

**FINAL DECISION
OF THE COMMUNICATIONS AUTHORITY**

**BREACH BY
ASIA TELEVISION LIMITED AND
TELEVISION BROADCASTS LIMITED
OF SPECIAL CONDITION 3.2 AND SCHEDULE 2(A)(ii) OF
THEIR FIXED CARRIER LICENCE**

Licensees Concerned:	Asia Television Limited (“ATV”) and Television Broadcasts Limited (“TVB”)
Issue:	ATV and TVB shared the transmission capacity of the Multiple Frequency Network (“MFN”) in a way which deviated from the licence requirement of their respective Fixed Carrier Licences (“FCLs”)
Relevant Instruments:	Special Condition (“SC”) 3.2 and Schedule 2(A)(ii) of ATV’s and TVB’s FCLs (No. 045 and No. 044 respectively)
Decision:	Breach of SC 3.2 and Schedule 2(A)(ii) of ATV’s and TVB’s FCLs (No. 045 and No. 044 respectively)
Sanction	Financial penalty imposed
Case Reference:	L/M T 8/13 in OFCA/S/BC/17 C

BACKGROUND

Pursuant to the Implementation Framework for Digital Terrestrial Television Broadcasting announced by the former Commerce, Industry and Technology Bureau (“CITB”) in 2004, ATV and TVB were assigned a total of three digital multiplexes to provide digital terrestrial television (“DTT”) services to the viewing public. They are required to share one MFN multiplex for the digital simulcast of their four analogue free-to-air television programmes. The former Telecommunications Authority, following the policy decision, assigned the MFN multiplex to ATV and TVB on an equal sharing basis for digital simulcast of the four analogue free-to-air television programmes in 2007.

2. SC 3.2 of ATV’s and TVB’s FCLs requires that –

“3.2 The licensee shall maintain and operate the network for provision of the service in accordance with Schedules 2 and 3 of this licence and any amendments to them as approved by the Authority.”

Schedule 2(A)(ii) of ATV’s and TVB’s FCLs further requires that the MFN for DTT transmission shall be shared equally between ATV and TVB.

3 The Office of the Communications Authority (“OFCA”) conducts regular monitoring of the DTT broadcast network, including the MFN. According to the measurement records, ATV and TVB each utilised roughly the same bit rate (i.e. at around 9.6 - 9.9 Mbps) in the MFN from year 2010 to early February 2013.

UNEQUAL SHARING OF TRANSMISSION CAPACITY BY ATV AND TVB AND THEIR REPRESENTATIONS

4. On 8 March 2013, OFCA observed that the bit rate utilised by TVB had increased to 11.3 Mbps (i.e. more than half of the transmission capacity in the MFN multiplex) whereas the bit rate utilised by ATV had decreased to 8.3 Mbps accordingly. OFCA also observed that the Jade channel has been upgraded to HDTV format since 18 March 2013 and the bit

rate utilised by TVB in the MFN multiplex had been further increased to 11.6 Mbps. The transmission capacity in the MFN was therefore found to have been unequally shared between ATV and TVB.

5. While ATV and TVB admitted to the unequal sharing of MFN capacity as revealed by OFCA's monitoring, they denied any breach of SC 3.2 and Schedule 2(A)(ii). They considered that the unequal sharing was permissible under SC 11 of the FCLs, (which obliges sharing of the combined transmitting systems) through commercial negotiation between the parties concerned. They also submitted that the words "shared equally" in Schedule 2(A)(ii) did not refer to MFN capacity and, even if the words had such meaning, it merely reflected the factual status as at the date of amendment of the FCLs. In this connection, following specific enquiries from OFCA, ATV and TVB admitted that they had entered into a commercial arrangement for the unequal sharing of the MFN capacity in early 2013.

6. OFCA completed its investigation and submitted its findings to the Communications Authority ("CA") on 6 July 2013. Having considered the findings of OFCA, the CA issued its Provisional Decision to ATV and TVB on 9 July 2013 and invited ATV and TVB to make representations. ATV and TVB submitted their responses to the CA on 19 August 2013. In view of the fact that the submissions were quoted as "preliminary responses", the CA further requested ATV and TVB to confirm their responses as final or otherwise submit their final representations to the CA. At the request of the CA, ATV and TVB submitted their further representations to the CA on 3 October 2013 followed by clarifications on 9 October 2013.

THE CA'S CONSIDERATION AND DECISION

7. The licence requirements which have been contravened by ATV and TVB are SC 3.2 and Schedule 2(A)(ii) of ATV's and TVB's FCLs.

8. In the Second Consultation Paper on Digital Terrestrial Television Broadcasting in Hong Kong issued by the former CITB ("Second Consultation Paper"), it was specifically mentioned that "*ATV and TVB will share the capacity of this [MFN] multiplex equally*". Both ATV and TVB

were involved in that consultation and, in their joint submission in response to the Second Consultation Paper, they requested the Government to pre-assign a single frequency network each to ATV and TVB in addition to the proposed 50% of the MFN for digital simulcast. In other words, they were fully aware of the requirement for sharing the MFN so that each holds 50% and the meaning of “shared equally” in the amended licence issued in 2007.

9. In addition, the CA has taken into account the following considerations:

- (a) neither ATV nor TVB, both of which are aware of the Second Consultation Paper, have challenged the statement in it as to equal sharing of the MFN capacity;
- (b) it is implicit in the statutory framework contained within the Telecommunications Ordinance (“Ordinance”) that private arrangements in relation to the allocation and use of spectrum are not permitted; it is only the CA which has been conferred with the power to allocate and assign spectrum as well as specify conditions for the use of the assigned spectrum and this is specifically given to it by the Ordinance; and
- (c) spectrum is a scarce and valuable resource and that is why the CA is declared to be the spectrum manager under section 32G of the Ordinance and is vested with the powers to allocate spectrum frequencies under section 32H. The CA has assigned the spectrum for use by ATV and TVB free of charge, for the provision of their respective broadcasting services. The licensees are not permitted to enter into private arrangements regarding the spectrum use especially if it involves commercial benefits.

10. The CA does not accept ATV and TVB’s interpretation of SC 11 of the FCLs. Under SC 11.1, the licensee shall enter into agreements with other licensees to share use of the combined transmitting systems. The “combined transmitting systems” listed in SC 11.5 are only examples of active and passive hardware facilities. The assigned spectrum, which is not the private property of the licensees, is omitted from the facilities listed under SC

11.5 and it is of a very different nature to the hardware listed there which is the private property of the licensees.

11. The CA considers that SC 11 imposes an obligation on ATV and TVB to negotiate and use their reasonable endeavours to enter into agreements to share the use of the combined transmitting systems. There is no restriction on what they may agree nor is there any requirement to obtain the CA's approval for what is agreed. If TVB and ATV's interpretation of SC 11 were correct, it would give them total freedom to enter into commercial arrangements for the allocation of spectrum without the need for obtaining the CA's approval. This would be completely contrary to the statutory framework of the Ordinance. The CA is required under section 32G of the Ordinance to promote the efficient allocation and use of radio spectrum which is a public resource. It is empowered by section 32H to assign frequencies or bands of frequencies and to vary or withdraw them. The Radio Spectrum Policy Framework ("SPF") promulgated by the Government in April 2007 identifies the policy considerations to which the CA should have regard in discharging its spectrum management functions under the Ordinance. There is no suggestion in the Ordinance or the SPF that licensees are permitted by the terms of their licences to deal with spectrum as they wish, and it would subvert the regime for management of this public resource if it was the case.

12. Having considered the findings of OFCA's investigation, and having been satisfied that ATV and TVB have been afforded a reasonable opportunity to make representations, the CA is of the view that ATV and TVB have failed to comply with SC 3.2 and Schedule 2(A)(ii) of their FCLs, by unequally sharing the capacity in the MFN without obtaining the prior approval of the CA.

13. In considering the sanction that it should impose, the CA notes that –

- (a) spectrum is a scarce public resource. The CA has assigned to ATV and TVB the MFN with no spectrum utilisation fee payable, for the development of their respective DTT services;
- (b) the FCLs specifically provide for a mechanism whereby the

licensees may seek approval from the CA for any changes in their MFN assignment;

- (c) there is as yet no Government policy on allowing spectrum trading in Hong Kong. The authority to allocate, assign and withdraw radio spectrum rests with the CA under the Ordinance. Neither the Ordinance nor any conditions of the FCLs permit ATV and TVB to trade the transmission capacity of the MFN between themselves for commercial benefit;
- (d) ATV and TVB have implemented the agreement and, despite the advice of OFCA, put into effect the adjustments to their respective transmission capacity without the authorisation of the CA; and
- (e) the unequal sharing of the transmission capacity between ATV and TVB not only constitutes a breach of the relevant licensing requirements by ATV and TVB, it disregards the CA's statutory role as the manager of spectrum with the power to allocate and assign frequency. It also ignores the fact that the Government has not expressly authorised spectrum trading and indeed has made clear that this is a proposal which needs further consultation and analysis.

14. Having considered the above and all circumstances of this case, the CA considers the breach a serious one and decides to impose a financial penalty of HK\$200,000 each on both ATV and TVB for the contravention.

Communications Authority
November 2013