

TELECOMMUNICATIONS ORDINANCE
(Chapter 106)
Authorization to Place and Maintain
Radiocommunications Installation, etc. on Land
(Section 14(1A))

Licensee: CSL Limited
Landowner: Route 3 (CPS) Company Limited
Date: 4 May 2012

1. In this authorization, the Schedules and Annex hereto,

“Authority” means the Communications Authority established under the Communications Authority Ordinance (Cap. 616, Laws of Hong Kong);

“Landowner” means Route 3 (CPS) Company Limited, the person having a lawful interest in the land concerned as specified in Schedule 2;

“Licensee” means CSL Limited, the holder of Unified Carrier Licence No. 008;

“Ordinance” means the Telecommunications Ordinance (Cap.106, Laws of Hong Kong);

“Personal Communications Services” or “PCS” refers to the public mobile radiocommunications services which are operated by the Licensee using the spectrum in the 1.7 – 1.9 GHz band listed in Schedule 3 to Unified Carrier Licence No. 008;

“Third Generation Mobile Services” or “3G” refers to the public mobile radiocommunications services which are operated by the Licensee using the spectrum in the 1.9 – 2.2 GHz band listed in Schedule 3 to Unified Carrier Licence No. 008; and

“radiocommunications installation” shall have the same meaning ascribed by the Ordinance.

2. The Authority, in exercise of its power under section 14(1A) of the Ordinance,

having been satisfied that the Landowner and the Licensee (the “parties”) have been afforded a reasonable opportunity in accordance with section 14(1B)(c) to make representations in respect of the granting of an authorization under section 14(1A);

having considered all submissions made by the parties in accordance with sections 14(1B)(a) and 14(1B)(b);

having considered the Preliminary Analysis issued on 26 April 2011;

having been satisfied that the parties have been afforded a reasonable opportunity to consider the Preliminary Analysis and to make representations in response to the Preliminary Analysis;

having considered the Final Analysis annexed to this authorization; and

having been satisfied that the granting of an authorization under section 14(1A) is in the public interest under section 14(1B)(a), and that it has considered all relevant matters under section 14(1B)(b),

hereby authorizes the Licensee to -

- (a) place and maintain the radiocommunications installation, specified in Schedule 1 hereto, in, over or upon any land as specified in Schedule 2 hereto, for the purpose of providing a radiocommunications service to any public place within the tunnel tubes of the Tai Lam Tunnel; and
- (b) enter any such land for the purpose of -
 - (i) inspecting the radiocommunications installation; or
 - (ii) other activities which are for the purpose of or incidental to the maintenance and placement of the installation.

3. This authorization is granted subject to -

- (a) the terms and conditions of Unified Carrier Licence No. 008 issued to the Licensee on 1 June 2009 under section 7 of the Ordinance and all applicable ordinances and subsidiary legislation as in force from time to time including but without limitation to all guidelines, codes of practice and directions issued by the Authority;
- (b) such reasonable directions as may be given from time to time by the Authority in writing relating to this authorization or the exercise of the powers conferred by section 14 of the Ordinance; and
- (c) an interim fee under section 14(1D)(a) as specified in Schedule 3 payable by the Licensee to the Landowner.

4. This authorization, unless withdrawn by the Authority, is valid until the expiry of Unified Carrier Licence No. 008 issued to the Licensee on 1 June 2009.

5. This authorization (including the Schedules and Annex hereto) may be withdrawn, modified or replaced from time to time by the Authority and nothing in this authorization or in any modification or replacement thereof shall extend to any part of the land which is not specified in Schedule 2.

(Danny KC LAU)
for Communications Authority

Schedule 1

Such radiocommunications installation as is reasonably required for the purpose of providing the Personal Communications Services and Third Generation Mobile Services which are licensed under Unified Carrier Licence No. 008 issued to the Licensee on 1 June 2009.

Schedule 2

Location of the land concerned:

1. Details of the installation locations as shown in Appendix 1 of the submission of the Licensee on 10 September 2010 or as agreed between the Licensee and the Landowner, which are set out below -
 - (a) The twin tubes tunnel passing under Tai Lam Country Park between Ting Kau and Au Tau;
 - (b) The North and South Portals, Cross Passage 16 of Tai Lam Tunnel with base station equipment installed;
 - (c) Cross Passages 6, 12, 26, 31 of Tai Lam Tunnel with repeaters equipment installed; and
 - (d) The Land between the North and South Portals, Cross Passages 6, 12, 16, 26, 31 which is necessary for the laying of ancillary facilities for interconnection of the radio communications installation and the facilities installed in the twin tubes, Cross Passages 6, 12, 16, 26, 31.

Schedule 3

Interim Fee

An interim fee of HK\$[] per month payable by the Licensee to the Landowner of the land concerned as specified in Schedule 2 for placing all the equipment and antennas the particulars of which are specified in paragraph 8 of the Preliminary Analysis of 26 April 2011 or as agreed between the Licensee and the Landowner for the period commencing on the first exercise of the right by the Licensee under this authorization until a fee to be paid under section 14(2)(ii) of the Ordinance is determined and made effective under section 14(5) of the Ordinance.

**Application for the Communications Authority's
Authorization Pursuant to Section 14(1A) of
the Telecommunications Ordinance (Cap. 106)
for Placing and Maintaining Radiocommunications Installation
in the Tai Lam Tunnel
by CSL Limited**

Final Analysis

Introduction

An application was made by CSL Limited (the "Licensee") on 10 September 2010 to the Communications Authority (the "Authority") for the grant of an authorization pursuant to section 14(1A) of the Telecommunications Ordinance (the "Ordinance") to place and maintain its radiocommunications installation (the "Installation") in the Tai Lam Tunnel (the "Tunnel") for the provision of its Personal Communications Services ("PCS") under Unified Carrier Licence No.008. The Tunnel is maintained and operated by Route 3 (CPS) Company Limited (the "Landowner") in pursuance of the provisions of the Tai Lam Tunnel and Yuen Long Approach Road Ordinance (Cap. 474). The Licensee has been negotiating with the Landowner for renewing the contract for placing and maintaining the Installation in the Tunnel since December 2009. The Licensee envisaged that the difference between the Landowner and the Licensee (the "parties") in relation to the amount of monthly licence fee to be paid by the Licensee to the Landowner could not be reconciled without the intervention of the Authority and therefore sought the present authorization.

2. Having considered the parties' submissions on the application, the Authority issued the Preliminary Analysis ("PA") on 26 April 2011 and invited the parties to comment and make further representations, if any, on the PA before it decides whether or not to grant an authorization under section 14(1A) of the Ordinance.

Submission by the Parties

3. The comments made by the Landowner and the Licensee on the PA were received on 9 May 2011 and 27 May 2011 respectively. The Landowner

made further comments on 28 July 2011. In the ensuing months, the parties continued their negotiations on the inclusion of the deployment of 3G network in the Tunnel but no agreement was reached. Finally, submissions made by the Landowner and the Licensee on whether this authorization should include two or three systems and the proposed level of fees were received on 28 December 2011 and 30 December 2011 respectively.

4. The representations of the parties and the final views of the Authority are given below. For the avoidance of doubt, the Final Analysis sets out the principal reasons upon which this authorization is based. The Authority has taken into account of all the submissions received but it does not consider it necessary to address all the arguments canvassed in the various submissions.

The Licensee's Representations

5. The Licensee submitted that the Authority should follow the approach in two recent authorizations to determine the interim fee. The Licensee submitted that the interim fee should be determined by taking an average of the licence fees for the same network paid to other private tunnel operators and on that basis the interim fee should be HK\$[3<] per month.

6. The Licensee relied upon a decision in 2002 with similar facts where the licensee had both a GSM and PCS licence agreement with a tunnel operator but did not renew the PCS licence agreement. The licensee in that case applied for a section 14(1A) authorization for its GSM network. The Authority held that the licence fee for the PCS network should not be considered in an application for authorization solely for maintaining a GSM network. The Licensee pointed out that the only difference to the present case was that the Licensee was applying for an authorization in respect of its PCS network as opposed to a GSM network. The Licensee therefore suggested that the Authority should use the approach adopted in the decision in 2002 and the Authority should determine the interim fee based on the licence fee payable in respect of the only network that was being operated by the Licensee in the Tunnel.

7. In the alternative, the Licensee submitted that the Authority should set the amount of HK\$[3<] as the interim fee since this was the current fee commercially agreed between the parties for the 2G network in the Tunnel.

According to the Licensee, a decision to base the interim fee on the existing fee would be in line with previous determinations of the Authority.

8. The Licensee submitted that the proposed interim fee of HK\$[§<] was not a maintenance of the *status quo* as indicated in the PA. The correct *status quo* for the interim fee was a licence fee of HK\$[§<] for the PCS network, given the termination of the GSM licence agreement and the removal of the GSM network. The Licensee also submitted that it was not reasonable for the Authority to incorporate a GSM charge as it would amount to the Licensee paying a charge for GSM rights that it did not receive since the termination of the GSM licence agreement.

9. With regard to the migration of GSM subscribers to the PCS network, the Licensee submitted that the number of subscriber units was no longer a relevant consideration. The Licensee also submitted that determining licence fees by reference to the number of subscriber units was obsolete and all private tunnel operators except the Tunnel relied on inflation as the relevant factor in fee reviews, not movement in subscriber numbers. The Licensee pointed out that the fee resulting from a strict application of Schedule 3 of the PCS licence agreement would far exceed any increase in the licence fee that could be justified by inflation or other costs. The Licensee argued that the Authority should not consider the issue of subscriber units in determining an interim fee.

10. The Licensee submitted that if the Authority maintained that the interim fee should include a component for the operation of two networks in the Tunnel, the deployment of the PCS and 3G networks would be beneficial to consumers and the Licensee should be entitled to deploy the PCS and 3G networks in the Tunnel if the interim fee was to be set at HK\$[§<].

11. The Licensee pointed out that the mobile network operator would be the one to decide which radiocommunications systems to be installed in accordance with its business needs and the Landowner should not interfere with the Licensee's decision on which radiocommunications systems to be installed. The Authority therefore should only consider the representation of the Licensee as to whether the authorization should include two or three systems.

12. The Licensee was of the view that the authorization should only include two systems, i.e. PCS and 3G. A 3G system was required to provide 3G

services in the Tunnel. [§<], the PCS system was sufficient to cater for the current traffic and future growth. According to the Licensee, it would be unreasonable for the Landowner to ask the Licensee to install the GSM system which is no longer required in the Tunnel.

13. The Licensee added that mobile network operators only maintain either a GSM or PCS system but not both for their 2G network in tunnels. Maintaining both GSM and PCS systems in private tunnels was a wastage of resources and against the industry norm particularly when the traffic was low.

14. Based on the Landowner's counter-offer of HK\$[§<] per month for three networks, namely PCS, GSM and 3G, the average licence fee should be HK\$[§<] per network on a pro-rata basis. The Licensee submitted that as it only required two networks, i.e. PCS and 3G in the Tunnel, the licence fees for two networks should be HK\$[§<]. However, the Licensee was willing to maintain the proposed interim fee at HK\$[§<] for the PCS and 3G networks in the Tunnel.

The Landowner's Representations

15. The Landowner submitted that it would be an abuse of law and the function of the Authority for a mobile network operator to deliberately act in breach of the licence agreement with the tunnel operator and when its licence to place its network was terminated by reason of its own breach, it asked the Authority to grant an authorization to allow it to place the same network in the Tunnel and to re-set the fees.

16. The Landowner submitted that while the Authority might have adopted certain approaches in particular cases when setting the interim fee, each application must be considered on the facts and specific circumstances of the case. According to the Landowner, the principle which the Authority should apply is that provided in section 14(1D) of the Ordinance, namely, a fee which is fair and reasonable in all the circumstances of the case. In appropriate circumstances, past cases may be used as references but they cannot override the fundamental principle set out in section 14(1D) of the Ordinance.

17. The Landowner pointed out that the previous cases referred to by the Licensee were inapplicable to this case because the facts of this case and previous cases are different. The Landowner submitted that it would not be fair and reasonable to compare or use the fees paid by the Licensee to other private tunnel operators as reference due to the specific circumstances and factual background of this case.

18. The Landowner was of the view that the PCS network maintained by the Licensee in the Tunnel was in reality two networks in one since the Licensee has continued to receive the benefit of providing its mobile network services to its GSM and PCS networks customers using the Tunnel. The Landowner opined that to consider the PCS network presently operated by the Licensee in the Tunnel as a single network and to treat this application on a per network basis would be a complete disregard of the reality of the situation.

19. The Landowner agreed with the Authority that to maintain the *status quo*, the interim fee should be the amounts paid by the Licensee for the provision of its mobile network services prior to the termination of the GSM licence agreement and the transfer of its customers previously served by the GSM network to its existing PCS network, namely HK\$[] being the aggregate of monthly fees payable under the GSM licence agreement and the PCS licence agreement.

20. Besides, the Landowner had no objection to the re-installation by the Licensee of the GSM network together with maintaining the PCS network in the Tunnel at the interim fee of HK\$[].

21. The Landowner objected to the Licensee's proposed inclusion of 3G network in the Tunnel for two reasons. Firstly, the proposal to place and maintain its 3G network in the Tunnel was not part of the Licensee's application submitted on 10 September 2010. Secondly, there had never been any discussion between the parties regarding the installation of 3G network in the Tunnel.

22. The Landowner considered that if the Licensee genuinely intended to place and maintain its 3G network in the Tunnel, it should submit details of its proposal to the Landowner for consideration and should make a proper application under section 14(1A) in accordance with the prescribed procedures.

23. The Landowner submitted that if the Authority considered it appropriate to include the Licensee's application for 3G network in its application for PCS network, the authorization should include three systems, namely PCS, GSM and 3G. The Landowner offered HK\$[] for the three systems.

24. The Landowner also submitted that even if the Authority considered that the authorization should include two networks (namely PCS and 3G) instead of three networks, the interim fee should be set on the basis of an interim monthly fee of HK\$[] for the PCS network plus an additional interim monthly fee for the 3G network. The Landowner proposed that the interim monthly fee for the PCS and 3G networks should be HK\$[].

25. The Landowner added that the monthly licence fee of HK\$[] as proposed by the Licensee was unfair and unreasonable as the Licensee would have the benefit of serving subscribers of three networks (PCS, GSM and 3G) but it would only be required to pay for two networks.

26. The Landowner considered that it would also be unfair to other network operators not in breach of their contracts with the Landowner and have been paying similar amount of around HK\$[] per month for two networks. Moreover, it would encourage mobile network operators to use the Ordinance as an instrument to break their commercially negotiated contracts with tunnel operators and to seek the right to place and maintain the same installations in the Tunnel through section 14(1A) applications.

The Authority's Final View

27. After the PA was issued in April 2011, the Licensee submitted in its letter dated 27 May 2011 that deploying PCS and 3G networks would be beneficial to consumers from the public interests point of view and so it should be permitted to place its installations for PCS and 3G networks in the Tunnel at the interim fee of HK\$[] proposed by the Authority. In the Landowner's response to the proposed inclusion of the deployment of 3G network in the Tunnel, the Authority noted that the Landowner had no objection in principle to negotiate with the Licensee on such proposal. The Authority also noted that the

Landowner had no objection to the re-installation by the Licensee of its GSM network in the Tunnel at the total monthly fees of HK\$[§<] for the GSM network and the existing PCS network.

28. Based on the above, the Authority has the following observations. Firstly, both parties agreed that the Licensee should be permitted to place its installations for two networks in the Tunnel. Secondly, the Licensee was invited to provide a properly proposed installation in respect of its 3G system in the Tunnel.

29. Although the section 14(1A) application originally made by the Licensee did not include any 3G system, the Authority is of the view that according to the “technology neutral” approach the Licensee should be allowed to extend the scope of its section 14(1A) application to include the deployment of the 3G network in the Tunnel. The Authority considers this is a more efficient way administratively of using the resources in dealing with section 14(1A) application in the circumstances of this case as it would save any unnecessary duplication of time and efforts if the Licensee eventually lodges a separate fresh application under section 14(1A) of the Ordinance.

30. However, to ensure a due process the parties have been given another opportunity to negotiate. As the Landowner already indicated its willingness to negotiate, the Authority gave the parties a period of about four months to resolve on the Licensee’s proposal to deploy 3G network in the Tunnel by way of commercial negotiation.

31. The parties reported the outcome of their negotiations to the Authority in December 2011. After considering the submissions and representations made by the parties, the Authority notes that while the parties agree in principle to include 3G network to the existing PCS network in the Tunnel, there is disagreement between the parties relating to the amount of the interim fee. Whilst the Landowner asked for HK\$[§<], the Licensee offered to pay HK\$[§<].

32. The Authority is surprised and deeply disappointed that the parties having come all the way through to this stage, but still unable to agree a small amount of HK\$[§<] and need to seek the Authority’s final determination. If not for the special circumstance of this case as explained in paragraphs 27 to 30

above, the Authority would normally not entertain a request for determination under section 14(1A) over a disagreement of a small sum, taking into consideration the fact that the Authority needs to appropriately allocate its resources in discharging its other functions

33. The Authority would like to emphasize that the interim fee which is set is based on the merits of the case. A major issue in dispute arose between the parties after the Licensee's removal of the GSM network as the Licensee's customers previously served by the GSM network have been transferred to be served by the Licensee's PCS network in the Tunnel. Taking into account the factual background and all the relevant circumstances of this case, the Authority has stated in paragraph 63 of the PA that the interim fee should be set at a level which maintains the *status quo* before the dispute arose. The Authority has determined that HK\$[] being the aggregate sum of the monthly fees paid by the Licensee to the Landowner for placing its radiocommunications installations (including the GSM and the PCS networks) in the Tunnel as the interim licence fee. If not for the Licensee's proposal to include the deployment of 3G network in the Tunnel, the Authority would have maintained the interim fee as proposed in the PA.

34. Since both parties have not been able to provide sound justifications for their proposed amount of the monthly interim fee and as there is only a small difference of HK\$[], representing about [] % of the interim fee proposed in the PA, without prejudice to any authorizations under section 14(1A) of the Ordinance to be issued in the future or any future arbitration proceedings, the Authority would simply divide the difference by half or an average of the parties' proposed fees, i.e. $(\text{HK\$}[] + \text{HK\$}[]) / 2$ and set the interim fee at HK\$[].

35. In reaching the monthly interim fee of HK\$[] in this case, the Authority is of the view that such an amount would be the least arbitrary and is within a reasonable range of the level of fees discussed between the parties. Indeed the determination of the fee is a matter for the arbitrator. Having said that, the Authority has an overarching duty to ensure that the interim fee is fair and reasonable in all circumstance of the case. The Authority is also satisfied the interim fee HK\$[] could achieve the policy objective of section 14(1A) and strike a balance between public interest and the interests of the parties concerned.

36. The Authority would like to reiterate that the fee determined is meant to be an interim one and each party's submissions on the final fee to be paid should better be dealt with either by further negotiation or arbitration in accordance with section 14 of the Ordinance. If arbitration is eventually pursued by the parties, the detailed calculation methodology for the determination of the fee should be the subject for deliberation by the arbitrator who has the duty to follow the guidelines issued by the Authority in determining the appropriate amount of fee. The interim fee determined by the Authority under section 14(1D) is only a provisional fee applicable during the interim period pending the determination of the final fee by the arbitrator. If the parties resort to arbitration to determine the final fee, the arbitrator may make provisions for over-payment or under-payment of the interim fee.

Conclusion

37. Having duly considered the submissions made by the parties, the Authority is satisfied that the parties have been afforded a reasonable opportunity to consider the PA and to make representations in response to the PA.

38. The Authority will proceed with the grant of an authorization under section 14(1A) of the Ordinance to the Licensee for placing and maintaining the PCS and 3G radiocommunications service in the Tunnel for the provision of radiocommunications services to the vicinity as specified. Pursuant to section 14(1D) of the Ordinance, the Authority specifies that the monthly interim fee payable by the Licensee to the Landowner shall be HK\$[3<] for the PCS and 3G networks. The section 14(1A) authorization shall take effect from the date of the issue of the authorization. Despite the fact that the 3G network is yet to be installed, the Authority has taken note that there are no technical difficulties for installing the 3G network as the tunnel facilities vacated by the GSM network could be largely utilized for the purpose. Both parties should strive to install the 3G network timely without undue delay. For the avoidance of doubt, the fee specified by the Authority is an interim one and may be replaced with agreement between the parties or awards by the arbitrator.

**Office of the Communications Authority
4 May 2012**