

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

Preliminary Analysis

Background

On 10 September 2010, CSL Limited ("CSL") made an application to the Telecommunications Authority ("TA") for an authorization pursuant to section 14(1A) of the Telecommunications Ordinance (the "Ordinance") to place and maintain radiocommunications installations in the Tai Lam Tunnel (the "Tunnel") for provision of its Personal Communications Services ("PCS") under the Unified Carrier Licence No. 008. The Tunnel is maintained and operated by Route 3 (CPS) Company Limited ("R3CPS") in pursuance of the provisions of the Tai Lam Tunnel and Yuen Long Approach Road Ordinance (Cap. 474).

2. Before 30 November 2009, CSL had two separate agreements with R3CPS for placing and maintaining radiocommunications installations in the Tunnel for provision of its PCS and GSM services (hereinafter referred to as "PCS licence agreement" and the "GSM licence agreement" respectively). Since 30 November 2009, CSL has terminated the GSM licence agreement with R3CPS and removed its GSM network installations from the Tunnel. At present, CSL only maintains its PCS network at the Tunnel.

3. The expiry date of the PCS licence agreement is 2025 and according to the agreement, either party may terminate the agreement by giving a six-month advance notice to the other party. According to Schedule 3 of the agreement, the monthly fee paid by CSL to R3CPS shall be adjusted on 1st August of each year by a rate of increase which is the highest of the following adjustment factors –

- (a) the inflation rate;
- (b) the percentage by which the average daily number of vehicles using the

Tunnel in June in the calendar year exceeds the average daily number of vehicles using the Tunnel in June in the immediately preceding calendar year; and

- (c) the percentage by which the average number of subscriber units to CSL's PCS network in June in the calendar year exceeds the average number of subscriber units to CSL's PCS network in June in the immediately preceding calendar year.

4. CSL and R3CPS "the parties" carried out the annual review on 1 August 1999 and on each anniversary of the review date. According to the PCS licence agreement, the "subscriber units" mean any mobile telephone units that are able or entitled to utilise CSL's PCS network in Hong Kong. The rate of increase referred to in paragraph 3 above was subject to a cap of [x%] % in 1999-2000, [x%] % in 2000-2001, and [x%] % in 2001-2002 and 2002-2003. No cap was applied to the rate of increase after August 2003. The monthly fee for 2008-2009 was HK\$[x], which was calculated based on the inflation rate. The monthly fee for 2009-2010 was kept at HK\$[x] as there was negative growth in all the three adjustment factors.

5. After CSL's removal of its GSM network from the Tunnel, a dispute arose between the parties when CSL transferred its GSM network customers to its PCS network. R3CPS asked CSL to provide information about the number of subscriber units in order to review the monthly fee for the period from 1 August 2010 to 31 July 2011 in accordance with the PCS licence agreement. Despite R3CPS's requests, CSL did not provide the number of subscriber units to R3CPS. On 22 March 2010, R3CPS gave a notice to CSL to terminate the PCS licence agreement with effect from 22 September 2010.

6. The parties then started commercial negotiations. During the negotiations, CSL first proposed the new monthly licence fee of HK\$[x] and then HK\$[x] as this amount is the existing PCS licence fee being paid by CSL and it represents the fee level which was previously agreed by the parties for 2009-2010. R3CPS did not accept those proposed fees and counter proposed a fee of HK\$[x], which was the aggregate sum of the monthly licence fees for the PCS and GSM networks operated by CSL before CSL removed its GSM network, including a [x%] % increase on PCS licence fee applied for annual renewal

adjustment¹. R3CPS's counter offer was not accepted by CSL.

7. After negotiating with R3CPS for six months, CSL envisaged that the difference between the parties could not be reconciled without the intervention of the TA and therefore sought the present authorization. Pending the outcome of this application, the parties agreed to extend the PCS licence agreement at a licence fee of HK\$[] per month until a new arrangement is either reached by commercial negotiations or determined by the TA.

8. CSL's proposed radiocommunications installation ("Installation") is given in Appendix 1 of its application dated 10 September 2010.

Legal Basis

9. The TA is empowered under section 14(1A) of the Ordinance to grant an authorization to any licensee to –

- (a) place and maintain a radiocommunications installation in, over or upon any land for the purpose of providing a radiocommunications service to a public place; and
- (b) enter any such land for the purpose of
 - (i) inspecting it; or
 - (ii) other activities which are for the purpose of or incidental to the maintenance and placement of the installation.

10. Under section 14(1B) of the Ordinance, the TA shall not grant an authorization referred to in section 14 (1A) –

- (a) unless he is satisfied that the authorization is in the public interest;
- (b) except after taking into account –
 - (i) whether an alternative location can be reasonably utilized for

¹ Monthly fee for PCS network was HK\$[] while that for GSM network was HK\$[]. R3CPS's offer is based on the sum of monthly licence fees for PCS and GSM networks, plus a [] % increase in PCS licence fee for annual renewal adjustment i.e. HK\$[] x (1+ [] %) + HK\$[] = HK\$[], and rounded up to HK\$[].

- placing the radiocommunications installation to which the authorization, if granted, will relate;
- (ii) whether or not there are technical alternatives to the installation;
 - (iii) whether or not the utilization of the land to which the authorization, if granted, will relate is critical for the supply of the service by the licensee seeking the authorization;
 - (iv) whether or not that land has available capacity to be so utilized having regard to the current and reasonable future needs of the occupants of that land; and
 - (v) the costs, time, penalties and inconvenience to the licensee and the public of the alternatives, if any, referred to in subparagraph (ii);
- (c) unless he has given a reasonable opportunity to the persons having a lawful interest in the land concerned and to the licensees concerned to make representations and has considered all representations made before he decides whether or not to grant the authorization; and
- (d) unless he –
- (i) gives reasons in writing for the grant of the authorization; and
 - (ii) specifies in writing the technical requirements, if any, of the right of access arising from the authorization.

11. Having considered the foregoing, the TA is satisfied that this application falls within the framework of section 14(1A) of the Ordinance for the following reasons –

- (a) this application is for placing and maintaining a radiocommunications installation of CSL, being a unified carrier licensee licensed to operate public mobile radiocommunications services; and
- (b) the Tunnel constitutes a “public place” as defined under the Ordinance.

The Proceedings

12. The TA invited R3CPS to make representations in relation to CSL’s application. R3CPS made representations on 26 October 2010 and CSL in turn submitted its comments on R3CPS’s representations on 16 November 2010. In response to the TA’s enquiry regarding the calculation of the existing monthly fee, R3CPS and CSL

provided the information on 10 and 21 January 2011 respectively.

13. In CSL's letter of 21 January 2011, it stated that the licence fee payable by CSL to R3CPS would increase significantly if Schedule 3 of the PCS licence agreement were applied to determine the licence fee for 2010-2011. In response to the TA's request for clarification on 1 February 2011, CSL confirmed in its letter of 16 February 2011 that the calculation of the increase in the licence fee was based on the "subscriber units" as defined in the PCS licence agreement and the figures in the wireless service statistics reports for June 2009 and June 2010 submitted to the TA by CSL.

Representations and TA's Preliminary Views

14. The comments and representations of the parties and the preliminary views of the TA after taking into consideration all the submissions and representations made by the parties are given in the paragraphs below.

Public Interest - Section 14(1B)(a)

CSL's Representations

15. CSL submitted that the Tunnel, 3.8 kilometres in length, is the longest tunnel in Hong Kong. The Tunnel provides a major access route within Hong Kong linking Ting Kau and Au Tau in Yuen Long and approximately 40,000 vehicles use this route daily. Disconnection of CSL's services would trigger public safety issue for all Tunnel users because if a vehicle broke down or there was an accident or delay in the Tunnel, CSL's customers would not be able to use their mobile phones. CSL submitted that no satisfactory call could be maintained by its customers in the Tunnel without the Installation.

R3CPS's Representations

16. R3CPS made no comment on whether the grant of an authorization would be in the public interest. However, R3CPS pointed out that CSL has exaggerated the public safety concern arising from the disconnection of its mobile services for all Tunnel users as the traffic within the Tunnel is constantly monitored by R3CPS's staff. R3CPS submitted that 152 accessible emergency telephones with direct connection to

the Control Room are installed inside the Tunnel.

TA's Preliminary View

17. The TA, in considering the public interest of this application under section 14(1B)(a) of the Ordinance, has taken into account the following factors –

- (a) whether the provision of an extensive and reliable radio coverage of public radiocommunications services to the general public is consistent with the policy of the Government;
- (b) the inconvenience to the general public if the authorization under section 14(1A) of the Ordinance is not granted;
- (c) whether the parties had engaged in negotiations for a protracted period but failed to reach an agreement; and
- (d) the maintenance of a light-handed regulatory environment, which obviates the need for regulatory intervention unless so justified on public interest grounds.

18. The TA considers that it would be in the public interest to ensure the continuation of uninterrupted and reliable radiocommunications services for the road users crossing the Tunnel, which would be unduly hindered if CSL could not place and maintain the Installation within the Tunnel. The TA is also of the view that it is unlikely that CSL and R3CPS could reach an agreement in the near future given the fact that the parties have been negotiating since April 2010 and their views on the amount of licence fee are divergent.

19. Having considered the parties' representations, the TA is satisfied that his intervention in this case is justified and the grant of an authorization under section 14(1A) of the Ordinance is in the public interest.

Considerations under Section 14(1B)(b)

Whether an alternative location can reasonably be utilized for placing the Installation

20. CSL submitted that as the Tunnel was situated under the Tai Lam Country Park and was entirely enclosed by mountains, the physical landscape presented difficulties

for mobile coverage, in particular radio attenuation resulting in a variation of the intensity of the radio signal in the area. CSL also submitted that given the length of the Tunnel, it was impossible for it to provide adequate mobile coverage for the Tunnel through neighbouring outdoor radiocommunications installations.

21. R3CPS had no comment on the viability of placing the Installation at any other alternative locations.

22. Taking into account the length of the Tunnel which is 3.8 kilometres long and its shielded environment, the TA considers that CSL would not be able to provide reliable radiocommunications services to the mobile phone users inside the Tunnel by using outdoor base stations.

23. Having been satisfied that reasonable opportunity has been given to the parties to make representations on this issue and having considered their representations, the TA is of the view that there is no alternative location, other than the land required for the Installation by CSL as set out in Appendix 1 of its application dated 10 September 2010 (“the land concerned”), that can be reasonably utilized for placing the Installation for providing uninterrupted and reliable radio coverage to the Tunnel.

Whether or not there are technical alternatives to the Installation

24. Having explored different technical alternatives to replace the Installation, CSL submitted that given the present available technology and geographical constraints, there was no satisfactory alternative to provide radiocommunications services for the Tunnel.

25. R3CPS had no comment on the availability of other technical alternatives.

26. Given the present state of technology that is practically available and the geographical constraints, the TA is satisfied that for the provision of radiocommunications services to the Tunnel, there is no other technical alternative to replace the Installation.

Whether or not the utilization of the land to which the authorization, if granted, will relate is critical for the supply of the service by the licensee seeking the authorization

27. CSL stated that the land concerned was uniquely important and was essential for the smooth and uninterrupted service operation of CSL's mobile services within Hong Kong. CSL considered that the utilization of the land was critical for CSL to continue to provide quality mobile services to its customers passing through the Tunnel and so it was in the best interest of the public that the service be continued without interruption.

28. R3CPS had no comment on whether the utilization of the land concerned was critical to the supply of the services provided by CSL.

29. For the provision of adequate radio coverage to the Tunnel, the TA agrees that the Installation is necessary for the provision of uninterrupted and satisfactory radiocommunications services within the Tunnel. The utilization of the land concerned to which the authorization, if granted, will relate is therefore critical for the supply of the services by CSL.

Whether or not that land has available capacity to be so utilized having regard to the current and reasonable future needs of the occupants of that land

30. CSL submitted that the Installation had been in place in the Tunnel for many years and no issue had ever arisen as to the space they had occupied in the Tunnel. CSL considered that the Tunnel had both structural and physical capacity to continuously accommodate the Installation. CSL also considered that the locations of the land occupied by the Installation would not prejudice the enjoyment of R3CPS or otherwise interfere with any other specific land users both presently and in the future.

31. R3CPS submitted that the land concerned had the available capacity to accommodate the Installation with regard to CSL's current needs.

32. The Installation has already been placed in the land concerned. In view of the fact that there is no dispute between the two parties about the availability of the land concerned, the TA is of the preliminary view that the land concerned has available capacity to be utilized for placing the Installation having regard to the current and reasonable future needs of occupants of the land concerned.

The cost, time, penalties and inconvenience to the licensee and the public of the

alternatives, if any, referred to in subparagraph (ii) of section 14(1B)(b)

33. As, in respect of sections 14(1B)(b)(i) and (ii) of the Ordinance, there is no alternative locations or technical alternatives to replace the Installation, the TA considers that this consideration is not applicable.

Other Considerations

CSL's Representations

34. CSL requested the TA to grant an authorization on an urgent basis since R3CPS had sought to terminate the PCS licence agreement on 22 September 2010. CSL considered that there would be sufficient time for the TA to conduct a limited consultation for a short authorization. CSL requested that a temporary authorization should be granted which is limited for a period of three months and during the 3-month period, the application for a longer authorization could be considered and more detailed consultation with the parties could be conducted.

35. Concerning the terms and conditions of the authorization, CSL asked for an interim fee pursuant to section 14(1D)(a) of the Ordinance (including the terms and conditions in accordance with which the fee shall be payable) to be paid by CSL to R3CPS.

R3CPS's Representations

36. R3CPS submitted that the TA had no power under the Ordinance to entertain CSL's requests for an authorization without conducting the necessary consultation or issue an authorization for a limited period of time. Nevertheless, noting that this application was being processed, the parties agreed by correspondence² that the PCS licence agreement would be extended until a new arrangement would be either reached by commercial negotiations or determined by the TA.

37. R3CPS also submitted that it was always willing to allow CSL to continue to operate its telecommunications services at the Tunnel provided that CSL paid the monthly fee previously agreed between the parties under the PCS licence agreement

² CSL's letter dated 22 September 2010 and R3CPS's letter dated 20 October 2010.

or a monthly fee which should be fair and reasonable, not only to the parties but also to other mobile network operators at the Tunnel.

TA's Preliminary View

38. The TA notes that the disagreement between the parties is essentially relating to the amount of licence fee. The TA will address the parties' concerns in the paragraphs below.

Request for Determination on Interim Fee

39. Under section 14(1D) of the Ordinance, the TA shall, upon application made to him, specify in writing an interim fee (including the terms and conditions in accordance with which it shall be payable) to be paid by the licensee to the landowner. In any future arbitration proceedings for the determination of the fee under section 14(5)(b) of the Ordinance, regard shall not be given to the amount of interim fee imposed by the TA. In a determination under section 14(5)(b), the arbitrator shall, in specifying the fee to which the determination relates, include provisions for set-off of any interim fee paid.

CSL's Representations

40. CSL submitted that the TA should adopt the approach he has taken in the past in determining an interim fee under section 14(1D) and not to consider the details of each party's submissions in support of their respective proposed fees as this is a matter for the arbitrator.

41. CSL considered that the TA should use the fee level that was previously agreed by the parties as the leading reference. In addition, the TA should consider the licence fees agreed commercially by CSL or other mobile operators in respect of similar radiocommunications for other private tunnels or the Tunnel itself.

42. CSL proposed that the interim fee should be HK\$[] per month for the following reasons –

- (a) For the year ended 31 December 2009, CSL paid a monthly licence

fee of HK\$[REDACTED]] in respect of the 2G services in the Tunnel;

- (b) The average licence fees in respect of 2G services that CSL pays to other private tunnel operators are HK\$[REDACTED]] at Tate's Cairn Tunnel, \$[REDACTED]] at Western Harbour Tunnel and HK\$[REDACTED]] at Eastern Harbour Tunnel. This gives an average monthly licence fee of HK\$[REDACTED]]. All of these payments are made pursuant to commercial agreements and the radiocommunications installations are similar to CSL's installations in the Tunnel;
- (c) In comparison to the other private tunnels, the licence fees paid by CSL in respect of the 2G services for the Tunnel is the highest, even though the average daily traffic in the Tunnel is the lowest among all the private tunnels;
- (d) The charges paid to tunnel operators are excessive. The TA should take the opportunity to set a lower fee that is more in line with the lower fees paid by CSL to other landowners. While HK\$[REDACTED]] reflects the average fee payable, it should be treated as an upper bound as it still does not reflect a competitive market and hence not a true "market benchmark"; and
- (e) The excessive fees charged by R3CPS and other tunnel operators are demonstrated by the position adopted by R3CPS in the present dispute. R3CPS sought to increase CSL's monthly fee by a substantial amount. This is notwithstanding that the space occupied by the Installation at the Tunnel has not changed and the nature of the Installation remains the same. In the normal circumstance, there would be no basis upon which R3CPS could seek such an increase in fees if it were an ordinary landowner other than an owner of the Tunnel.

43. CSL also submitted that if the TA did not consider that the amount of HK\$[REDACTED]] was an appropriate interim fee, in the alternative, the amount of HK\$[REDACTED]], being the amount that is the existing PCS licence fee paid by CSL, should be set as the interim fee.

R3CPS's Representations

44. R3CPS did not agree that the licence fees paid to tunnel operators in Hong Kong were excessive. R3CPS submitted that it was not the function of the TA to consider whether licence fees paid to tunnel operators in Hong Kong were excessive or too low and the TA should not set the fees except in accordance with the Ordinance.

45. R3CPS considered that the basis on which they determine the licence fees payable by CSL and the other mobile network operators at the Tunnel, namely, by taking into account the number of their subscribers was fair and reasonable because the larger their numbers of subscribers, the more benefit the mobile network operators would derive from their operation at the Tunnel. R3CPS considered that the area of space occupied by the installations of mobile network operators at the Tunnel, though being one of the factors that R3CPS would take into account, was only a relatively minor consideration.

46. R3CPS did not comment on the fees allegedly paid by CSL to other tunnel operators as R3CPS had not been provided with full information as to when and how such licence fees were determined and the other terms and conditions of the licences. The commercial strategy, customer mix, territorial location and length of the various tunnels were not identical and should thus not be benchmarked.

47. R3CPS submitted that the monthly licence fee paid by CSL to R3CPS pursuant to the PCS licence agreement until 31 July 2010 was HK\$[REDACTED]. R3CPS stated that the monthly licence fee was not the highest comparing with those currently paid by other 2G operators to R3CPS. One of the 2G operators was paying a monthly fee of HK\$[REDACTED] and the average monthly fee currently paid by 2G operators to R3CPS was approximately HK\$[REDACTED].

48. R3CPS proposed that the interim fee should be HK\$[REDACTED] per month which was the aggregate sum of the monthly fee most recently paid by CSL for the PCS network with [REDACTED] % renewal adjustment and the monthly fee paid by CSL for the GSM network prior to the termination of the GSM licence agreement. R3CPS stated that it was willing to review its proposed fee upon CSL's provision of the subscriber number to R3CPS. R3CPS reiterated that according to the PCS licence agreement, the monthly licence fee was due to be reviewed in August 2010 but CSL had withheld the relevant information from R3CPS. R3CPS was of the view

that CSL had not made any genuine and reasonable endeavour to negotiate with R3CPS on the new licence fee.

CSL's Further Representations

49. Regarding its subscriber numbers, CSL submitted that R3CPS placed too much emphasis on this consideration and ignored the fact that the PCS licence agreement had been concluded in 1998 and could not reasonably reflect the latest market situation. CSL considered that other considerations such as inflation indexing and average daily number of vehicles using the Tunnel were of greater relevance to determining the monthly fee. CSL also submitted that calculating the fee with reference to the number of subscriber units would inflate the monthly fee without taking into account other adjustments provided for in the guidelines issued by the TA concerning the application of the principles for the determination of fees in arbitration proceedings. CSL pointed out that even if subscriber numbers had increased, the average revenue per user was decreasing; and there was no correlation between increased subscriber numbers and revenue to CSL. It would therefore be unfair for R3CPS to use such an increase in subscriber numbers as the basis for calculating the annual adjustment of the monthly fee.

50. CSL submitted that although the monthly fee paid by CSL to R3CPS was the highest in comparison to the fees paid by CSL in respect of three other private tunnels in Hong Kong, all with similar radiocommunications installations, neither the traffic volume in the Tunnel nor income generated from that traffic volume could justify the monthly fee R3CPS is charging.

51. CSL also submitted that given R3CPS's monopoly power as the owner of the Tunnel for which there were no reasonable or practicable substitutes, agreements with other carriers and the fees payable by them provided no useful guidance in determining an interim fee. Therefore, the fees charged by R3CPS to other mobile network operators did not reflect a true, competitive and commercial outcome.

52. CSL disagreed that it had not made any genuine and reasonable endeavours to negotiate with R3CPS. The fact that CSL proposed a rate lower than R3CPS's suggested rate did not mean that CSL had not made any genuine and reasonable endeavour to negotiate. CSL submitted that it had initiated a number of discussions

and meetings with R3CPS and had taken all reasonable steps to explain what CSL considered was fair and reasonable.

53. CSL reiterated that the determination of the licence fees paid to a tunnel operator was a matter of broad public interest. CSL submitted that the best way for the TA to proceed with this application was to preserve the status quo as regards the amount of the monthly fee payable by CSL to R3CPS. CSL considered this was appropriate until the parties could reach a commercial resolution or the matter would proceed to arbitration.

TA's Preliminary View

54. The TA considers that, in line with the approach adopted in dealing with the previous applications for authorization under section 14(1A) of the Ordinance, he would not go into the details of each party's submissions in support of their respective proposed fees. The determination of the fee is a matter for the arbitrator. Any detailed assessment of the relevant considerations should be left to the arbitrator, who is obliged under section 14(6)(a) of the Ordinance to have regard to the guidelines issued by the TA on the principles to be adopted for determining a fee. It is expressly provided in section 14(6) of the Ordinance that the arbitrator shall not give regard to the amount of any interim fee specified by the TA.

55. The interim fee set needs to be fair and reasonable in all the circumstances of the case as it is required by the law. Thus the interim fee to be set must be based on the facts, evidence and the specific circumstances of each case. While the precedents and past cases would be of referential value to the TA, he has to exercise his judgment and discretion in individual cases. For the avoidance of doubt, nothing herein below should prejudice the contention by each party in any future arbitration.

56. The TA notes the following evidence provided by the parties -

- (a) CSL had prior to this application placed and maintained PCS and GSM network installations in the Tunnel under separate licence agreements for a period of about 10 years;
- (b) Before the GSM network was removed, the monthly fees paid by CSL

to R3CPS for its GSM network and PCS network were HK\$[] and HK\$[] respectively, making it a total of HK\$[];

- (c) The average amount of the monthly licence fee currently paid by each of the other four mobile network operators to R3CPS for placing their radiocommunications installations (including 2G and 3G networks) in the Tunnel is approximately HK\$[];
- (d) R3CPS's proposal of an interim fee of HK\$[] per month for the PCS network is based on the amount it previously charged CSL for the GSM network and the PCS network with an increment of [] % applied to the PCS licence fee; and
- (e) After the termination of the GSM licence agreement and the removal of GSM network from the Tunnel in November 2009, the customers previously served by the removed GSM network are now served by CSL's existing PCS network in the Tunnel.

57. The TA notes CSL's submission of the monopoly position of the tunnel operators in general in charging the licence fees for tunnel access, and hence the average licence fee it pays to the private tunnel operators other than R3CPS does not represent a true market benchmark. Applying the same logic, the licence fees R3CPS received from operators other than CSL should not be taken as the market benchmark as well. The TA would like to point out that these fees are all market outcomes arrived through commercial negotiations between the mobile network operators and the tunnel operators. The direction of payment and the level of fees are dependent on the economic value of mobile connection in the tunnel as assessed by each party for itself in the negotiation process. These are thus fair and reasonable references available to the TA in setting the interim fee.

58. The TA also notes that since the introduction of section 14(1A) of the Ordinance in 2000, the PCS licence agreement has continued in force for nearly a decade and prior to the application for the authorization, CSL has paid the monthly licence fee according to this commercially negotiated agreement.

59. CSL terminated the GSM licence agreement in November 2009 and the

customers previously served by the removed GSM network are now served by CSL's existing PCS network in the Tunnel. In view of such change, R3CPS asked CSL to provide the number of subscribers served by CSL's PCS network in order to calculate the licence fee. CSL was not willing to provide the information because it was of the view that the PCS licence agreement had been concluded in 1998 and that it did not reflect what might be fair and reasonable in the current market. As a result, R3CPS decided to exercise its right under the PCS licence agreement and terminate the PCS licence agreement.

60. The TA notes that CSL has continued to provide statistics on the number of PCS subscribers to R3CPS for the annual fee review up to June 2009. The operating environment, however, has changed following the termination of the GSM licence agreement by CSL in November 2009, with its GSM customers also being served by the PCS network in the Tunnel now. The TA is of the view that if either CSL or both CSL and R3CPS find that the existing PCS licence agreement is no longer applicable to the new operating environment, they should continue to commercially negotiate with a view to agreeing on an alternative fee settlement mechanism. The TA is not empowered by the law to resolve such dispute and cannot decide the ultimate level of licence fee which is a matter for the arbitrator. If the parties still cannot reach an agreement after an authorization is made and an interim fee is set by the TA, the dispute may be resolved by arbitration under the law according to the guiding principles laid by the TA in accordance with section 14 of the Ordinance.

61. The TA notes that CSL's proposed interim monthly fee of HK\$[§<], being the average of the licence fees CSL paying to the other three private tunnel operators or alternatively the existing monthly fee of HK\$[§<], has not taken into account the facts and evidence mentioned in paragraph 56 above.

62. On the other hand, the TA notes that R3CPS offered HK\$[§<] to CSL as the interim fee which is the aggregate sum of the monthly licence fees for the PCS and GSM networks operated by CSL, including a [§<] % increase on the PCS licence fee applied for annual renewal adjustment. Taking into account all those matters discussed in paragraphs 56 to 61, the TA considers that in ensuring the interim fee is fair and reasonable he ought to give due weight to the amount of licence fee which R3CPS is asking as this has been commercially agreed between the two parties and customarily settled by CSL.

63. As the parties cannot reach agreement on the new calculation method of the licence fee, it appears that the interim fee should be set at a level which maintains the status quo before the dispute arose. In this regard, given the justification for the [x<] % adjustment is unclear, the TA is of the view that HK\$[x<], being the aggregate sum of the monthly fees paid by CSL to R3CPS for placing its radiocommunications installations (including the GSM and PCS networks) in the Tunnel, is more appropriate than HK\$[x<] as the interim licence fee. Not only CSL has been paying this amount over a considerable period, which it now claimed to be unreasonable, other network operators have also been paying an average amount of monthly licence fee at HK\$[x<] for placing their radiocommunications installations (including 2G and 3G networks) in the Tunnel.

64. The TA is satisfied that the amount of HK\$[x<] as interim fee is fair and reasonable for CSL to place the Installation in the Tunnel and the parties may resurrect their commercial negotiations or opt for arbitration for the determination of the fee. For the avoidance of doubt, the interim fee to be determined by the TA is a provisional fee only. If the parties proceed to arbitration to determine the access fee, the arbitrator may make provisions for set-off of any interim fee paid in excess of the determined fee by the arbitrator.

Preliminary View on Whether or Not the Authorization should be Granted

65. Having been satisfied that a reasonable opportunity has been given to the persons having a lawful interest in the land concerned and to the licensee concerned to make representations and having considered all the representations made before him pursuant to section 14(1B)(c) of the Ordinance, the TA is satisfied that the grant of an authorization to CSL under section 14(1A) of the Ordinance for CSL to maintain the Installation on the land concerned to provide radio coverage within the Tunnel is in the public interest after taking into account that –

- (a) no alternative locations other than the land concerned can be reasonably utilized for placing the Installation to which, the authorization, if granted, will relate;
- (b) there are no technical alternatives to the Installation;
- (c) the utilization of the land concerned to which the authorization will

relate is critical for the supply of quality service by CSL;

- (d) the land concerned has available capacity to be so utilized having regard to the current and reasonable future needs of the occupants of that land; and
- (e) the cost, time, penalties and inconvenience to CSL and the public of the alternatives, if any, referred to in (b) above are irrelevant because the TA is satisfied that there is no technical alternative to the Installation.

Interim fee

66. Pursuant to section 14(1D) of the Ordinance, the TA hereby specifies that the monthly interim fees payable by CSL to R3CPS should be HK\$[] for placing and maintaining the Installation at the Tunnel.

Invitation for further representations

67. The TA invites the parties to make comments and representations, if any, on this Preliminary Analysis for his due consideration before he makes the final decision as to whether the authorization under section 14(1A) of the Ordinance should be granted, and if the authorization is to be granted, the level of the interim fee and the technical requirements, if any, of the right of access arising from the authorization.

Office of the Telecommunications Authority
26 April 2011