

# Comments on China's Draft Telecom Law

On Behalf of:

The Telecommunications Industry Association (TIA), the U.S. Information Technology Office (USITO), & the Information Technology Industry Council (ITI)

*Final Version, 11/3/2009*

TIA, USITO and ITI welcome China making its draft Telecommunications Law available for public review and comment as part of the joint U.S.-China Legal Exchange. We applaud and encourage China to continue to make this and other laws and regulations available for public comment in the future. Active and robust exchanges with industry will help China ensure that policies that are adopted will achieve maximum development and market impact.

It is important to note that there are a number of ongoing government-led bilateral dialogues, such as the aforementioned legal exchange, between the United States and China which may cover issues related to some of the regulatory provisions outlined in the draft Telecom Law. We recommend, that in areas where there are undetermined outcomes of bilateral discussion and debate, China adopt a flexible approach and avoid codifying provisions that are subject to ongoing discussions.

China has undertaken a number of important steps to foster expansion of its telecommunications sector as it develops a dynamic and resilient economy. In its draft telecommunications law, China has incorporated some important global regulatory principles and applied them to China's unique circumstances to establish the legal framework to ensure the healthy and robust development of its telecommunications sector. The comments below reflect industry suggestions for China to consider as it seeks to build and remain the world's largest telecommunications market. Comments are organized in order of the Articles of the draft telecommunications law.

## **Chapter 1 - General Principles**

Article 2. This Article aptly recognizes the trend toward convergence of different technologies and services offered by telecommunications, media and information services sectors. However, it is debatable whether or not it is effective or even appropriate to simply apply the laws and regulations governing the traditional media and broadcasting sectors to the vast array of new convergent media services that are offered over telecommunications infrastructures, including the Internet. Many of these new services utilize drastically different technologies, delivery mechanisms, and, in some cases, with completely different business models compared with the traditional services. As such, applying regulations that were designed prior to the advent of these new technologies and services risk stifling the innovation and new market creation brought forth by these new services. Applying laws and regulations from multiple regulatory authorities could also lead to overlapping and sometimes contradicting regulation over the same service, potentially creating market uncertainty and confusion that deter investment and market development.

We recommend that China consider establishing a convergent, independent, regulator as the central authority governing the converging telecom, Internet media, and broadcast industries. We also recommend a multi-tiered, principle-based (as opposed to rules-based) regulatory framework that employs both traditional command-and-control approaches and light-touch approaches such as industry self-regulation and/or co-regulation, depending on the nature and maturity of the service under consideration.

Article 3. China should be commended for realizing the important benefits of telecommunications networks to developing the Chinese economy. Unfortunately, regulatory processes in China today exist without clearly defined regulatory responsibilities. While MIIT has been, in practice, the lead agency with respect to regulating the Telecommunications sector, other government organs (SARFT, SEMB, CNCA, etc) also play a role. It would be helpful to industry if the Telecommunications law could clearly define what constitutes the “competent telecommunications authorities” and, in addition, their areas of policy responsibility with respect to the telecommunications sector. With this in mind, we remind China of its WTO Basic Telecommunications Agreement Reference Paper commitment to establish an independent regulator. MIIT, with its multiple policy and industry functions has a clear conflict of interest when it comes to regulating the telecommunications industry in a nondiscriminatory and transparent manner.

We applaud the State’s support and promotion of network convergence and the encouragement of cross-entry among telecom and broadcast service providers. We believe that these policy advancements will nurture healthy and increased market competition and benefit both the consumers and the nation’s economy as a whole. We notice, however, the subtle difference in that broadcast organizations are encouraged to engage in the telecom business (with no limitations) while telecom operators are encouraged to engage in radio and TV *transmission* businesses, which seems to limit the telecom operators to only the transmission aspect of radio and TV businesses. As radio and TV services migrate onto digital and interactive technology platforms, the associated business models also undergo tremendous change and often require end-to-end business integration across content packaging, content delivery (transmission), and content presentation (user interfaces/devices) in order to enable service innovation and maintain service competitiveness. As such, we recommend that the qualifier term “transmission” in the last sentence of Article 3 be removed to signify the encouragement of truly equal entry among telecom and broadcast service operators.

Article 4. We applaud China for including an Article in the law that protects citizens’ freedom and privacy. In the same spirit, we urge China to consider an addition to the Article giving consumers the freedom to choose a telecommunications service provider, thus reinforcing steps taken to create competition in the Chinese telecommunications market.

Article 5. We recognize China’s concern with respect to misuse of the telecommunications networks. However, it is important from a legal perspective for

China to specify in more detail what activities constitute a violation of Article 5. In order to provide businesses and consumers a clear understanding of the rules governing limitations on the free flow of information within China, it is important to understand what constitutes a violation under this very broadly written article.

*Articles 6 & 17.* Given that the two articles cover similar and related issues, we suggest merging the two Articles to read: “Telecommunications business operators, especially basic telecommunications business operators, shall, in a fair and non-discriminatory manner, provide accurate, safe, convenient and smooth telecommunication services to subscribers, provide non-discriminatory interconnection and data transmission services to other telecommunications business operators, and provide relevant use information in a transparent manner. Specific services, terms and conditions shall be negotiated between the parties involved.”

*Article 7.* In order to ensure that China’s regulatory decisions take into account the views of industry and consumers, we encourage language be inserted to the law that requires telecommunications authorities to seek public comment in an open and transparent proceeding.

## **Chapter 2 - Access to the Telecommunications Market**

*Article 8.* It is unclear why the government must establish a list of pre-approved value added services for the telecommunications sector in China. Prescribing approved services is a top-down method that slows the deployment of new and innovative services to the Chinese public. We urge China to take a more open approach to value added services and enable companies to compete in this area without new services first needing to be approved by the government.

*Article 9.* We realize that China currently has an equity limit of 49% for any foreign company invested in a basic telecommunications service provider. However, foreign equity caps limit foreign telecommunications providers from fully engaging in the Chinese market given the barriers to acquiring majority interest in their investments and difficulties in finding appropriate joint venture partners. In addition, the WTO parameters with respect to foreign equity caps are subject to change. In order to ensure China remains flexible in this regard, we recommend not codifying the present foreign direct investment limits in the Telecommunications Law. In addition, the current capitalization requirements are excessive and the Telecommunications Law should eliminate them or lower them to a level that does not pose a barrier to entry.

Furthermore, the existing simplistic categorization of all telecom services into basic service and value-added service does not reflect the market reality of many emerging and convergent services, which are not pure telecom services in the traditional sense and should not be regulated as one. There may be a need to consider adding additional categories of services (such as Information Services) which are subject to a lighter regulation and possibly more relaxed foreign investment guidelines.

Article 10. We welcome China's clear statutory time frames for the permit application process; however, it is unclear if there is any appeal or reapplication process if concerns of the "competent telecom authorities" can be addressed. We would appreciate further clarification on the appeals and reapplication process and its respective timeline for review and notification.

Article 11. Similar to our point in Article 9, we encourage China not to codify the 50% foreign equity cap for Value Added Services (VAS), in order to provide greater flexibility for future investments.

Article 12. Similar to our concerns raised with Article 10, we would welcome clarification on whether an appeal or reapplication process is possible and, if so, details of the process.

Article 14. The global nature of Internet and the proliferated adoption of soft-switches, distributed computing, virtualization, and cloud computing technologies have disassociated telecommunications and Internet services from any particular set of physical equipment and, as a consequence, from any particular equipment location. It is increasingly difficult, sometimes impossible, to pinpoint the set of physical equipment that is responsible for a given service, since computing resources are allocated dynamically out of a pool of possible resources that reside in a large geographical area. As such, we recommend that China not regulate services (and service providers) based on locations of computing resources or facilities, but rather based on the fulfillment of business registration and licensing requirements in a given jurisdiction.

Article 15. We would appreciate a clarification as to why the draft Telecommunications Law requires approval by the Chinese government for the establishment of international telecommunications gateways. If a company is licensed to operate as a telecommunications business in China, why would it not be permitted to determine for itself the number of international gateways it needs to adequately manage its traffic? Why would the Chinese government need to authorize each additional international gateway? We recommend that this requirement be dropped from the draft law as it would negatively impact the ability of carriers to adequately compete.

Article 16. We recommend listing further details on what is required when reporting "relevant circumstances" to the competent authorities. Will the competent authorities have a transparent and readily available list of information required of telecommunications business operators before registering a business? When filing and putting on record a change in name, residence or legal representative to the industrial and commercial administration, approved telecom service permits should be modified accordingly.

### **Chapter 3 - Interconnection of and Intercommunication Between Telecommunications Networks**

*Article 19.* While we understand Chinese desires to understand the overall network infrastructure, it would be helpful if the law could be more explicit in not applying this requirement to new entrants, who will not be in a market dominant position and would find such reporting requirements overly burdensome.

*Article 20.* The obligations contained in this Article should apply only to operators, which are major suppliers as defined in the WTO Reference Paper. New entrants will need access to the networks of the major suppliers on reasonable terms and conditions and will not have much leverage to negotiate. By requiring that major suppliers make comprehensive interconnection offers to new entrants, the Telecom Law would send a strong signal that China's goal is to foster healthy competition in the telecom sector.

*Articles 22 and 24.* We recommend further clarification on how the government will conduct arbitration proceedings for settlement of interconnection disputes and what government body will oversee this process.

### **Chapter 4 - Telecommunications Resources**

*Article 28.* While it is normal to charge fees for use of wireless frequencies, we propose that China also clarify which government body will be given responsibility for setting the fees, explain how the fees will be established, and provide information on what legal redress (fines, administrative measures, etc) available should an entity interfere with the spectrum use of a licensed holder of same spectrum.

*Article 29.* China recognizes the scarcity of resources in telecommunications and its decision to encourage users of these resources to be quick in deployment of services is heartening. However, the industry would prefer a more market-driven and technology neutral approach for allocation of telecom resources. In addition to designation/open bid/auction methods, China should also consider license-exempted (or license-by-rule) usage for radio frequency spectrum where appropriate and preferable in terms of stimulating innovation and market adoption. Spectrum trading is also a common practice in many markets with the provision that radio spectrum is allocated without association with the use of a particular technology. China should consider allowing the trading of radio frequencies among qualified users, as it will lead to more optimal use of the scarce spectrum.

*Articles 31 & 32.* The draft Telecommunications Law indicates that organizations that register and manage domain names must be approved by competent telecommunications authorities. While we welcome and support third party organizations providing these functions, we are concerned that the law as presently drafted does not require these organizations to be neutral and independent. Furthermore, it is not clear what the State's role will be as described in Article 32, which gives the State the right to exercise management of the distributed use of Internet protocol addresses and the registration of

Internet domain name resources by filing them and putting them on record. Can China clarify what is intended by this Article that the State will not have a deciding role in the domain name approval and registration?

### **Chapter 5 – Telecommunication Service Fees**

*Article 34.* We support China's decision to hold public hearings in soliciting opinions on the setting of upper limits on telecommunications service fees where there is inadequate competition. Public comment is a valuable tool for governments to best gauge consumer and industry views in designing policies. We encourage China to establish a public comment process for all telecommunications regulatory decisions undertaken in China.

### **Chapter 6 – Universal Telecommunication Service and Protection of Subscribers' Rights and Interests**

*Article 38.* We suggest that universal telecommunications service be defined as being provided to all users, including Chinese citizens, Chinese legal persons, foreign legal persons and foreign individuals who have a legal operation in China.

*Article 39.* Like many countries, China recognizes the importance of expanding telecommunication services into non-commercially viable areas. The Universal Service Fund should explicitly provide assurance that designated operators for universal service will be compensated for providing service to areas that are not commercially viable.

In support of universal services, China should adopt more market-driven and technology-neutral approaches in allocating scarce telecom resources such as radio frequency spectrum. License-exempt use of radio frequency spectrum (such as 2.4 GHz Wi-Fi services) has proven to be hugely successful in proliferating Internet access and stimulating service innovation. The same license-exempt model could be applied to more frequency bands in order to support more cost-effective rural coverage and bring down the overall cost of implementing universal services.

*Article 43.* In the interest of empowering the consumer, it would be useful to include subscriber requests into the requirement of service providers when requiring number portability. Steps clarifying number portability options and time frames would be beneficial to creating competition for consumers.

*Article 49.* Industry recognizes the potential benefits of a real-name registration scheme, and appreciates the provision in this article for protection of subscriber information. However, the vast majority of new mobile subscribers in China is composed of prepaid users who are currently without real-name registration. Retrofitting such requirements to millions of existing prepaid users could be an impractical exercise. Furthermore, it is important to understand better how to determine if a telecom service would require a registration process for network access (and hence require real name registration). A real-name registration system also has limitations, given the possibility of identity theft on the Internet.

Article 52. What is intended by the term “appropriate arrangements” when terminating a subscriber’s access?

Article 54. What is intended by the term “enterprise-specific plans” and what information does China expects to be included in the report?

### **Chapter 7 – Construction and Protection of Telecommunications Facilities**

Articles 57 & 59. While there are many global examples where different carriers have shared in the construction and use of telecommunications facilities, we strongly believe that those decisions must be voluntary and based on the business and technical needs of individual telecommunications carriers. We do not believe it is in the interest of China’s future telecommunications growth to forcibly require carriers to share in the construction and use of their facilities. Such forced facilities-sharing reduces competition and incentives for infrastructure build out.

### **Chapter 8 – Telecommunications Standards and Connection of Equipment to Networks**

Article 68. In order for China to continue to avail itself of the best technologies the world has to offer, we strongly encourage China to adopt international standards wherever possible. Global standards developed through privately managed, open, voluntary and consensus driven standards processes ensure that voices across the technology development spectrum have an opportunity to influence the development of standards. This approach helps promote interoperability, reduces equipment costs, and helps accelerate innovation. Closed standards development procedures shuts out other important voices and can lead to creation of standards in a vacuum that are not compatible with internationally developed standards, and would not be relevant in a global market if those technologies were to be deployed outside Chinese jurisdiction. If China mandates national standards or technologies (as we have seen attempted in several areas), China is reducing its potential to be a global innovation leader. Only through embracing technology and standards collaboration with the rest of the world, will it be able to fully take advantage of the economies of scale the Chinese market place provides.

Article 69. We propose adding the following language to distinguish between enterprise networks and public networks. “Special technical requirements for enterprise standards developed and implemented by enterprises for internal reference shall not be used as part of the network access threshold for public telecom equipment.”

Article 70. While we recognize the necessity and importance of standards-compliance in telecom equipment, industry would appreciate a more qualitative definition of “relevant telecom standards” referenced in this article, perhaps something along the lines of “mandatory telecom standards with GB designation.”

Article 71. While recognizing that China has undertaken steps to improve the Type Approval process for telecommunications equipment, we believe that additional steps could be taken to clarify the process and the requirements to improve transparency, create a level playing field for manufacturers, and eliminate redundancies in testing requirements. These steps will continue to be discussed in bilateral discussions. Outcomes should not be pre-empted by publication of this law.

One of the major challenges industry has with the current type approval process is that the technical specifications that are required are often changed, and are not made easily accessible and available to vendors. China should publish and post on the Internet a catalogue of telecommunications equipment subject to type approval requirements, including making more obvious the relevant standards and when those standards are updated.

Article 72. Further to our call to create an independent telecommunications regulator to comply with its WTO obligations, we urge China to clarify the legal requirements for telecommunications equipment and establish one licensing system for telecommunications equipment rather than the multiple licensing regimes currently in existence. We also encourage China to shorten as much as possible the current 45-day application/approval process for receiving approval to introduce new telecommunications equipment to the Chinese market. The current application timeframe significantly delays any business from making substantial market-enhancing moves to benefit Chinese consumers.

Article 75. This is an important provision that will help remove black market equipment from China. It would be helpful if China were to clarify further which agency would have enforcement authority and receive cases, including what legal procedures they would follow.

## **Chapter 9 – Telecommunications Network and Information Security**

Article 77. For the purpose of legal consistency, we suggest that a reference to China's privacy law be included when requiring telecommunications operators to keep a record of subscriber information along with a system maintenance journal. We also suggest adding the following article: "The competent telecommunications authorities shall be able to audit the measures taken by a telecommunications business operator and to issue recommendations about best practices and performance indicators concerning the level of security which these measures should achieve."

Article 80. While we recognize China's right to ensure security of its telecommunications network, the language in this article establishes some very broad and vague definitions of what constitutes an act that compromises network and information security. As written, the language creates legal uncertainties for consumers and telecommunications companies alike. The free flow of information is critically important to creating a long lasting, vibrant, and innovative economy. Laws which create uncertainties and as a consequence inhibit the free flow of information not only create



global concerns about China's commitment to guaranteeing the free flow of information, it unnecessarily puts up obstacles to China reaching its full economic potential.

Article 81. The requirement that operators stop transmission and report use of their networks for illegal activities identified in Article 80 reinforces the point we have made in Article 80 regarding the legal uncertainty the vague language in the law creates.

### **Chapter 11 – Supervision and Inspection**

Article 92. While the draft law describes supervision and inspection activities authorized by the State with respect to quality of service, billing systems, network and information security, and communications support and controls, we are concerned that these may become overly burdensome and intrusive for companies to comply with. We recommend that China establish a process to handle investigations into these issues by setting appropriate parameters and process that is triggered when reports of issues in these areas are reported. Furthermore, this process should be designed to minimize the operational impact on service providers. As currently written, the law appears to require telecommunications authorities to carry out the proscribed supervision on a continuous basis.

Article 95. We reiterate our recommendation that a process be established to create public proceedings before telecommunications authorities issue regulations as well as any technical requirements to ensure adequate opportunity for the public to comment.

Article 97. We request the language in this section be clarified as to which authority in China may take measures to address competition. How do the powers of the telecom authorities differ from those of entities charged with enforcing China's anti-monopoly law?

### **Issues not covered in the draft Telecom Law**

The Telecom Law does not specify whether leased lines will be made available by major Chinese carriers at regulated prices. The availability of this type of service is key to fostering competition in the telecommunications sector. Furthermore, the Telecom Law does not appear to contain a requirement that facilities-based carriers resell services on a non-discriminatory basis. Ensuring and enforcing this principle would also be beneficial to fostering competition in the telecom sector which will benefit Chinese consumers.

It is important to note that at the October 2009 meeting of the U.S.-China Joint Commission on Commerce and Trade, China and the United States agreed to jointly hold a program with public and private participants to discuss the issue of intermediary legal liability on the Internet. Because this discussion has not been initiated yet, it would be difficult to say how these discussions would affect the China Telecommunications Law and other relevant laws, regulations and agencies roles.