnished by PCCW and [Wharf];*

hereby directs that, without prejudice to the contentions by any party in relation to any possible future request for determination under section 36A on terms and conditions for the interconnection between PCCW and [Wharf] in relation to Zone, and any terms and conditions as may be determined by the Authority in exercise of his powers under section 36A,

(i) PCCW shall observe and comply with SC 3.1 and SC 3.2 of its Fixed Carrier Licence, as well as the CoP;

(ii) PCCW and [Wharf] shall effect interconnection so as to pass traffic to and from the number block '5804' in relation to Zone such that not later than 14 November 2006, Zone is capable of passing its traffic via the hosting network of [Wharf] to and from PCCW's network in accordance with the Interim Charge;

(iii) Subject to (iv) and (v), the Interim Charge applicable to traffic to/from prefix '5804' numbers should be at the same level and in the same direction as those currently applicable to traffic between PCCW and [Wharf] for end-users of a basic telephone service that makes use of telephone numbers with prefix '2' and '3';

(iv) The Interim Charge is without prejudice to any contentions which a party to this Direction may raise as to the applicable interconnection charge in respect of the number '5804' and is subject to variation in accordance with

(1) such commercial terms as the parties may otherwise mutually agree by commercial negotiation, or

(2) failing (1) and at the request of any one party, such determination as may be made by the Authority in accordance with section 36A of the Ordinance and such retrospective application of any terms and conditions of interconnection so determined as the Authority may consider fair and reasonable for application to the interconnection implemented pursuant to this Direction.

(v) Nothing in this Direction shall have the effect of amending, altering, varying, adding to, abrogating or in any way affecting the powers, rights, duties and obligations of the Authority or any party to this Direction under the Ordinance or any relevant licence, code of practice or determination issued thereunder, each provision of which other than those which may be affected as a result of sub-paragraph (iv)(1) or (2) shall remain operative.

(vi) As far as practicable, PCCW and [Wharf] shall keep a record of the amount of traffic flowing in each direction of their networks to enable settlement of interconnection charge referred to in sub-paragraph (iii) above.

[…]"

(Emphasis added)

11 In making this Direction the TA exercised his powers under section 36B(1)(a)(i) and (iii) of the TO as well as Special Condition (**"SC"**) 3 of PCCW's 2005 Licence. Section 36B in so far as relevant provides as follows:

"***36B. Directions by Authority***

(1) Subject to subsection (2), the Authority may issue directions in writing—

(a) to a licensee requiring it to take such actions as the Authority considers necessary in order for the licensee to—

(i) comply with any of the terms or conditions of its licence; or

(ii) comply with any provision of this Ordinance or any regulation made thereunder; or

(iii) in relation to any interconnection of the type mentioned in section 36A(3D), secure the connection of any telecommunications service being the subject of its licence to—

(A) any other telecommunications service being the subject of a licence granted under this Ordinance or of an order made under section 39; or

(B) a system of the description mentioned in section 8(4)(e); or

(C) a closed circuit television system of the description mentioned in section 8(4)(f); or

(D) (repealed)

[…]"

12 It is also worth noting section 36A of the TO which gives the TA a discretion to determine the terms and conditions of interconnection either "*on the request of a party to the interconnection or, in the absence of a request, if he considered it is in the interest of the public to do so*".

B. Hearing

13 The hearing of this Appeal took place at the Hong Kong International Arbitration Centre between 12-15 January 2009. PCCW was represented by Mr James Farmer QC and Mr Roger Beresford instructed by Herbert Smith.

The TA was represented by Mr Nicholas Green QC and Mr Edward Alder instructed by Slaughter & May. A LiveNote transcription service was provided.

14 PCCW relied upon a witness statement of Mr Stuart Z Chiron, the head of Regulatory Affairs at PCCW, and the expert report of Dr Cento Veljanovski.

15 The TA relied upon two affirmations of Mr Ha Yung Kuen, the Deputy Director-General of the Office of the TA (**"OFTA"**), from the judicial review proceedings and a supplementary witness statement from Mr Ha.

16 Mr Chiron, Dr Veljanovski and Mr Ha were all cross-examined.

C. Background to the Appeal

17 That the hearing of this Appeal took place over two years after the date of the Direction is explained by the chequered history of events subsequent to the Direction.

18 As stated above, the Direction was issued on 7 November 2006. On 21 November 2006, the Notice of Appeal in these proceedings was issued.

19 PCCW applied for leave to apply for Judicial Review on 12 January 2007 and leave was granted by Reyes J. Pending the hearing of the Judicial Review no further steps were taken with regard to this Appeal.

20 Reyes J heard the Judicial Review on 9-10 May 2007 and delivered his judgment dismissing the Judicial Review on 1 June 2007.

21 Following the dismissal of the Judicial Review, PCCW filed a Notice of Appeal to the Court of Appeal but subsequently abandoned that Appeal.

22 The Judicial Review having been disposed of, the TA then counter-attacked by seeking a strike-out of the Notice of Appeal to this Board on the ground that the Board did not have jurisdiction under section 32N of the TO as set out above. This was on the basis that the Direction of the TA in this case did not relate to any of sections 7K, 7L, 7M or 7N (**"Sections 7K-N"**) of the TO as explained by the Court of Appeal in *PCCW-HK Telephone Limited v Telecommunications Authority* (CACV274/2003) dated 8 July 2004 per Ma CJHC (**"Ma Judgment"**).

23 By a Decision dated 27 March 2008, a Board chaired by John Griffiths SC CMG declined to strike out the Notice of Appeal. The Board decided that as the case on jurisdiction was fact sensitive *"the Appeal should not be struck out as without jurisdiction at this early stage because the legal basis for the claim is <u>not</u> 'unarguable or almost incontestably bad'."* (Paragraph 41, original emphasis). Accordingly, the Board applied principles akin to The Rules of the High Court, Order 18, Rule 19. It did not definitively decide the issue of jurisdiction and it was common ground between the Parties that it was open to the TA to invite the Board to revisit the whole question of jurisdiction at the substantive hearing of this Appeal.

24 In its 27 March 2008 Decision, the Board also declined to strike out the Appeal on the grounds of abuse of process which had been argued on the basis that it was such to commence both Judicial Review proceedings and the Appeal to this Board.

D. Chronology of Events Leading to the Direction

25 As the facts of this matter have been aired in Court before Reyes J who delivered a full judgment and as they have also all been fully considered by this

Board in a written decision on the strike-out application (both hearings being in public), the Board does not feel it necessary to set out the basic facts all over again in any great detail. However, the Board has considered all the arguments advanced by both sides even if they are not specifically set out in this decision.

26 However, a short outline of events is set out below.

27 The TA granted Zone a SBO License on 25 May 2006 for internal and external telecommunications services and allocated the number block '5804' to Zone.

28 On 5 June 2006, Wharf wrote to PCCW notifying PCCW of Zone's choice of Wharf as its host. Wharf requested PCCW to implement routing to open access to the number block '5804'. PCCW replied on 7 June 2006 inviting Wharf to approach PCCW's commercial team in order to negotiate the commercial terms for the implementation.

29 Between 7 and 28 June 2006, PCCW and Wharf tried to negotiate an agreement.

30 It is a special feature of IP telephony that a user can make calls from (and be called dialling) a local Hong Kong telephone number, even though he or she is physically located outside Hong Kong. The connection from the Hong Kong telephone network to the user outside of Hong Kong is routed through the Internet.

31 PCCW held the view that due to this feature Zone's service would attract predominantly disguised international calls but hardly any local calls, as the latter are free of charge to the customer in Hong Kong in any event. Therefore PCCW sought to charge the higher LAC for Zone calls.

32 Wharf, on the other hand, requested that Zone traffic should be treated as regular Wharf traffic. Wharf insisted that calls to and from local telephone numbers through Zone are local calls and thus the lower LIC applies.

33 On 28 June 2006, Wharf complained to OFTA that PCCW was insisting on LAC. Before and after this complaint against PCCW, Wharf and Zone filed numerous other complaints in relation to other network operators which had refused to open access.

34 By 21 September 2006, all network operators but PCCW had opened access for Zone traffic or consented to open access. On 24 September 2006, Wharf stated to OFTA that PCCW was insisting on applying LAC to Zone's traffic and hence further negotiations were futile. Wharf urged the TA to take action.

35 In extensive discussions between OFTA, Wharf, Zone and PCCW, which had already started with the initial complaint on 28 June 2006, the TA fixed numerous deadlines for PCCW to open access or make formal representations, none of which was met by PCCW (see OFTA letter dated 18 July 2006, p. 948 of Hearing Bundle B2, volume 3; OFTA letter dated 28 September 2006, *ibid.* p. 955; OFTA letter dated 13 October 2006, *ibid.* p. 965; OFTA letter dated 27 October 2006, *ibid.* p. 971; OFTA letter dated 7 November 2006, *ibid.* p. 976). The Board is of the view that the TA has shown great patience with PCCW in setting new deadlines over and over again after the previous deadline had been ignored before finally issuing the Direction. The Board is comforted in this conclusion because it accords with the view of Reyes J that the TA had allowed sufficient time for interconnection (see Reyes Judgment, paragraph 115).

36 Eventually, the TA issued the Direction ordering PCCW to connect Zone's number block and setting LIC as the interim charge.

E. Issues in this Appeal

37 This Appeal—which has been excellently argued by Counsel on both sides—involves three issues:

(1) Has the Board jurisdiction to entertain this Appeal on the basis that the Direction relates to Sections 7K-N of the TO? Using the words of the Ma Judgment, have any of these sections been *"truly engaged"* by the TA in making the Direction?

(2) If the Board does have jurisdiction, should it nonetheless dismiss these proceedings on the grounds of abuse of process on the basis (i) that PCCW is trying to relitigate issues upon which it has lost earlier and/or (ii) seeks now to rely on points that it failed to raise in earlier proceedings and/or (iii) that PCCW has been taking inconsistent positions in the different proceedings?

(3) If not an abuse of process, should the Direction be set aside or varied or what other order should the Board make?

F. Jurisdiction

38 In order to deal with the issue of jurisdiction it is necessary to have regard to the observations in the Ma Judgment referred to in paragraph 22 above.

39 It is also necessary to have regard to the facts of that case in order to appreciate what Ma CJHC meant in the passage which will be set out in full later in this section. Before going into the facts of that case it is important to

appreciate that in 2000, PCCW was presumed to be in a dominant position. This no longer applies.

40 It is also important to point out that the terms of PCCW's 1995 Licence which were relevant for the Ma Judgment differ to the terms of its present 2005 Licence which is the subject of this Appeal. GC 15 and 16 of PCCW's 1995 Licence stated as follows:–

"***Anti-competitive conduct***

15. (1) (a) A licensee shall not engage in any conduct which, in the opinion of the Authority, has the purpose or effect of preventing or substantially restricting competition in the operation of the Service or in any market for the provision or acquisition of a telecommunications installation, service or apparatus.

(b) Conduct which the Authority may consider has the relevant purpose or effect referred to in subparagraph (a) includes, but is not limited to -

(i) collusive agreements to fix the price for any apparatus or service;

(ii) boycotting the supply of goods or services to competitors;

(iii) entering into exclusive arrangements which prevent competitors from having access to supplies or outlets;

(iv) agreements between licensees to share the available market between them along agreed geographic or customer lines.

(2) In particular, but without limiting the generality of the conduct referred to in paragraph (1), a licensee shall not -

(a) enter into any agreement, arrangement or understanding, whether legally enforceable or

not, which has or is likely to have the purpose or effect of preventing or substantially restricting competition in any market for the provision or acquisition of any telecommunications installations, services or apparatus;

(b) without the authorization of the Authority, make it a condition of the provision or connection of telecommunication installations, services or apparatus that the person acquiring such telecommunications installations, services or apparatus also acquire or not acquire any other service or apparatus either from itself or of any kind from another person; or

(c) give an undue preference to, or receive an unfair advantage from, a business carried on by it or an associated or affiliated company, service or person if, in the opinion of the Authority, competitors could be placed at a significant competitive disadvantage or competition would be prevented or substantially restricted within the meaning of paragraph (1).

Abuse of position

16. (1) Where the licensee is, in the opinion of the Authority, in a dominant position with respect to a market for the relevant telecommunications services, it shall not abuse its position.

(2) A licensee is in a dominant position when, in the opinion of the Authority, it is able to act without significant competitive restraint from its competitors and customers. In considering whether a licensee is dominant, the Authority will take into account the market share of the licensee, its power to make pricing and other decision, the height of barriers to entry, the degree of product differentiation and sales promotion and such other relevant matters which are or may be contained in guidelines to be issued by the Authority.

(3) (a) A licensee which is in a dominant position within the meaning in paragraph (1) shall be taken to have abused its position if, in the

opinion of the Authority, it has engaged in conduct which has the purpose of preventing or substantially restricting competition in a market for the provision or acquisition of telecommunications installations, services or apparatus.

(b) Conduct which the Authority may consider to fall within the conduct referred to in subparagraph (a) includes, but is not limited to -

(i) predatory pricing;

(ii) price discrimination;

(iii) the imposition of contractual terms which are harsh or unrelated to the subject of the contract;

(iv) tying agreements;

(v) discrimination in supply of services to competitors."

41 The surrounding facts underlying the Ma Judgment were as follows.

42 In November 2000, after consulting the industry, the TA issued a Statement on Broadband Interconnection dated 14 November 2000. The policy objective stated therein was to open up the market for broadband interconnection so that the public would have a greater choice. The TA recognised the need to balance open competition with ensuring that companies like PCCW which had invested heavily in their infrastructure were treated fairly for allowing their competitors to interconnect with their network. As to the terms for such interconnection, the TA encouraged the parties to negotiate but stated he would intervene where agreement eluded the parties.

43 After the Statement was issued, Wharf began negotiations with PCCW with the view to establishing a Broadband Interconnection using PCCW's

network. Agreement on terms could not be reached. In July 2001, Wharf asked the TA to make a determination under section 36A of the TO. PCCW objected to the TA making a determination but instead submitted a tariff proposal. The proposal was made under GC 22 of PCCW's 1995 Licence which obliged PCCW to seek the TA's approval of a tariff but such approval was not to be given if the charges contravened GC 15 and 16 set out above. The TA approved the tariff.

44 Wharf continued to press the TA to make a determination and in a letter dated 7 November 2001 opposed the tariff alleging that its terms and conditions were *"harsh and unfair and completely disregards the regulatory obligations of [PCCW]"*. Wharf further stated that the tariff ought to be rejected outright as it would *"deprive the consumers of effective competition in the broadband market"*. The letter concluded by stating that the charges in the tariff were *"excessive, unsubstantiated and uncompetitive"*. Correspondence continued between the parties but Wharf insisted throughout that the tariff sought by PCCW was anti-competitive and entailed an abuse of PCCW's dominant position.

45 Eventually, on 15 May 2002, the TA issued a Direction pursuant to section 36B(1)(a)(iii) of the TO directing PCCW on receipt of request from Wharf promptly to implement a broadband type II interconnection. However, none of the conditions contained in PCCW's tariff nor any other payment conditions were imposed.

46 The Direction itself stated that it was made in order *"to promote effective competition in the telecommunications industry […]"*. It was clear to the Court of Appeal that the direction was made by the TA in the interest of effective

competition to PCCW. Furthermore, in a letter from the TA to PCCW's then solicitors it was stated: -

> "*The public interest demands that interconnection shall be effected as soon as it is technically feasible: Interconnection promotes effective competition in the telecommunications industry and its early implementation will in turn maximise consumer benefits by enabling consumers to enjoy sooner the benefits brought about by increased competition in the market for broadband services.*"

47 In paragraph 37 of the Ma Judgment, Ma CJHC sets out in six sub-paragraphs the effect of section 32N(1)(a)(i) of the TO and this Board makes no apology for citing this in full because it has loomed large in the argument before this Board:

> *"37. In my view, the effect of section 32N(1)(a)(i) of the TO is as follows :-*
>
> *(1) It is not enough simply for the relevant opinion, determination, direction or decision of the TA to have some connection (however strong) to competition (or anti-competition), abuse of dominant position, misleading or deceptive conduct or non-discrimination. If this were the only criterion needed, the phrase 'relating to' would refer to exactly such terms rather than specifically to sections 7K, 7L, 7M and 7N. Something else must therefore be required.*
>
> *(2) <u>What is required is that</u> the person who is aggrieved by the relevant opinion, determination,*

direction or decision of the TA must also establish that one or more of sections 7K to 7N have been truly engaged. This means that the TA (in issuing or making the relevant opinion, determination, direction or decision) must, expressly or by implication, have arrived at an opinion that the licensee concerned has engaged, or will (if the relevant opinion, determination, direction or decision is not complied with) engage or continue to engage in conduct that contravenes one or more of sections 7K to 7N. I put it in these terms to emphasize that not only is past or present conduct covered but also future conduct. The language of section 7K to 7N is sufficiently wide (and for good reasons) to cover such situations. A good measure of flexibility is therefore given to the TA.

(3) Whether or not in issuing or making an opinion, determination, direction or decision, the TA has arrived at such opinion, is in any given case a question of fact. In his submissions, Mr Roth raised the spectre of the possibility of there being cross-examination to establish whether or not the TA has indeed reached such an opinion. In my view, it will in most (if not all) cases be fully evident whether or not the TA has arrived at such an opinion. I note here the duty on the part of the TA to provide reasons for any opinion,

determination, direction or decision :- see section 6A(3)(b) of the TO. This will no doubt facilitate the exercise.

(4) *As to Mr Gordon's point that breaches of sections 7K, 7L, 7M or 7N are required to be shown before an appeal under section 32N(1)(a) can be triggered, this is really a matter of semantics. Section 32N(1)(a)(i) does not use the word 'breach' (although section 32N(1)(b) does). This matters not. The important point to remember is that an appeal to the Appeal Board under section 32N(1)(a)(i) is possible only where the relevant opinion, determination, direction or decision involves an opinion on the part of the TA along the lines mentioned in sub-paragraph (2) above. Whether or not one chooses to refer to this as a past, present or future breach is immaterial. The important requirement is the TA's opinion under sections 7K, 7L, 7M or 7N.*

(5) *I am prepared to accept that opinions, determinations, directions or decisions made or issued by the TA may not necessarily engage sections 7K to 7N but the important point for present purposes is that they may, depending on the facts.*

(6) I have found the legislative history to be of limited assistance. The legislative background referred to in the materials shown to us is already evident from the terms of the Ordinance itself."

(Emphasis added)

1. PCCW's Case

48 Mr Farmer QC began his closing submissions with noting that it was the TA's case that the Direction was made under section 36B(1)(a)(i) of the TO which deals with compliance with the terms and conditions of a licence (Any-2-Any) and under (iii) which is the interconnection provision. He recognised that the TA's case was that the Direction was not made under (ii) which deals with compliance with provisions of the TO and thus that the Direction was accordingly limited in scope.

49 PCCW's case on the other hand is that the Board is entitled to *"look behind the Direction and behind the reasons expressly stated in the Direction, to find whether the real reasons extended to, in this case, an opinion by the TA that PCCW's conduct breached or would breach the competition provisions, namely, that its conduct was anti-competitive and was restrictive of competition"* (Transcript day 4, page 2, lines 6-12).

50 Mr Farmer took the Board through Ma CJHC's judgment and submitted that in that case the Court of Appeal did go behind the precise words of the Direction to find that the TA had impliedly formed the view that PCCW's conduct did contravene the competition provisions of the ordinance. He asked this Board to adopt a similar approach in the present appeal.

51 In attempting to establish the TA's view that the competition provisions had been engaged in this case Mr Farmer relied heavily on the TA's own email dated 10 July 2006 (Bundle A, tab 6(d), page 162). As so much reliance has been placed on this email the Board proposes to set it out in full. It was sent to a number of people including Mr Bernard Hill, the head of the Competition Affairs Branch of OFTA, and to Mr Ha, the Deputy Director General. It is headed *"Levying LAC for Traffic to/from '58' Prefixed Numbers of SBO Licensees"* and it reads as follows:–

> *"CONFIDENTIAL*
>
> *I have read the file on the problem recently raised by PCCW on levying LAC for traffic to and from '58' prefixed numbers allocated to SBO licensees for VoIP services. This problem should be dealt with expeditiously and effectively.*
>
> *PCCW claims that it has to comply with the TA's 1998 Determination on LAC. My observations on this claim are as follows:*
>
> *(1) My reading of the TA's Determination is that the scope of ETS is narrowly defined and covered only the types of ETS envisaged in the series of meetings leading to the determination. HLS should advise on this point.*
>
> *(2) If the definition of 'external telecommunications services' should literally include any service where the user at one end is overseas, why PCCW is not levying LAC on the mobile network operator where the mobile customer is roaming outside Hong Kong?*
>
> *(3) Why is PCCW not levying LAC on the other fixed network operators for VoIP services where the user is located outside Hong Kong?*
>
> *(4) Why is PCCW not levying LAC on the other fixed network operators for VoIP services (under the brand name 'Convergence') when the user is located overseas?*
>
> *(5) I am not aware of any such discrimination against VoIP traffic in overseas jurisdictions with similar pro-liberalization*

policies of Hong Kong. PCCW's proposed discrimination against the VoIP traffic is an obstruction to technological and market developments.

(6) PCCW's proposal affects our consideration on the competitive restraints on the level of LAC by VoIP services and whether the LAC level for fixed networks can be deregulated as proposed in the 2nd FMC Consultation Paper.

To resolve the above problem, PCCW should asked [sic] to explain its objection. We should prepare our grounds for a direction to PCCW to observe its licence obligations of prompt interconnection with other networks and services. The interim terms imposed in the direction should be that interconnection charges for local traffic should apply, based on the considerations given above. If need be, after issuing the direction, the TA will proceed with a determination under section 36A to clarify the scope of the 1998 Determination.

As the BO Licensee's service is being held up, there is urgency in resolving the above issue. Therefore each step in the due process should not take unduly long time.

M H Au"

52 Mr Farmer cross-examined Mr Ha in some detail on this email (Transcript day 3, page 78 *et seq.*). Mr Farmer read passages to Mr Ha and the Board proposes to set out this question and answer session (Transcript day 3, page 80, lines 21 *et seq.*):–

"*Q. So that what I put to you is that the way the TA saw it at that time, at the very time that he then issued a direction to prepare a draft direction of the kind that was ultimately issued was that he concluded that the need for that direction arose because of PCCW's conduct; do you agree with that?*

A. Yes.

Q. Conduct as described by him there, which is, first, conduct in insisting on LAC in respect of SBO traffic?

A. Yes.

Q. And, secondly, that that conduct was discriminatory because it wasn't consistent, he says, with what was being charged as between fixed carriers for telephony calls – IP telephony calls?

A. Yes.

Q. So that what we're – and he was also concerned, and it was the third point that he's making, isn't it, that this conduct – I'm looking at paragraph 6 in particular – had an impact on the competitive restraints on the level of LAC by VoIP service providers; yes?

A. Yes.

Q. So that what you've got there, in total, I'd suggest to you, is conduct by PCCW that was affecting competition, that was discriminatory, and that was keeping Zone out of the market, and that's what led to him wanting, or directing preparation of a draft direction for immediate connection with an interim charge of LIC. That's what the effect of that is, isn't it?

A. Yes.

Q. You, yourself, have pointed out, in those paragraphs 77 to 79 where you deal with the fact that Zone was being barred from the market, that this was occurring in a situation with PCCW which had 70 per cent – the largest PSTN in Hong Kong – of all fixed telephone users?

A. Yes.

Q. So the conclusion is inescapable, isn't it, Mr Ha, that what was driving the TA at this time, and what his concern was, was what he regarded as being anti-competitive conduct by PCCW?

A. No."

53 Mr Farmer then summed up this passage by stating in his closing submissions (Transcript day 4, page 21, line 17 *et seq.*):-

"*MR FARMER: […] With respect, that conclusion is inescapable, from all the concessions to the propositions that have been put before based on the interpretation of that email. Our case is that it is an inescapable conclusion that the TA, when he directed his*

staff to go down the track of preparing a draft direction for immediate interconnection at an LIC rate, local rate, that those were the very considerations that were driving him. It must be the view – the only view you can take of it was that he was of the view that PCCW was acting in an anti-competitive way by insisting on LAC.

THE CHAIRMAN: That's your case, really, isn't it?

MR FARMER: It is our case. It is our case.

THE CHAIRMAN: In a nutshell, that's what it's all about.

MR FARMER: It is. […]"

2. TA's Case

54 Mr Green QC began his closing submission by reminding the Board that the facts referred to by Ma CJHC in his judgment were markedly different from the present case. That case concerned PCCW's 1995 Licence. At that time, PCCW was presumed to be in a dominant position. GC 15 and 16 of PCCW's 1995 Licence dealt expressly with anti-competitive conduct, in marked contra-distinction to SC 3.2 and 3.3 in PCCW's 2005 Licence. As Mr Green put it: *"[T]hat was, in a nutshell, why the Court of Appeal felt itself justified in concluding that the dispute truly engaged section 7K and 7L, because they are in virtually identical language, as the Court of Appeal explained, to the statutory provisions in the Ordinance"* (Transcript day 4, page 66, lines 17-22).

55 Mr Green submitted that in the present case the legal basis was fully discussed in the correspondence passing between PCCW and the TA between July and November 2006. He pointed out that the TA was content for PCCW to negotiate whatever contract and contract price it could, including LAC. He submitted that it was clear from the Direction that the Parties were free to continue negotiations and that if PCCW had been able to negotiate LAC the TA would have been content. Thus, he submits, that it cannot be argued that

the TA was of the opinion that if LAC had been agreed that that would have been a breach of 7K or 7L. As he put it, what the TA was effectively saying was *"get on with it, negotiate whatever price you can, and we will withdraw from the prospect of regulation"*.

56 As to the email of 10 July 2006 quoted at paragraph 51 above, Mr Green submitted that this was far from being a high watermark. This email was sent two days before the first letter sent by the TA to PCCW and almost four months before the Direction itself.

57 Mr Green also points out that the correspondence passing between PCCW and the TA between July and November 2006 was written by the TA and reflected his opinion that PCCW should promptly interconnect on negotiated terms and if the terms could not be agreed an interim solution would be imposed but subject to the right of either party to seek a subsequent determination. That was stated in the draft direction and in the Direction itself.

58 As to the applicability of LAC Mr Green pointed out that it is clear that the TA had not formed a final view as to whether LAC was appropriate or not and was prepared for a possible section 36A investigation at a later stage. It is clear from the documents the Board has been shown that the TA was seeking advice from his staff about the applicability of LAC at this time.

59 Mr Green made the point that the disclosed documents show that the OFTA officials differentiated between sections 36A on the one hand and 36B on the other. There is a fundamental difference between the provisions. As Mr Green puts it: *"One is quick and dirty: Is there prompt negotiation? No; enforce. The other is long and complicated and involves economic accounting*

and commercial analysis of a difficult and complex situation" (Transcript day 4, page 84, lines 12-16).

60 Mr Green then commented on the cross-examination of Mr Ha referred to above upon which Mr Farmer so heavily relied. What he submitted actually occurred was that Mr Ha agreed with a number of factual propositions put by Mr Farmer but that he was unable to agree with the final proposition, said to be inexorable, which allegedly demonstrated that the TA had truly engaged sections 7K or 7N. He maintained the denial that the case had anything to do with Sections 7K-N of the TO.

3. Conclusion

61 This Board is quite satisfied on the totality of the evidence presented to it that PCCW had declined to interconnect and would continue to do so unless and until Wharf agreed to pay LAC or similar or until required to do so by the TA.

62 The Board is equally satisfied on the totality of the evidence presented that PCCW and Wharf had been given sufficient time to reach an agreement.

63 The Board finds and holds that the TA did have a genuine choice. Either he could, as he did, require the enforcement of a licence obligation and fix a charge subject to later agreement or determination. Or, alternatively, he could have taken the route of requiring compliance with the provisions of the TO. Had he taken the latter route, he would first have been required to undertake a competition law analysis which would have taken a considerable length of time and would have been costly.

64 The evidence that the Board has heard is that if PCCW had sought a determination of the appropriate charge that would have taken about 14 months to complete which is substantially shorter than the litigation which this case has spawned.

65 It is significant that no challenge had been made in the Judicial Review proceedings to the effect that the TA's choice of the licence condition route was unlawful or unreasonable. Accordingly, the Board does not think that the TA can be criticised for enforcing the licence obligations as opposed to the TO. Further, it was held by Reyes J that the Direction was lawful.

66 In the opinion of the Board it is important to draw a distinction between a consideration of competition issues on the one hand and the enforcement of competition provisions on the other. It can be said that the desirability of achieving Any-2-Any connectivity is the furtherance of competition within the market. But it is not the same as saying that connectivity considerations necessarily engage Sections 7K-N. Similarly, merely because Mr Farmer is able to point to documents in which the TA and his staff have used the words *"competition"*, *"market failure"* and *"discrimination"* does not mean necessarily that the Direction in this case is one which engages the competition provisions in the Ordinance. If the breach of the competition provisions had been the reason for issuing the Direction, the Board can see no reason why the TA would not have said so. It is difficult to see from the facts of this case how it can be suggested that PCCW was effectively *"in the dock"* in relation to the competition law provisions. Furthermore, it was conceded by PCCW in the Judicial Review proceedings that in the correspondence between PCCW, Wharf and the TA no reference was made to the competition provisions.

67 The Board notes the somewhat paradoxical situation with which it is faced. The TA, through Counsel, tells the Board that it is not now, and has never been, part of his case nor his view that PCCW had committed any breach of any of the competition provisions. To find that the Direction related to or engaged those provisions would create an air of unreality.

68 Further, it seems to the Board quite extraordinary for it to be asked to find that the competition provisions had been engaged in circumstances where the TA had not undertaken the necessary competition analysis to underpin that conclusion. This would have involved a serious dereliction of duty on the part of the TA which this Board rejects.

69 The Board also concludes that not every decision affecting competition is within its jurisdiction but only those where the TA has made a competition law finding whether express or implied.

70 Accordingly, even if the Direction was intended to promote competition, it cannot be said that the Direction automatically relates to the competition law provisions or truly engages them in such a way as to give jurisdiction to this Board.

71 The Board concludes that the facts of the Ma Judgment were markedly different to the present case. In that case, although the Direction was silent on the issue, it was clear to the Court that the TA was concerned with anti-competitive conduct and wished to enforce a licence condition which expressly prohibited it. The Court had no difficulty in finding that the relevant sections in the TO were "*truly engaged*". In the present case all the written material leading up to the Direction makes clear that the TA was merely attempting to encourage interconnection with the terms to be agreed or later determined.

When by November 2006 no progress had been made, he had no choice but to make the Direction but left open the question of negotiation of the relevant charge. Accordingly, the Board has no difficulty in applying the Court of Appeal's test on the facts of this case with the result that the Board concludes that the relevant provisions were not engaged, truly or otherwise.

72 The Board accordingly finds, as a fact, that the Direction dated 7 November 2006, did not relate to nor engage any of the competition provisions of the TO and that, accordingly, this Board has no jurisdiction to entertain this Appeal.

73 Having reached the conclusion that this Board has no jurisdiction it would not be appropriate for the Board to comment on the abuse of process allegation nor on the merits of the Direction.

74 The Board is grateful to Counsel on both sides for their extremely helpful written and oral arguments all of which have been taken into account even if not specifically referred to in this Decision. The Board is also grateful to Dr Veljanovski for his expert evidence. No disrespect to him is intended by the Board not dealing with his interesting evidence. However the point before the Board is a question of mixed fact and law which the Board has felt able to resolve without reference to or reliance upon his evidence. Had the Board decided that it had jurisdiction his evidence may well have been relevant to the merits of this Appeal.

G. Case Stated

75 At the conclusion of the hearing of this Appeal both sides invited the Board to consider inserting some agreed wording in this Decision which might

be relevant to the jurisdiction to state a case. This wording with a very slight amendment is included in paragraph 76 below.

76 This Decision sets out our definitive findings of fact and provisional rules of law. We will hear any submissions from the Parties as to whether any questions of law arising from the Decision should be put to the Court of Appeal by way of a case stated under section 32R(1) of the TO. If neither party makes such submissions within 21 days of this Decision, it will become the final determination of this Appeal (save as to costs). If such submissions are made, we will consider whether or not to state a case. If the Board decides to state a case, the Board will not determine this Appeal before the Court of Appeal has determined the relevant points of law.

77 At a later stage, the Board will deal with costs in respect of which both Parties have liberty to apply.

78 In so far as this Decision resolves issues of law they have been decided by the Chairman pursuant to section 32O(1)(b) of the TO. All issues of fact have been decided unanimously by the whole Board.

Dated this 13th day of February 2009 in Hong Kong

Signed …….
Ms Jolene Lin

Signed …….
Prof Sunny Kwong

Signed …….

Neil Kaplan CBE QC SBS

(Chairman of the Board)

Appeal No. 24

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)

BETWEEN

PCCW-HKT TELEPHONE LTD.

—Appellant—

AND

THE TELECOMMUNICATIONS AUTHORITY

—Respondent—

DECISION ON APPELLANT'S APPLICATION FOR LEAVE TO STATE A CASE

Neil Kaplan CBE QC SBS
(Chairman)

14 April 2009

A. INTRODUCTION

1 The Appeal Board (**"Board"**) refers to its decision dated 13 February 2009 (**"Decision"**) on the appeal of PCCW-HKT Telephone Limited (**"PCCW"**) against a Direction of the Telecommunications Authority (**"TA"**) dated 7 November 2006 (**"Direction"**), in which the Board found that it had no jurisdiction to hear PCCW's appeal. PCCW and the TA are jointly referred to as **"the Parties"**.

2 The Board does not feel it necessary to set out all the facts of the case as they are all set out in the decision referred to above. PCCW now seeks the Board's consent to State a Case to the Court of Appeal.

3 PCCW identifies the following four, as it says, questions of law (references to *"competition provisions"*) is meant to refer to sections 7K-7L of the Telecommunications Ordinance (Cap 106) (**"TO"**):

(1) Whether, on true construction of section 36B and in the events which have happened, the TA could, by choosing to enforce a connectivity licence condition in whole or in part for competition reasons rather than require explicit compliance with one or more of the competition provisions, avoid an appeal or oust the Appeal Board's jurisdiction under section 32N. Alternatively, can the TA, where he has formed a view on the evidence that there has been a breach of the competition provisions in the TO, elect to enforce a licence condition, a breach of which is also a breach of those competition provisions, and then object to the jurisdiction of the Appeal Board to determine an appeal?

(2) Whether the competition provisions can be engaged for the purpose of section 32N notwithstanding that the TA has not undertaken the necessary competition analysis to underpin a conclusion that the licensee concerned has engaged, or will engage, or will (if the relevant opinion, determination, direction or decision is not complied with) engage or continue to engage in conduct that contravenes one or more of sections 7K-7N (Decision paragraph 68).

(3) Whether the question of whether the TA (in issuing or making the Direction) had by implication arrived at an opinion that the licensee concerned has engaged, or would (if the Direction was not issued and complied with) be likely to engage or be likely to continue to engage in conduct that contravenes one or more of sections 7K to 7L was correctly characterised as a question of fact (Decision, paragraph 72) or whether it was a question of law to be determined on the basis of primary facts found by the Appeal Board.

(4) If the answer to question 3 is that it is a question of law, whether the TA (in issuing or making the Direction) had by implication arrived at an opinion that PCCW had engaged, or would (if the Direction was not complied with) be likely to engage or be likely to continue to engage in conduct that contravenes one or more of sections 7K to 7N.

4 The relevant provision on when a case can be stated to the Court of Appeal by the Appeal Board is section 32R of the TO:–

"32R. Case may be stated for Court of Appeal

(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."

5 By letter dated 6 March 2009 Herbert Smith for PCCW wrote to the Board inviting it to concur in submitting four questions for the consideration of the Court of Appeal pursuant to section 32R(1) of the TO.

6 By letter dated 17 March 2006 Slaughter and May for the TA objected to PCCW's request for the Board to state a case for the consideration of the Court of Appeal.

7 I heard the Parties through Counsel at the Hong Kong International Arbitration Centre on 26 March 2009 and I am very grateful for their submissions and assistance.

8 Following the hearing on 26 March 2009, Herbert Smith wrote to the Board on the 2 April 2009 identifying certain materials that they contended were relevant to the exercise of my discretion, and Slaughter and May responded on 6 April 2009 highlighting authorities in support of TA's views

that the four proposed questions are either (a) hypothetical, (b) questions on which binding guidance has already been given by the Court of Appeal, or (c) an abuse of the case stated procedures.

9 Included in the bundle of materials submitted by Herbert Smith was the judgement of the Court of Appeal dated 2 April 2009 in which the Court dismissed PCCW's appeal by way of case stated against the decision of the Board in Case 25.

10 The Court of Appeal accepted that it was open to an aggrieved party to appeal to the Court of Appeal under the case stated procedure after, as well as, during the course of an appeal to the Board. Accordingly, there is no bar to PCCW's application to the Board to state a case after the Board has rendered a decision.

11 It is quite clear that I have a discretion under section 32R(1) of the TO whether or not to grant a case stated to the Court of Appeal. I find nothing in the Court of Appeal's judgement in Case 25 that impinges on or affects the exercise of that discretion.

12 Further, I find nothing in the Court of Appeal's judgement in Case 25 that supports or encourages a review of the law as it was found by the Board to be basing itself on an earlier Court of Appeal judgement which PCCW did not seek to challenge in the Court of Appeal in Case 25.

13 The Board found as a fact that the TA's Direction, the subject matter of the appeal, did not engage the competition provisions and that, accordingly, the Board had no jurisdiction to entertain the appeal. Proposed question 1 attempts to go behind this finding by the posing of a hypothetical question.

14 Proposed question 2 also raises a hypothetical question which does not sit easily with the facts as found by the Board.

15 Question 3 also appears to raise factual issues and, furthermore, I am not satisfied that the Court of Appeal judgement (referred to in the Decision as the "*Ma Judgement*") requires revisiting as it was apparently accepted as correct in argument during case 25.

16 Question 4 is based on question 3 and has to fall with it.

17 I accept that in rare cases a factual decision can be characterised as a legal one on *Edwards v Bairstow* principles. However that is not the way the matter has been put before me.

18 Finally it is argued that if I refuse leave then it will be open to PCCW to apply to a single judge of the Court of Appeal under Order 61 of the Rules of the High Court for leave to state a case. It is contended that as this would add expense and cause delay it is, in some way, a reason why I should grant leave. I regret I cannot accept this argument. Although I accept that it is easier for the Board to consider this question as it has both general and specific experience of the matters at issue, it has to be recognised that Order 61 is a long-stop provision to deal with cases where tribunals or boards wrongly refuse leave to state a case. I cannot see how the existence of the right to apply under Order 61 can be relevant to the exercise of my discretion. If it were relevant in this case then it would be relevant in all other cases. PCCW has the right to apply under Order 61 if they are so advised.

19 I do not find it necessary to refer to all the case law that has so helpfully been placed before me. I have come to the very clear conclusion that none of the four questions posed are, in the circumstances of this case, suitable for the

case stated procedure as they do not raise questions of law that genuinely arise out of the facts of the case as determined by the Board. This dispute, which goes back nearly two and a half years, has exercised Reyes J, the Court of Appeal, a differently constituted Board (on the strike-out) and this Board on the merits. I can see no reason for this matter to go any further.

Dated this the 14th day of April 2009.

Signed .....
Neil Kaplan CBE QC SBS
Chairman of the Telecommunications
(Competition Provisions) Appeal Board

To : Herbert Smith
Solicitors for the Appellant
23rd Floor, Gloucester Tower
15 Queen's Road Central
Central, Hong Kong
Ref : 2446/7777/30870643

To : Slaughter and May
Solicitors for the Respondent
47th Floor, Jardine House
One Connaught Place
Central, Hong Kong
Ref : MPY/84419-3