

3 April 2014

The Communications Authority  
c/o Office of the Communications Authority  
20/F, Wu Chung House  
213 Queen's Road East  
Wan Chai  
Hong Kong

Dear Sirs,

**Renewal of Domestic Free TV Programme Service Licences of TVB & ATV**

We are pleased to submit the following views for your Authority's consideration in respect of the incumbent free TV operators' applications for licence renewal.

**True Competition or Not?**

1. It has always been our view that the Government as policy maker and CA as regulator should always endeavour to foster an environment allowing true competition. The benefits of true competition are widely recognised and need no further elaboration. A level-playing field is essential to true competition.
2. Applying this to the local free TV landscape which will soon see drastic change with two newcomers entering the market, providing a level-playing field for new operators and affording them at least equal status and treatment as the incumbents is of first and foremost significance.
3. Many would even argue that more needs to be done to put market liberalisation on a sound footing. In a more mature and developed market, a level-playing field may simply mean applying the same set of rules to everybody. However, where a particular player is dominant and/or has substantial advantages over others, more stringent rules for the dominant incumbent may be required to help prevent



unfair practices. In markets under liberalisation, special arrangements may be required to allow new entrants a reasonable period to establish a foothold to compete more effectively and meaningfully with the dominant incumbents.

4. This is not unlike handicapping in sports such as professional horse racing or amateur golf. It allows players of different proficiencies, and true competition, to stand a chance of success.
5. Both the Government and the CA should proactively exercise great care in ensuring, with special measures or arrangements where appropriate, that there will always be a true level-playing field enabling the newcomers to operate to the fullest of their capabilities and compete effectively. A mere introduction of new entrants but without any such considerations would most likely make a mockery of the very good policy intentions and justifications for opening up the free TV market.

#### One Class of Citizens or Two?

6. As explained above, it is of utmost importance that new players are treated at least as equally as the incumbents, with special handicapping measures where appropriate particularly during the initial phases of market liberalisation, to help ensure true competition as much as possible. The newcomers should not be perceived by the market, let alone preconditioned by the Government and CA, as second-class citizens in any way whatsoever.
7. TV services in Hong Kong are regulated, among other things, according to the Government's technology and transmission neutral regime adopted since 2000. Prior to the Government's decision to introduce new free TV players, technologies and modes of transmission did not give rise to any public and industry concerns when there were just two TV licensees both of which provided their services over-the-air free with minimal technical differences between them.
8. Circumstances will become very different later this year with two newcomers entering the market. The free TV market will soon see a very uneven playing





field involving incumbents with radio spectrum use and new players without, despite the fact they are deemed by the CA and Government to be the same in every material way and hold the same type of licences. Are incumbent licensees first class citizens and new ones second-class?

9. It must be realised that although both the Government's broadcasting policy and today's technology allow transmission of terrestrial TV services over fixed or wireless means and that fixed networks are said to enjoy near universal coverage, there is an extremely limited coverage by fixed networks in non-residential buildings for free TV distribution. Even for residential premises, the lack of communal aerial facilities in many such buildings is another problem. According to recent OFCA statistics, over 90,000 residential buildings do not have such facilities versus some 40,000 that do. These figures do not even include residents outside urban areas and non-residential premises across the territory where free TV services are equally needed. In view of these, over-the-air transmission via public radio spectrum continues to be the only mode allowing immediate universal coverage, shortest service rollout lead-time and highest penetration rate. And it would continue to enjoy a significant edge over other delivery means for many years to come in the foreseeable future.
10. Owing to such insurmountable differences in the form of signal transmission, the incumbents will most definitely command a substantial edge over the newcomers in terms of coverage, ease of reception and penetration. As a result of being barred from the most effective and efficient transmission mode now available to the incumbents only, the new players will come under great disadvantages in terms of their ability to roll out their services and develop sufficient critical mass to be able to effectively compete against the incumbents for a considerable time after service launch, if ever. That can hardly be a level-playing field.
11. Under these very unfavourable circumstances, "level-playing field", "true competition" and "market liberalisation" would very likely end up being just academic concepts that look good on paper only. This very undesirable situation, if not satisfactorily addressed, will certainly give rise to regulatory problems and seriously hinder the effective implementation of the Government's policy to open



up the free TV market, promote competition, provide viewers with more programming choice, attract investments, stimulate the growth of the broadcasting and related industries, create new employment opportunities and develop Hong Kong as a regional broadcasting hub.

12. A total rethink of the Government's broadcasting and spectrum utilisation policies is the only viable way forward and is therefore urgently called for at this particular juncture when analogue broadcasts will be switched off in 2015 and the Chief Executive in Council will in the course of the next few months consider applications from the newcomers for a new licence and from the incumbents for renewal of theirs. Missing this very rare window of opportunity to set things right would mean that the incumbents will continue to command an insurmountable advantage over the newcomers for the next 12 years on top of their being able to continue to enjoy public radio spectrum being a scarce public resource without having to pay any utilisation fees, let alone paying at reasonable commercial terms.

#### Spectrum Policy Framework (SPF)

13. The Government's SPF clearly states, among other things, that (a) a market-based approach shall be adopted where there are likely to be competing demands from providers of non-government services unless there are overriding public policy reasons to do otherwise, (b) public radio spectrum being a scarce and valuable public resource could continue to be well utilised economically, socially and technically and (c) no spectrum user is afforded any legitimate expectation of any right of renewal or first refusal.
14. For historical reasons including previous technology constraints, no spare or idle frequencies were made available for new domestic free TV services in the past four decades other than those provided by the incumbents. When digital terrestrial TV was first put on the agenda, the Government publicly stated in 1998 that the two incumbents would not be conferred with any automatic right to use any frequency channels for digital broadcast if and when DTT was introduced to Hong Kong. Despite such reassurances and the TV market





liberalisation policy also announced at the same time, the Government did not make use of that opportunity to open up the market and introduce new players. When a decision was finally made to go ahead with DTT, the frequency channels were automatically conferred upon the two incumbents. The incumbents were even allowed to occupy those frequencies without having to pay any spectrum utilisation fees against stated Government policy on ground of providing them with the incentive to develop DTT.

15. Whilst one could argue that in the absence of any interested parties back then applying for a new free TV licence, there were no competing demands for spectrum use and therefore the decision to simply assign the digital frequency channels to the two incumbents was both reasonable and justified. That, however, is no longer the case. Now with two applicants having the CE in C's in-principle approval to start new services soon, the situation is entirely different. There are genuine competing demands for spectrum use and hence very legitimate justifications requiring that spectrum is used in the best possible ways economically, socially and technically. This in fact presents the Government and CA with a rare but most timely window of opportunity, as mentioned above, to conduct a thorough review of the relevant laws, policies, regulatory frameworks, existing spectrum arrangements, prevailing market circumstances as well as present and future public needs and priorities with a view to ensuring that Hong Kong would be on the right track promoting growth in the TV and associated industries, nurturing creative and performing talent, enhancing market competition and providing viewers with better choice.
16. Not unexpectedly, there would likely be very strong objections and probably legal actions from the incumbents against such a change although they are all fully aware of the fact that as spectrum users under the SPF they do not enjoy any legitimate expectation of any right of renewal or first refusal upon expiry of their present spectrum assignments. Needless to say, few could see how their present spectrum privileges could be allowed to continue should all relevant policies and regulatory frameworks be strictly and fully observed both in letter and spirit for attaining and ensuring the best possible public interest.



## Spectrum Use - The Right Way Forward

17. There have been strong and legitimate calls from across the community in recent years, and recent months particularly, questioning the present TV spectrum arrangements that are allowed to continue despite their clear deviations from SPF principles and objectives. Any decision on the part of the Government and/or CA to continue to restrict spectrum use to the two incumbents only, and to guarantee them another 12 years' of exclusive spectrum use free of charge, will require some very convincing justifications demonstrating to the satisfaction of society that there are indeed overriding public interest reasons to do so.
18. As to feasible ways forward, there are numerous ways to go about this. A simple and straightforward option would be allowing all incumbent and new free TV operators to broadcast their respective primary channels (i.e., their Cantonese and English integrated programming channels) over-the-air and transmit additional channels, if any, via other delivery means. Alternatively, interested operators could place competitive bids for any spare frequencies left after such equal sharing by the primary channels. There is presently enough frequency capacity for such an allocation scheme. Newer and more efficient compression and bandwidth management technologies would certainly make available further room for more over-the-air channels within the present TV spectrum. Furthermore, the 2015 analogue switch-off will mean even more spare capacity. The Government does not even have to make available any additional frequencies for free TV use for the above mentioned allocation scheme with sufficient left for competitive bidding.
19. Most importantly, whatever allocation scheme that may be adopted, operators shall be required to compensate the public at reasonable market terms for their spectrum use. The CA could consider hiring consultants to make proposals in this regard for public consultation and Government consideration before implementation.
20. In view of the pressing nature of the matter, we respectively urge the Government and CA to start planning for this review right away and carry it out



in the same effective manner the 3G spectrum reassignment exercise was conducted.

21. As the CE in C may grant the two new free TV licences later this year and make a decision on the incumbents' licence renewal applications by November 2014, there would not be sufficient time for conducting and completing the entire exercise as well as effecting in time before such licence grants and renewals whatever consequential policy or legislative changes that may be required. Transitional arrangements could be made by way of including conditions in such licences stating at the outset the CA's intention and right to subsequently change the licensees' respective service delivery means accordingly pending future Government decisions based on results of the review.

Yours faithfully,

For & On Behalf Of

i-CABLE Communications Ltd

A handwritten signature in blue ink, appearing to be 'S.Y. Wai', written over a horizontal line.

S.Y.Wai

Vice President

External Affairs & Service Operations



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Dear Sirs,

**Renewal of Domestic Free TV Programme Service Licences of TVB & ATV**

Further to a separate submission of even date to your Authority on issues pertaining to the public radio spectrum side of the captioned matter, we wish to submit the following views for your Authority's consideration in respect of the incumbent free TV operators' applications for licence renewal for the purpose of ensuring their better compliance.

**Spectrum Squatting**

1. The CA must be commended for effectively policing spectrum use and investigating into a recent case involving spectrum allocation between the incumbents without CA's prior knowledge and authorisation. Such conduct and action on the part of the incumbents amounted to unauthorised squatting, trading and profit-making of public radio spectrum being a scarce public resource against all relevant Government policies, regulatory frameworks and conditions in their broadcasting and carrier licences. One could hardly envisage any other possible breach that could be more serious as far as spectrum use is concerned.
2. We must however register our grave reservations firstly over the sanctions which amount to nothing more than a slap on the wrist for the incumbents, particularly TVB, as the fine would practically mean nothing when compared with the





enormous benefits, financial or otherwise, from the picture quality improvements. Secondly, we are greatly disappointed with CA's decision to rush to recognise and legitimise such a serious wrong and do so in such a back-to-back manner. The CA is in fact undermining its authority as regulator and setting a very bad precedent encouraging rather than discouraging such breaches in the future.

3. We do appreciate that the CA in reaching its decision might be concerned with possible public complaints against the channel in question reverting to its former, lower picture quality. However, the longer TVB is allowed to “squat”, the more difficult it is to resume the spectrum from the “squatter”.
4. On top of breaching their respective licences' conditions, such trading was not lawful and both operators should be required to disclose to the CA the consideration of the transaction and the CA has every right to recover that sum for and on behalf of the public.

#### Misuse of Public Radio Spectrum

5. Valuable radio spectrum should be used to serve local viewers catering for their unique needs, tastes and preferences only. Allowing users to use such frequencies for resale, sublicensing or direct retransmission purposes, particularly when it is entirely for commercial gain, should never have been allowed in the first place.
6. If any user assigned with frequencies is not investing in programming for operating its own channels, such frequencies should be resumed by the Government for more beneficial uses economically, socially and technologically in accordance with the SPF. Such user should not be allowed to carry third party channels acquired for direct retransmission.
7. If the authorities consider it a must to make available on local free TV certain Mainland channels for the general public for national education reasons or otherwise, the RTHK as public broadcaster would be the most suitable vehicle in this regard.



8. Simulcast on TVB's HD Jade and Jade channels is another example of radio spectrum misuse. As of today, there remains considerable amount of prime time programming simulcast on these channels. With today's very high DTT take-up rate, such simulcast is neither necessary nor justified. The CA should not allow TVB to continue with such practice which is in every way against the spirit of the SPF in terms of ensuring that radio spectrum could be well utilised at all times, not to mention the Government policy of promoting better and wider programming choice for local viewers.

#### Indirect Advertising

9. The CA takes public complaints rather seriously. Even inadvertent mistakes involving very minor factual or operational errors are often considered licence breaches. The same, however, is seldom applied to advertising prominently featured in the incumbents' various programmes which is anything but "indirect". Other than a recent case where an incumbent was fined for doing that, mere warnings and advisories were given in most cases.
10. We urge the CA to fully take into consideration that indirect advertising, particularly when it is deliberately done in a very "direct" manner, amounts to making available programming airtime being a scarce public resource for money-making purposes, which are otherwise allowed during specified commercial timeslots only. Although that incumbent was fined, the amount of which did not even measure up to its advertising revenue from such "indirect" advertising. The CA should investigate into it fully to ascertain the incumbent's full benefits from such breaches and set a more appropriate fine commensurate with its commercial gains and reflecting the seriousness of such deliberate violations.

#### Personal View Programmes

11. A recent CA decision regarding personal view programmes is yet another example of the CA rushing to legitimise wrongs committed by the incumbents. By so doing, the CA is actually giving them a free hand to continue with their





already much criticised and totally unacceptable behaviour through using programming airtime being a scarce public resource to further their own political/business agenda rather than serving public needs.

Yours faithfully,  
For & On Behalf Of

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S.Y.Wai  
Vice President  
External Affairs & Service Operations