

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

Licensee: Hong Kong Telecommunications (HKT) Limited

Landowner: Route 3 (CPS) Company Limited

Date: 21 April 2017

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 Hong Kong Telecommunications (HKT) Limited, the holder of Unified Carrier Licence No. 008;

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

“4G Services” refers to the public mobile radiocommunications services which are operated by the Licensee using fourth generation mobile technologies and the spectrum 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 17 March 2017;

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 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 22 October 2016 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 22 October 2016.
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.

(Esmond Chiu)
for Communications Authority

Schedule 1

Such radiocommunications installation as is reasonably required for the purpose of providing 4G Services which are licensed under Unified Carrier Licence No. 008 issued to the Licensee on 22 October 2016.

Schedule 2

Location of the land concerned:

1. Details of the installation locations as shown in item (iv) of the submission of the Licensee on 5 October 2016, which supplemented its application dated 6 September 2016, or as agreed between the Licensee and the Landowner, 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 Passages 2, 6, 12, 19, 26, 31 and 35 of Tai Lam Tunnel with equipment installed; and
- (c) The Land between the North and South Portals, Cross Passages 2, 6, 12, 19, 26, 31 and 35 which is necessary for the laying of ancillary facilities for interconnection of the radiocommunications installation and the facilities installed in the twin tubes, Cross Passages 2, 6, 12, 19, 26, 31 and 35.

Schedule 3

Interim Fee

An interim fee of HK\$[~~8~~] per month payable by the Licensee to the Landowner of the land concerned for placing all the equipment and antennas the particulars of which are specified in Schedule 2 to this authorization 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 Tai Lam Tunnel
by Hong Kong Telecommunications (HKT) Limited**

Final Analysis

Introduction

An application was made by Hong Kong Telecommunications (HKT) Limited (the “Licensee”) on 6 September 2016 to the Communications Authority (the “Authority”) for the grant of an authorization pursuant to section 14(1A) of the Telecommunications Ordinance (Cap. 106) (the “Ordinance”) to place and maintain its radiocommunications installation (the “Installation”) in the Tai Lam Tunnel (the “Tunnel”) for the provision of fourth generation (“4G”) services under the Unified Carrier Licence No. 008 (the “Application”). The Tunnel is maintained and operated by Route 3 (CPS) Company Limited (the “Landowner”) in accordance with the Tai Lam Tunnel and Yuen Long Approach Road Ordinance (Cap. 474). The Licensee had been negotiating with the Landowner for a new agreement for placing and maintaining the Installation in the Tunnel since September 2015. 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 resolved or settled without the intervention of the Authority and therefore sought the present authorization.

2. Having considered the parties’ submissions on the Application, the Authority issued its Preliminary Analysis (“PA”) on 17 March 2017 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.

Submissions made by the Parties

3. The Landowner and the Licensee submitted their comments on the PA on 30 and 31 March 2017 respectively. The Authority has taken

into account all the submissions received and set out below its final views on the Application. 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

4. The Licensee accepted the PA and the interim fee of HK\$[~~8~~] per month set by the Authority.

The Landowner's Representations

5. The Landowner submitted that the Licensee's voluntary termination of the two agreements in mid-2016 for the provision of part of its second generation ("2G") and third generation ("3G") services in the Tunnel was contradictory to its claim that the mobile traffic growth in the Tunnel had caused congestion of its existing 2G/3G network. The Landowner considered that the Licensee's main purpose of applying for the authorization was to avoid the payment of higher level of licence fee to the Landowner by using the mechanism provided under section 14(1A) of the Ordinance.

6. The Landowner commented that in the PA, the Authority had not realised that the Licensee's proposed Installation in the Tunnel would or was mainly to increase the commercial value of its 4G services. The Landowner also questioned the accuracy of defining the 4G regular users as public at large unless the Authority knew the average number of the Licensee's 4G users passing the Tunnel per day. The Landowner was of the view that the public could opt for other mobile network operator(s) ("MNOs") which were already providing 4G services in the Tunnel.

7. The Landowner considered that the total number of regular users of the Tunnel should be larger than the number of the Licensee's 4G regular users passing the Tunnel. The Landowner contended that a larger group of regular users of the Tunnel should not subsidise the Licensee, a private company, for serving its niche group of 4G customers.

8. The Landowner challenged the Authority's method of determining the interim fee and repeated its submission that the proposed

interim fee by the Authority was inconsistent with section 16(6)(b) of Tai Lam Tunnel and Yuen Long Approach Road Ordinance (Cap. 474) (i.e. to impose similar terms and conditions (including charges) as regards all installations of utilities within the toll area).

9. The Landowner disagreed with the interim fee because it was not in line with the contractual amount which it had agreed with another MNO.

The Authority's Final View

10. The Authority noted that the Landowner raised various issues concerning the public interest and the interim fee and what it considered should be the appropriate level of the interim fee.

Public Interest – Section 14(1B)(a)

11. The Authority would like to reiterate that when considering the public interest of the Application under section 14(1B)(a) of the Ordinance, it has taken into account all the relevant information, comments and representations it received from the parties, as well as taking into account the factors as stated in paragraph 17 of the PA (the “relevant matters”).

12. Having carefully considered all the relevant matters, the Authority maintains its view that there is public interest to ensure the continuation of uninterrupted and reliable radiocommunications services for members of the public when travelling in the Tunnel. This is in line with the Government's policy objectives that the widest range of quality telecommunications services should be available to the community at reasonable cost and that the telecommunications services should be provided in the most economically efficient manner possible. The provision of 4G services to a large number of members of the public who are customers of the Licensee would be unduly hindered if the Licensee could not reasonably place and maintain the Installation in the Tunnel. If such customers had to switch to other MNOs in order to have access to 4G services inside the Tunnel, this would not be an efficient provision of telecommunications services and would unduly restrict the choice of consumers in having access to telecommunications services.

13. Based on all the available evidence, the Authority is of the view that it is unlikely that the Licensee and the Landowner are able to reach an agreement in the near future since the parties are yet to reach an agreement on the licence fee since their negotiation began in September 2015. Having

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

Interim Fee – Section 14(1D)

14. With respect to the interim fee, the Authority is of the view that in this Authorization the interim fee for the Installation should be set at a level which could better reflect the *status quo* of commercially agreed arrangement between the two parties before the dispute arose between them. This approach has been followed wherever justified in the circumstances of the case and that has also been explained in paragraphs 51 to 59 of the PA. The Authority considers it appropriate to adopt the per system basis approach, the *status quo*, in determining the interim fee for placing and maintaining the MNOs' radiocommunications installations in the tunnels pursuant to section 14(1D) of the Ordinance. On that basis, the Authority is of the view that the monthly interim fee of HK\$[] as proposed in the PA should be maintained.

15. The Authority would like to emphasise that the interim fee does not prejudice any future contentions by the parties if they resurrect their commercial negotiations or opt for arbitration for the determination of the fee. As mentioned above, the interim fee would reflect the commercially agreed arrangement for installation of similar radiocommunications facilities between the two parties before the subject dispute. As stated in paragraph 49 of the PA, it is noted that the Licensee is willing to negotiate with the Landowner its method of calculation on condition that certain criteria could be reasonably agreed. The Authority would encourage the Landowner to continue further negotiations on the monthly licence fee with the Licensee and/or other MNOs, and it is prepared to offer all reasonable assistance if necessary. As far as section 16(6) of Tai Lam Tunnel and Yuen Long Approach Road Ordinance (Cap. 474) is concerned, given that the Landowner has this obligation, the Landowner might take into account all the existing agreements with the Licensee and other MNOs for installation of similar radiocommunications facilities inside the Tunnel, including the charges and terms and conditions for these agreements, in further negotiations with the Licensee with a view to arriving at a mutually agreed charging arrangement.

16. The Authority would like to reiterate that the fee determined is meant to be interim 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 following 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 interim fee.

Conclusion

17. 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.

18. 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 Installation in the Tunnel for the provision of 4G 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\$[] for the 4G network. The section 14(1A) authorization shall take effect from the date of the issue of the authorization. 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 future awards by the arbitrator.

Office of the Communications Authority
21 April 2017