

OpenNet Pte Ltd v Info-communications Development Authority of Singapore
[2012] SGHC 168

Case Number : Originating Summons No 1099 of 2011
Decision Date : 24 August 2012
Tribunal/Court : High Court
Coram : Woo Bih Li J
Counsel Name(s) : Tan Chee Meng SC, Melvin Lum, Daniel Chan and Lionel Leo (WongPartnership LLP) for the applicant; Cavinder Bull SC, Chia Voon Jiet and Lin Shumin (Drew & Napier LLC) for the respondent.
Parties : OpenNet Pte Ltd — Info-communications Development Authority of Singapore

Administrative Law – Judicial Review

[LawNet Editorial Note: The application in Civil Appeal No 81 of 2012/Q (Summons No 3702 of 2012/Y) was dismissed by the Court of Appeal on 15 October 2012. See [\[2013\] SGCA 24.](#)]

24 August 2012

Woo Bih Li J:

Introduction

1 OpenNet Pte Ltd (“OpenNet”) filed the present application to seek leave from the court to apply for a quashing order against a decision of the Info-communications Development Authority of Singapore (“IDA”) communicated by letter dated 22 September 2011 in:

- (i) determining that NetLink Trust and/or its trustee-manager, CityNet Infrastructure Management Pte Ltd (“CityNet”) meet the Control and Ownership Requirements specified in the Deed of Undertaking between the IDA and Singapore Telecommunications Limited (“Singtel”);
- (ii) granting CityNet a Facilities-Based Operating Licence (“FBO licence”); and
- (iii) designating CityNet as a Public Telecommunications Licensee.

2 On 7 June 2012, I dismissed the application with costs. OpenNet has filed an appeal against my decision to the Court of Appeal.

Background

3 IDA is a statutory body constituted under the Info-communications Development Authority of Singapore Act (Cap 137A, 2000 Rev Ed) (“the IDA Act”).

4 On or about 7 April 2008, IDA issued a Request for Proposal (“RFP”) for a passive network operator to design, build and operate the passive infrastructure of Singapore’s Next Generation Nationwide Broadband Network (“NGNBN”).

5 A consortium was formed to respond to the RFP. This consortium comprised:

- (a) Singtel;
- (b) Singapore Press Holdings Ltd;
- (c) Axia NetMedia Corporation; and
- (d) SP Telecommunications Pte Ltd.

6 The consortium's response or bid was initially submitted to IDA on or about 5 May 2008. The bid was eventually successful and OpenNet was incorporated in Singapore as the passive network operator.

7 OpenNet's present concerns arose from developments before and after the award of tender to the consortium.

8 As mentioned above, the consortium submitted its bid on or about 5 May 2008. The bid took the form of a certain financial model with OpenNet as the lessee and Singtel as the lessor of the fibre infrastructure. However, IDA was of the view that such a model did not satisfy the Control and Ownership Requirements stipulated in the RFP. Under such requirements, OpenNet could not be under the "Effective Control" of any other telecommunications licensee ("the Neutrality Requirement"). Singtel is a telecommunications licensee. It is unnecessary for me to elaborate on the definition and elaboration of "Effective Control" under the requirements.

9 To address IDA's concern, the consortium submitted a revised bid on 20 August 2008. It proposed that OpenNet would own the fibre infrastructure instead of Singtel, and following from that, OpenNet entered into four agreements with Singtel. One of the agreements was an agreement which was referred to as "the Duct Use Agreement".

10 The revised bid included a draft deed of undertaking from Singtel to IDA not to compete with OpenNet using fibre-based services in the residential market.

11 At this point, there is a slight divergence between OpenNet and IDA on the formal facts. According to para 57 of an affidavit of Leong Keng Thai of 28 March 2012 filed on behalf of IDA, IDA was satisfied with the revised bid and the draft deed of undertaking.

12 According to paragraphs 14 and 15 of the Statement filed by OpenNet pursuant to O 53 r 1(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), IDA was still of the view that Singtel would still have some form of "Effective Control" over OpenNet as Singtel owned the ducts and related assets. Accordingly, IDA informed the consortium that the ducts and related assets would have to be owned either by OpenNet or another party which met the Neutrality Requirement. Singtel then provided another deed of undertaking to IDA that it would divest the ducts and related assets to another company ("AssetCo") which would meet the Neutrality Requirement.

13 It appears from paragraph 58 of the said affidavit of Leong Keng Thai that, in any event, the consortium was awarded the tender before a signed deed of undertaking dated 20 October 2008 from Singtel was submitted ("the Deed of Undertaking").

14 OpenNet said that it was contemplated that, with the consent of OpenNet, Singtel would novate the Duct Use Agreement and some, or part, of the other three agreements (referred to at [9] above) to AssetCo so that AssetCo would take over some of Singtel's obligations to OpenNet under those agreements.

15 OpenNet's complaint was that it had expected to be included in discussions relating to the formation of AssetCo as AssetCo would affect OpenNet's own commitments to IDA on the Neutrality Requirement and OpenNet's commercial position. It was not consulted. OpenNet alleged that on or about 22 July 2011, it was made aware by a Singapore Exchange announcement that AssetCo was to be established as Netlink Trust, a business trust to be managed by CityNet. It also alleged that subsequent to IDA's letter dated 22 September 2011 (referred to at [1] above), it had requested documents relating to AssetCo from IDA and Singtel and Singtel's solicitors. Its request was not successful until 16 October 2011 when Singtel's solicitors provided six documents of which five were already publicly available. The six documents were not helpful in assisting OpenNet as to how AssetCo would operate independently of Singtel.

16 Accordingly, OpenNet filed this application. I would clarify that the letter from IDA dated 22 September 2011 was addressed to all facilities-based operations licensees and not to OpenNet only. Also, the letter provided information on AssetCo and on IDA's decision in respect of AssetCo. It did not appear to be IDA's decision itself. However, the parties in this action initially proceeded on the basis that that letter comprised IDA's decision. A copy of the letter and its annexure is enclosed herewith as Annexure A.

[LawNet Admin Note: Annexure A is viewable only to LawNet subscribers via the PDF in the Case View Tools.]

17 OpenNet's application was essentially for leave to seek judicial review of the decision of IDA of 22 September 2011. IDA resisted the application on one ground only, *ie*, that OpenNet had not pursued alternative remedies which would otherwise have been available to it. For present purposes only, IDA did not dispute that OpenNet might have some merit in its complaint.

18 IDA's objection was based on another piece of legislation, *ie*, the Telecommunications Act (Cap 323, 2000 Rev Ed) ("the TA"). IDA submitted that it had granted OpenNet a licence to provide facilities-based operations under s 5 of the TA. Under the TA, a telecommunication licensee aggrieved by a decision of IDA had to seek recourse under the regime set out in s 69 of the TA. I adopt paragraphs 31 to 33 of IDA's first submissions dated 21 February 2012 on the salient TA provisions:

31. Under section 69(1) of the [TA], a telecommunication licensee may, within 14 days of the receipt of IDA's decision, make a request to IDA to reconsider the matter and/or appeal to the Minister. Section 69(1) provides:

69.—(1) Any telecommunication licensee aggrieved by —

(a) any decision of the Authority in the exercise of any discretion vested in it by or under this Act; or

(b) anything contained in any code of practice or standard of performance or in any direction of the Authority given under section 21, 27, 32D or 32F(2),

may, within 14 days of the receipt of the decision or direction of the Authority or the issue or approval of the code of practice or standard of performance, as the case may be —

(i) make a request to the Authority to reconsider the matter; or

(ii) appeal to the Minister.

32. If the telecommunication licensee, having requested for IDA to reconsider the matter pursuant to section 69(1)(i) of the Telecommunications Act, is still aggrieved by IDA's decision upon its reconsideration, the telecommunication licensee may appeal to the Minister under section 69(7) of the [TA].

33. Section 69 of the [TA] confers upon IDA and the Minister the absolute power to vary or reverse IDA's original decision.

(a) Under section 69(6) of the [TA], IDA may determine any reconsideration request "by confirming, varying or reversing any decision or direction or by amending any code of practice or standard of performance".

(b) Similarly, section 69(13) of the [TA] provides that the Minister may determine an appeal "by confirming, varying or reversing any decision or direction of the Authority or by amending any code of practice or standard of performance".

19 IDA referred to various authorities for the proposition that the courts will not normally grant public law remedies if an applicant has not exhausted alternative remedies available to him save in the most exceptional circumstances. It was undisputed that OpenNet had missed the deadline under s 69(1) of the TA to pursue the alternative remedies therein. However, the authorities IDA relied on also established the proposition that the fact that the deadline to pursue an alternative remedy has expired was not an exceptional circumstance. IDA submitted that this had to be so, otherwise an applicant who had defaulted in meeting the deadline would be in a better position than one who could still meet the deadline.

20 OpenNet did not dispute the above propositions of law. Neither did it allege any exceptional circumstance (other than the one referred to below) to justify its present application. Instead, OpenNet broke down IDA's decision of 22 September 2011 into the following three decisions:

(a) determining that NetLink Trust and/or CityNet meets the Control and Ownership Requirements specified in the Deed of Undertaking between the [IDA] and [Singtel] ("IDA Determination");

(b) granting CityNet a FBO licence ("IDA FBO Decision"); and

(c) designating CityNet as a Public Telecommunications Licensee ("IDA PTL Decision").

21 OpenNet submitted that IDA's Determination was made by IDA under the IDA Act and not under the TA. The recourse under s 69 of the TA was not available to a decision made by IDA under the IDA Act. Also, there was no provision in the IDA Act for recourse against a decision of IDA. While OpenNet conceded that the IDA FBO Decision and the IDA PTL Decision were made by IDA under the TA, it submitted that those two decisions were dependent on the IDA Determination. If the IDA Determination was quashed, the other two decisions would not stand.

22 OpenNet also submitted that because the statutory remedy under the TA could not afford it an adequate remedy (since the IDA Determination was made under the IDA Act and not under the TA), this constituted an exceptional circumstance to justify the court granting it leave to seek judicial review against the IDA Determination.

23 In my view, the above argument about an exceptional circumstance was a non-starter. If the IDA Determination was not covered by the TA, then there was no alternative remedy available to

OpenNet in the first place. There would then be no need for it to rely on the exceptional circumstance argument. If the IDA Determination came under the TA, then OpenNet could not argue that the statutory remedy under the TA was never available to it.

24 The “real” argument of OpenNet was that the IDA Determination was made under the IDA Act.

25 Relying on Parliamentary debates, OpenNet submitted that when IDA was established, it was Parliament’s intention for IDA to perform three key functions:

(a) To promote and facilitate the growth and development of an efficient and internationally competitive Info-communications technology sector in Singapore (“First Function”).

(b) To carry out licensing and regulatory functions, and help maintain effective competition in the Info-communications technology sector (“Second Function”).

(c) To promote an Information Society in which Info-communications technology is readily accessible and available to all Singaporeans (“Third Function”).

(a) (see *Singapore Parliamentary Debates, Official Report* (23 November 1999) vol 71 at cols 457-458).

26 As regards IDA’s argument that the IDA Act constituted the IDA and that the functions and powers of IDA were exercised under the TA and not the IDA Act, OpenNet submitted that the IDA Act was more extensive than a mere constitutive document as it was the IDA Act, and not the TA, which conferred statutory functions and powers on IDA. For example, under s 7(1) of the IDA Act, IDA could exercise various powers specified in the Second Schedule of the IDA Act. Those powers included the granting of licences under the TA.

27 OpenNet submitted that the RFP was issued by IDA pursuant to its First Function and Third Function as the design, building and operation of the NGNBN were obviously aimed at the “development and expansion of the information and communications industry in Singapore” as opposed to the operation and regulation of the telecommunications sector. This was affirmed by s 6(1)(m) of the IDA Act which empowered IDA with the function and duty to “encourage, promote, facilitate, invest in and otherwise assist in the establishment, development and expansion of the information and communications industry in Singapore ...”.

28 OpenNet also submitted that it was required to meet the Neutrality Requirement under the RFP when it submitted its bid in response to the RFP. Its bid preceded its own application for an FBO licence. Also, IDA’s acceptance of OpenNet’s bid under the RFP also preceded IDA’s grant of an FBO licence. As the Neutrality Requirement was a requirement under the RFP and not under OpenNet’s application for an FBO licence, the TA did not apply.

29 OpenNet also relied on paragraph 4.2.1(e) of the RFP which stated:

IDA reserves the right to determine in its sole and absolute discretion if there is “Effective Control” or whether an “entity and its Associate are acting in concert”. In addition, IDA reserves the right to change its policies and/or to amend this set of requirements without prior notice.

30 OpenNet’s argument was that because IDA had reserved the right to determine “in its sole and absolute discretion” if the Neutrality Requirement was met, this must mean that the RFP stemmed from the IDA Act, which did not provide for recourse to the Minister.

31 OpenNet further submitted that IDA had in fact determined that OpenNet had met the Neutrality Requirement on 6 June 2011 (and not 22 September 2011) when one of OpenNet's shareholders received a letter from Singtel suggesting that IDA had determined that AssetCo had met the Neutrality Requirement. Paragraph 3 of the letter stated:

AssetCo will be a registered business trust managed by an independent-trustee-manager. This business structure was approved by IDA (i.e. it satisfies the IDA's requirement of "no effective control" by SingTel), and the IDA has had or will have sight of the proposed agreements between SingTel and AssetCo.

32 OpenNet concluded that therefore there were two distinct processes. The first was IDA's decision that AssetCo met the Neutrality Requirement, *ie*, the IDA Determination and the second was the IDA FBO Decision and the IDA PTL Decision.

33 On the other hand, IDA submitted that the IDA Act constituted the IDA. IDA's functions and power extended to both the telecommunications service sector and the postal service sector. Every exercise of IDA's regulatory powers in the telecommunications service sector fell under the TA. Every exercise of IDA's regulatory powers in the postal service sector came under another legislation, *ie*, the Postal Services Act (Cap 237A, 2000 Rev Ed) ("Postal Services Act").

34 IDA explained the background to the IDA Act. The predecessor of the IDA Act was the Telecommunication Authority of Singapore Act (Cap 323, 1993 Ed) ("the TAS Act"). Likewise, the Telecommunication Authority of Singapore ("TAS") was the predecessor of IDA.

35 Technology changes led to a convergence of the telecommunications, information technology and broadcasting sectors. To address these developments, the Government announced its intention in 1999 to merge the TAS with the National Computer Board and to form a new statutory board, *ie*, IDA.

36 The TAS Act was repealed and three new statutes were enacted in its place, namely, the IDA Act, the TA and the Postal Services Act. The IDA Act merely constituted IDA and the meat of IDA's powers were found in the other two Acts. The Minister for Communications and Information Technology, Mr Yeo Cheow Tong, explained during the Second Reading of the Info-communications Development authority of Singapore Bill on 23 November 1999 (see *Singapore Parliamentary Debates, Official Report* (23 November 1999) vol 71 at col 457) as follows:

Sir, my Ministry will be taking a two-stage approach in establishing the regulatory framework for the info-communications industry. The merger of NCB and TAS is the first phase. Instead of two specific regulators, NCB and TAS will be merged into an integrated agency, the Info-communications Development Authority, to oversee the development and regulation of the ICT industry and infrastructure. **The IDA Bill constitutes the new statutory board and lists its broad functions and duties. The Telecommunications and Postal Services Bills provide the detailed regulatory powers of IDA in the telecommunications and postal sectors respectively.** The regulatory provisions are generally taken from the existing TAS Act, with some revisions and enhancements.

[emphasis added]

37 I quote paragraphs 30 and 31 of the submissions for IDA dated 8 May 2012:

30. Perhaps more directly, during the Second Reading of the Telecommunications Bill, Mr Yeo Cheow Tong stated that it was the Telecommunications Bill (and not the IDA Bill) which re-

enacted substantively the provisions of the TAS Act. *Singapore Parliamentary Debates* (23 November 1999) vol 71 at col 467:

“Sir, this Bill provides the detailed regulatory powers of the [IDA] in the telecommunications sector. It repeals and re-enacts substantively the provisions of the present [TAS] Act.”

31. In a similar vein, during the Second Reading of the Postal Services Bill, then-Minister of State for Communications and Information Technology, Mr Lim Swee Say, stated that like the Telecommunications Bill, it was the Postal Services Bill (and not the IDA Bill) which re-enacted substantively the provisions of the TAS Act. *Singapore Parliamentary Debates* (23 November 1999) vol 71 at col 483:

“Sir, the Bill before this House provides for the regulation of the postal services sector in Singapore. Like the Telecommunications Bill 1999 that was debated earlier in this House, the Postal Services Bill repeals and re-enacts substantively the provisions of the [TAS] Act on the licensing and regulatory powers in postal services.”

38 Under the TAS Act, there were provisions for an appeal to the relevant Minister (see for example, ss 26(6), 28(4) and 29(2)). No such provision is found in the IDA Act. Instead the provision for recourse is found in s 69 of the TA which has been discussed (see [18] above).

39 IDA stressed that during the Second Reading of the Telecommunications Bill (*Singapore Parliamentary Debates Official Report* (23 November 1999) vol 71 at col 469), Mr Yeo Cheow Tong said:

Clause 69 contains explicit provisions allowing aggrieved licensees to appeal to the Minister. The appeal can be against *any* decision of the IDA in the exercise of *any* discretion vested in it, such as an order for suspension or cancelling of a licence, or the issuance of directions, or anything contained in a code of practice or standard of performance.

[emphasis added]

40 IDA submitted that it was not Parliament’s intention to have some decisions of IDA in the exercise of any discretion vested in it subject to s 69 but others not.

41 IDA pointed out that the structure where one statute constitutes a statutory authority and sets out its broad functions, duties and powers and another statute contains detailed provisions including a provision for recourse was not unique. Two examples were given but I would mention one only. According to IDA, the Energy Market Authority of Singapore Act (Cap 92B, 2002 Rev Ed) (“the EMA Act”) establishes the Energy Market Authority of Singapore (“the EMA”). Sections 6 and 7 of the EMA Act set out the EMA’s broad functions, duties and powers like ss 6 and 7 of the IDA Act for IDA. Other statutes detail EMA’s regulatory powers, for example, the Electricity Act (Cap 89A, 2002 Rev Ed) and the Gas Act (Cap 116A, 2002 Rev Ed). The EMA Act, like the IDA Act, does not contain any provisions for recourse against EMA’s decisions. Such a provision is found in other statutes.

42 On this point, OpenNet submitted that statutory bodies are established in a variety of ways and it was not uncommon for all or part of a statutory body’s regulatory powers to be contained within the same statute which constitutes that body. Various examples were given in paragraph 15 of its reply submissions but I do not need to set them out here.

43 IDA also relied on s 3 of the TA which states:

Exclusive privilege with respect to telecommunications

3.—(1) As from 1st December 1999 and subject to this Act, the Authority shall have the exclusive privilege for the operation and provision of telecommunication systems and services in Singapore.

(2) The privilege conferred on the Authority by subsection (1) shall —

(a) include the rights of establishing, installing, using, working, maintaining, developing, constructing, promoting, hiring and selling telecommunication systems and services; and

(b) extend to every vessel or aircraft registered in Singapore and every other vessel, aircraft and any vehicle, whether mechanically propelled or not, in Singapore.

44 IDA submitted that s 3 of the TA gave it the exclusive power to operate and provide telecommunication systems and services in Singapore whereas OpenNet submitted that s 3 did not give IDA such a power but only the exclusive privilege to do so.

45 IDA also relied on the 2005 Code of Practice for Competition in the Provision of Telecommunication Services which it said introduced the concept of "Effective Control". Recent amendments to the TA which came into force on 1 February 2012 have included the concept of "Effective Control" into Part VA of the TA. IDA submitted that these developments demonstrated that the TA was the source of IDA's power to make the IDA Determination.

46 IDA submitted that the IDA Determination was part of the IDA FBO Decision and the IDA PTL Decision. The IDA Determination was a step in the process of making the other two decisions.

47 IDA also submitted that any bidder in response to the RFP was already required to apply for a FBO licence to be issued under the TA. The Neutrality Requirement would be part of the terms of the licence to be issued. In fact, the terms of the RFP stipulated that documents submitted for the RFP were to be deemed as the bidder's application for the FBO licence subject to such exclusions as the bidder notified to IDA. Paragraph 8 of Part B Volume 1 of the RFP provided:

8. APPLICATION OF REGULATORY FRAMEWORK TO THE NETCO

8.1 Facilities-Based Operator Licence

8.1.1 Under the [TA], any person operating and providing telecommunication systems and services in Singapore must be licensed by IDA. IDA's licensing scheme differentiates between licensees based upon the nature of their operations e.g. whether they have facilities-based or services-based type of operations.

8.1.2 ***Given the nature of the NetCo Project, IDA has decided that the NetCo will need an FBO licence.*** Upon the award of the RFP, the awarded Bidder will need to confirm in writing with IDA that its RFP documents are to be deemed as its licence application for the FBO licence. If there are any changes or options to [sic] in the RFP documents [to] be excluded as part of the licence application, the awarded Bidder shall notify IDA of such changes in the form of written confirmation. IDA will formally grant the NetCo FBO licence to the awarded Bidder subsequently.

[emphasis added in bold italics]

IDA's point was that the above provisions demonstrated that any bid in response to the RFP was governed by the TA which dealt with, *inter alia*, the issue of licences.

48 OpenNet's response to this argument was that changes could be made to its application for the FBO licence.

49 As for OpenNet's reliance on para 4.2.1(e) of the RFP (see [29] above), IDA submitted that s 69 of the TA did not derogate from IDA's discretion to determine if the Neutrality Requirement had been met.

The court's reasons

50 As regards OpenNet's submission (see [31] above), that IDA had in fact determined that OpenNet had met the Neutrality Requirement on 6 June 2011 (and not 22 September 2011), it seemed to me that this was not OpenNet's approach when it filed its application in court. At that time it had proceeded on the basis that IDA's letter of 22 September 2011 was, *inter alia*, IDA's determination that CityNet had met the Neutrality Requirement specified in the Deed of Undertaking (see prayer (i) of its application as set out at [1] above). Yet in the midst of submissions, OpenNet sought to distance itself from the letter of 22 September 2011, presumably because that letter was dealing with the issuance of licences which might in turn mean that the entire letter was issued under the TA and not under the IDA Act.

51 This twist by OpenNet revealed a flaw in its approach. It had assumed that the IDA Determination (that CityNet had met the Neutrality Requirement) pertained to CityNet only. In my view, the IDA Determination pertained to OpenNet as well. Indeed that was what OpenNet itself had thought when it framed prayer (i) of its application.

52 I was of the view that in deciding that CityNet met the Neutrality Requirement, IDA was determining that OpenNet had complied with its own undertaking under its revised bid to IDA and also determining that CityNet was eligible to be granted the licences which were issued to it. Whether the IDA Determination was reached on 6 June 2011 or 22 September 2011 was immaterial for present purposes. It was a single decision.

53 The second flaw in OpenNet's submission was its attempt to differentiate between its response to the RFP and its own application for an FBO licence. The reason for the attempt to differentiate was because it knew that the latter would come under the TA. If its response to the RFP was connected with its application for an FBO licence, then its argument that the RFP was covered by the IDA Act and not the TA would be weakened.

54 As mentioned above at [47], it was already a term under the RFP that the bidder would have to apply for an FBO licence. Indeed the documents submitted for the RFP were to be deemed as the bidder's application for the FBO licence subject to any exclusion as the bidder might notify IDA. The point was not so much that the bidder could make changes when it came to its application for the FBO licence but that it knew that it had to apply for such a licence as part of its response to the RFP.

55 Accordingly, it was clear to me that the RFP was an integral part of the process leading to the granting of an FBO licence to the bidder. Therefore, even if OpenNet was correct in placing the First Function and Third Function of the IDA under the IDA Act and only the Second Function under the TA, s 69 of the TA would still apply to OpenNet because the RFP was part of the Second Function.

56 In any event, there was a short answer to OpenNet's attempt to split the three functions between these two pieces of legislation. While it was correct that IDA was and is to have three functions, this did not mean that some were to be executed under the IDA Act and others under the TA. I agree that the IDA Act is the constituent instrument. Its functions in respect of the telecommunications sector are to be executed under the TA. As the Minister for Communications and Information Technology said during the Second Reading of the IDA Bill on 23 November 1999 and I reiterate:

... The IDA Bill constitutes the new statutory board and lists its broad functions and duties. The Telecommunications and Postal Services Bills provide the detailed regulatory powers of IDA in the telecommunications and postal sectors respectively.

57 OpenNet's attempt to place one function of the IDA under the TA and two functions under the IDA Act would result in a chaotic situation. It would mean that one would have to interpret every decision of IDA in respect of the telecommunications sector and conclude whether it comes under the IDA Act or the TA before deciding whether s 69 of the TA applies. That cannot be right. It would also mean that Parliament intended that some decisions of IDA would be subject to s 69 of the TA while others would not. In the absence of clear words to that effect, such a conclusion should be resisted. Furthermore, as mentioned at [39] above, s 69 of the TA is meant to apply to any decision of the IDA in the exercise of any discretion vested in it. In my view, every decision of IDA which can be the subject of recourse is governed by s 69 of the TA.

58 As for OpenNet's reliance on paragraph 4.2.1(e) of the RFP (see [29] above), it was clear to me that that provision did not intend to and could not oust s 69 of the TA. Neither did it mean that the TA does not apply. I agree with IDA's submission that s 69 of the TA does not derogate from IDA's right to decide whether the Neutrality Requirement has been met, before s 69 of the TA kicks in.

59 In the circumstances, it is unnecessary for me to comment on other provisions in the TA and the IDA Act or the 2005 Code of Practice for Competition in the Provisions of Telecommunication Services.

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**OpenNet Pte Ltd v Info-communications Development Authority
of Singapore
[2012] SGHC 168**

Annexure A

CONFIDENTIAL



22 September 2011

To: All Facilities-based Operations Licensees

Dear Sirs,

**INFORMATION ON LICENCE AND REGULATORY FRAMEWORK
GOVERNING ASSET COMPANY**

Singapore Telecommunications Limited ("**SingTel**") has established NetLink Trust, a business trust registered under the Business Trusts Act (Cap. 31A) on 12 August 2011, as part of the commitments made by the OpenNet consortium in its bid for the Network Company Request for Proposals (NetCo RFP) of the Next Generation Nationwide Broadband Network.

2. CityNet Infrastructure Management Pte Ltd ("**CityNet**") has been appointed by SingTel as the trustee-manager of NetLink Trust, and will be the entity carrying out the business of establishing, installing, operating and maintaining the assets transferred from SingTel to support the operations of OpenNet Pte Ltd.
3. IDA has received queries from various interested industry players, particularly Facilities-Based Operation ("FBO") licensees regarding the formation of NetLink Trust and the obligations of CityNet. This letter thus seeks to provide all FBO licensees with the background on the formation of NetLink Trust and CityNet, as well as an overview of the regulatory obligations that IDA has imposed on CityNet (see attached **Annex** for details),
4. Should you have any enquiries, please direct them to the undersigned via email at IDAJLO@ida.gov.sg.

Yours faithfully,

Aileen Chia (Ms)

Deputy Director-General (Telecoms & Post)

INFORMATION ON LICENCE AND REGULATORY FRAMEWORK GOVERNING ASSET COMPANY

Setup of AssetCo

1. IDA awarded the Next Generation Nationwide Broadband Network ("**Next Gen NBN**") Network Company project to OpenNet Pte Ltd ("**OpenNet**"), which is a consortium comprising Axia NetMedia Corporation, Singapore Telecommunications Limited ("SingTel"), Singapore Press Holdings Limited and Singapore Power Telecommunications Pte Ltd). As part of the award, IDA had accepted the OpenNet consortium's proposal for the formation of an Asset Company (hereinafter referred to as **AssetCo**), which would be established as a business trust. SingTel committed to transferring to AssetCo the ownership and control of the relevant underlying passive infrastructure assets (comprising relevant ducts, manholes and exchange buildings) that are used to support the deployment of the Next Gen NBN infrastructure by OpenNet (the "Underlying Assets").
2. SingTel has established NetLink Trust, a business trust registered under the Business Trusts Act (Cap. 31 A) for the purposes of forming AssetCo, on 12 August 2011.
3. CityNet Infrastructure Management Pte Ltd ("**CityNet**") has been appointed by SingTel as the trustee-manager of NetLink Trust, and will be the entity carrying out the business of establishing, installing, operating and maintaining the Underlying Assets.

Ownership Structure of NetLink Trust and CityNet

4. Currently, SingTel is the sole unitholder of NetLink Trust. To ensure the neutrality of AssetCo, SingTel has committed to reduce its unit holdings in NetLink Trust to less than 25 per cent by April 2014, subject to the relevant approvals being obtained.
5. CityNet is a wholly-owned subsidiary of CitySpring Infrastructure Management Pte Ltd, the trustee-manager of CitySpring Infrastructure Trust. CityNet will have a majority independent board of directors. However, to allow SingTel to safeguard its interests as the owner of the economic benefit of NetLink Trust, SingTel will be allowed to appoint no more than 30% of the board of directors in CityNet. IDA believes that allowing SingTel to appoint not more than 30% of the board of directors will help to ensure that SingTel is unable to exercise any effective control over CityNet. Further safeguards to ensure the independence of CityNet are set out below.

Public Telecommunication Licensee and Dominant Licensee Designation

6. Pursuant to Sub-section 2.4 of the Telecom Competition Code 2010 (the "**Code**"), SingTel, as a Dominant Licensee, has applied for and obtained IDA'S approval for the transfer of its Underlying Assets to CityNet, in the latter's capacity as the trustee-manager of NetLink Trust. CityNet has applied for and obtained a Facilities-Based Operation ("FBO") licence from IDA to establish, install, maintain and operate the Underlying Assets. To facilitate CityNet's deployment of telecommunication systems, CityNet has also applied to be a Public Telecommunication Licensee ("PTL") and IDA has designated CityNet as one.
7. As part of the Underlying Assets, CityNet will also be taking over control and ownership of certain assets from SingTel that SingTel currently uses to offer interconnection related services under its Reference Interconnection Offer ("RIO") as part of its Dominant Licensee obligations. These assets include several central offices or telecommunication exchanges for the provision of co-location services, and lead-in ducts and associated manholes for access to buildings for the provision of telecommunication services, which constitute essential support facilities under the RIO.
8. Arising from the transfer of the above assets, IDA has classified CityNet as a Dominant Licensee. This is in accordance with Sub-section 2.4(b) of the Code, which stipulates that IDA may "[reclassify] *the transferee* [i.e. CityNet] *as dominant where the criteria for dominant classification set out in Subsection 2.2.1 of [the] Code is satisfied*".

Licence and Regulatory Obligations of CityNet

Public Telecommunication Licensee

9. As part of its PTL obligation, CityNet will establish, install, maintain and operate the Underlying Assets and:
 - (a) where CityNet has available ducts and associated manholes, shall provide access to and use of such ducts and manholes; and
 - (b) where CityNet has no available ducts and manholes, shall procure or deploy such ducts and manholes and provide access to and use thereof,to any PTL designated by IDA that requests such ducts and associated manholes (as the case may be) from CityNet.
10. Other rights afforded to and obligations imposed on CityNet, as a PTL, can be found in: (a) a copy of CityNet's FBO licence published on the IDA website (www.ida.gov.sg); and (b) the Telecommunications Act (Cap. 323).

Licence Conditions to Ensure Independence of CityNet

11. To further safeguard the neutrality and independence of CityNet, IDA has also

imposed a requirement in the Licence that CityNet shall not have any effective control over, or be under the effective control of any other telecommunication or broadcasting licensee. CityNet must also obtain IDA's approval for any changes to its ownership structure. As an FBO licensee, CityNet will also be required to seek IDA's approval for the appointment of its chief executive officer, its directors and the chairman of its board of directors. CityNet is also not permitted to offer any retail telecommunication systems and/or services or wholesale transmission services without IDA's prior written approval.

Dominant Licensee

12. As a Dominant Licensee, CityNet will be required to comply with the Dominant Licensee obligations specified under the Code. These include the duty to file tariffs and seek IDA's approval for the provision of any service for telecommunications (excluding any broadcasting service), as well as services relating to the use of telecommunication systems. Once any such tariffs are approved, CityNet will be required to publish the tariffs and to provide services in accordance with the prices, terms and conditions of these tariffs.
13. IDA has reviewed and approved CityNet's proposed tariffs to lease duct and manhole space to: (1) OpenNet; (2) SingTel; and (3) all other FBO licensees. Going forward, IDA will assess whether the proposed prices, terms and conditions of any tariffs submitted by CityNet are just, reasonable and nondiscriminatory, under IDA's tariff review procedures set out in the Code.
14. With the transfer of the assets classified as essential support facilities under SingTel's RIO to CityNet and with the designation of CityNet as a Dominant Licensee, IDA has required CityNet to offer a Reference Access Offer ("RAO"), which will offer (a) building lead-in duct space; and (b) access to building lead-in manholes, previously provided by SingTel under its RIO. As a start, the prices, terms and conditions for services under the RAO will be based on the prevailing SingTel RIO prices, terms and conditions. A copy of CityNet's RAO will be published on the IDA website (www.ida.gov.sg) once it has been approved.
15. SingTel has entered into agreements with CityNet for: a) the lease of space in the exchange buildings for SingTel (including co-location space provided for under the RIO); and b) access to SingTel's ducts in the manholes. With the aforesaid arrangement, notwithstanding the transfer of assets to CityNet, SingTel

aforesaid arrangement, notwithstanding the transfer of assets to CityNet, SingTel will continue to fulfil its RIO obligations to offer services for interconnection purposes, co-location space in the affected exchange buildings, and leasing of building lead-in ducts. However, access to the associated building lead-in manholes transferred to CityNet is only offered under the RAO, as CityNet has full control over the use of its manholes.
16. IDA would like to highlight that SingTel's RIO is currently undergoing review. In this respect, CityNet's RAO may be amended to reflect any consequential modifications (where applicable) following the completion of SingTel's RIO review, until such time that the RAO undergoes a

comprehensive review of its own.

17. For the avoidance of doubt, SingTel is still designated as a Dominant Licensee and will continue to offer its RIO in relation to those telecommunication systems it still owns and/or controls.
 18. Similarly, the establishment of CityNet will not affect any existing agreements relating to the Next Gen NBN, including OpenNet's Interconnection Offer or any Customised Agreements entered into by FBO licensees with OpenNet.
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