**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: 27 September 2018

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);

"2G Services" refers to the public mobile radiocommunications services which are operated by the Licensee using second generation mobile technologies and the spectrum listed in Schedule 3 to Unified Carrier Licence No. 008;

"2G System" refers to the radiocommuications installation for the provision of 2G Services;

"3G Services" refers to the public mobile radiocommunications services which are operated by the Licensee using third generation mobile technologies and the spectrum listed in Schedule 3 to Unified Carrier Licence No. 008;

"3G System" refers to the radiocommunications installation for the provision of 3G Services; 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 21 August 2018;

*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.

( Sanda Cheuk )
for Communications Authority

## Schedule 1

Such radiocommunications installation as is reasonably required for the purpose of providing 2G and 3G 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 Appendix #4 of the submission of the Licensee on 27 April 2018, which supplemented its application dated 16 April 2018, 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 Portal (the roof and Telecom Room 7), South Portal (the roof and Telecom Room 7), Cross Passages 6, 12, 19, 26 and 31 of Tai Lam Tunnel with equipment installed; and

(c) The Land between the North and South Portals, Cross Passages 6, 12, 19, 26 and 31 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 6, 12, 19, 26 and 31.

## Schedule 3

## Interim Fee

A monthly interim fee of HK$[✂ ] for 2G System and HK$[✂ ] for 3G System 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. Unless and until the parties reach a commercial agreement or the fee is determined by an arbitrator, the monthly interim fee as specified above shall be adjusted on 16 July of each year [Note 1] thereafter by –

(a) the inflation rate [Note 2]; or

(b) where the inflation rate is zero or negative, there shall be no change to the monthly interim fee by reference to that relevant year.

Note 1 –
The fee was adjusted annually on the anniversary date of the original agreement made between the Licensee and the Landowner on 16 July 2013 (i.e. 16 July of the year).

Note 2 –
"inflation rate" means, in relation to any review date (i.e. 15 July of each year), the figure which is equal to the percentage difference between the Consumer Price Index (B) most recently published (by Census and Statistics Department of Hong Kong) on or before such review date and the Consumer Price Index (B) published in the corresponding month of the previous year.

**Annex**

# 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 16 April 2018 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 second generation ("2G") and third generation ("3G") 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 "Tai-Lam-Tunnel-Ordinance").

2. The Licensee had maintained a commercial agreement with the Landowner for placing and maintaining radiocommunications installations for the provision of 2G and 3G services in the Tunnel (the "Agreement") which expired in July 2018. The Licensee had been negotiating with the Landowner on renewing the agreement for placing and maintaining the Installation in the Tunnel since March 2018. 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.

3. Having considered the parties' submissions on the Application, the Authority issued its Preliminary Analysis ("PA") on 21 August 2018 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

4. The Landowner and the Licensee submitted their comments on the PA on 4 and 5 September 2018 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 and given thorough consideration to all of the submissions received, even if not all of the issues raised are specifically mentioned or addressed herein.

The Licensee's Representations

5. The Licensee accepted the monthly interim fee of HK$[✂ ] per system[1] specified by the Authority in the PA and had no adverse comment on the monthly interim fee adjustment method as defined in the PA.

6. The Licensee did not agree with the Authority for not putting the provision of electricity in the PA and leaving the related fee undetermined. Based on its previous dealings with the Landowner, the Licensee considered that it was not possible to reach a mutually agreed licence fee (including also the provision of electricity) with the Landowner. The Licensee also disagreed that the two parties would be expected to reach an agreement on the matter after the interim fee has been set. It adduced evidence of a past case in which the Authority granted authorization for placing and maintaining the Licensee's fourth generation radiocommunications installation in the Tunnel under section 14(1A) of the Ordinance and specified an interim fee under section 14(1D) of the Ordinance on 21 April 2017 but the Landowner refused to provide electricity in response to the Licensee's technical proposal for placing and maintaining the abovementioned installation in the Tunnel. The Licensee claimed that it had attempted to apply for the supply of electricity in the Tunnel from the utility company, but was unsuccessful because the utility company was unable to provide the Licensee with an additional power feed inside the Tunnel.

7. The Licensee was of the view that the authorization shall set out the provision of electricity for the Installation as well as the related fee. The Licensee considered that such arrangement would facilitate its subsequent licence fee negotiation with the Landowner and protect the

[1] There are two systems of the Licensee, namely 2G system and 3G system, in the present case.

public interest by avoiding service interruption inside the Tunnel due to cessation of electricity provision to the radio equipment by the Landowner.

The Landowner's Representations

8. The Landowner disagreed with the Authority that an authorization under section 14(1A) of the Ordinance should be granted to the Licensee on the ground that the Authority had not duly considered all the available evidence in the case and public interest from a wider perspective covering the interest of different stakeholders. It was of the view that the Authority had only considered the business interest of the Licensee in the case.

9. The Landowner also did not agree with the proposed amount of monthly interim fee as specified in the PA, and questioned how the Landowner could comply with the obligations under section 16(6) of the Tai-Lam-Tunnel-Ordinance for treating all applications for installation of utilities within the toll area fairly and in a similar manner. The Landowner was of the view that the latest market rates of licence fee for the existing similar systems in the Tunnel were derived from established agreements with other mobile network operators, and thus the Authority should not propose an interim fee below such level, which amounted to offer the Licensee an apparent privilege.

10. The Landowner submitted that the Authority should not specify the positions of the Licensee's Installation in the Tunnel, unless the Authority provided reasons for doing so.

11. The Landowner reiterated in its representations that it had no obligation to provide electricity to the Licensee's equipment in accordance with the Ordinance and was of the view that the Authority had not considered such representations in the PA. The Landowner considered that from technical point of view, the Licensee could seek alternative and viable sources for arranging provision of electricity supply to its equipment instead of relying solely on the Landowner.

12. The Landowner considered that the Authority had not specified the extents of technical requirements of the right of access in the PA.

## The Authority's Final View

Public Interest – Section 14(1B)(a) of the Ordinance

13. The Authority would like to emphasise again, as it did in the PA, 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 the factors as stated in paragraph 17 of the PA (the "relevant matters").

14. The Authority noted that the Landowner had not raised any new issue or evidence. Having carefully considered all the submissions and 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. Access to 2G and 3G services by 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.

15. 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 March 2018. 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) of the Ordinance

16. 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* and mimic commercially agreed arrangement between the two parties before the dispute arose between them, including also the arrangement for adjustment of the monthly licence fee per system on each anniversary date. This approach has been followed in the past and has also been explained in paragraphs 49 to 54 of the PA. The Authority is of the view that the monthly interim fee of HK$[✂ ] per system as proposed in the PA should be maintained.

17. The Authority would like to emphasise that the interim fee does not prejudice any future contentions by the parties if they restart 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. The Authority would encourage the Landowner to continue further negotiations on the monthly licence fee with the Licensee, and would be prepared to offer all reasonable assistance if necessary. As far as section 16(6) of the Tai-Lam-Tunnel-Ordinance is concerned, according to the Landowner, an obligation is imposed upon it to treat all applications for installation of utilities within the Tunnel fairly and in a similar manner. It is noted that such obligation under the Tai-Lam-Tunnel-Ordinance is expressly premised on the basis "in so far as it is reasonably practicable and feasible to do so" and it is presumed that the Landowner shall comply with all relevant laws and regulations. The Landowner should therefore have regard to the authorization and the Ordinance when it discharges its obligations under the Tai-Lam-Tunnel-Ordinance.

18. The Authority would like to reiterate that the interim fee should not prejudice each party's positions on the final fee to be paid 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 fee specified by the Authority under section 14(1D) of the Ordinance 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.

Other Considerations

19. The Authority notes the parties' views on the provision of electricity to the Licensee's Installation in the Tunnel. The Authority further notes that in the Agreement between the Landowner and the Licensee that expired in July 2018, the Licensee had been granted access to the Landowner's power supply system for the provision of electricity to the Licensee's Installation in the Tunnel by paying an administration fee which covered the expenses so incurred. Having carefully considered the views and comments made by both parties on this aspect, the Authority maintains its view in the PA that the supply of electricity is essential to the implementation of this authorization for the purpose of the provision of mobile services by the Licensee in the Tunnel and so to that extent, it does

not agree with the Landowner that it has no obligation whatsoever to facilitate the supply of electricity to the Licensee. Having said that, as the 2G and 3G systems of the Licensee have been in operation for a long period of time, there should be existing electricity facilities available and thus there should be no insurmountable problem in continuing a reasonable electricity supply arrangement. The Authority believes that the parties would be expected to reach an agreement on this issue after the interim fee has been specified and so it will not state the requirement in the authorization.

20. Should the parties fail to reach any agreement within a reasonable time on the arrangement for electricity power supply, the matter may, depending on the circumstance of the case, be determined by arbitration as prescribed in the Ordinance and set out in the guidelines issued by the Authority in accordance with the Ordinance. The Authority therefore urges the parties to continue their negotiation in good faith for the purpose of provision of mobile services by the Licensee in the Tunnel.

21. The Authority notes the Landowner's objection to the Authority's practice of specifying the positions of the Installation in the authorization. The Authority maintains its view as stated in paragraph 24 of the PA that it did not find the Licensee's preferred positions to be inappropriate or unreasonable since the Installation had already been established at the specified positions for a long period of time without causing any inconvenience or hazard to the public. The Authority would like to reiterate that specifying the positions of the Installation does not prejudice the parties' further agreement on the relocation, if necessary, for the Installation.

22. As regards the technical requirements of the right of access arising from the authorization, the Authority notes that the disagreement between the parties in the Application is essentially in relation to the amount of licence fee instead of any particular technical requirements specified by the Landowner or the Licensee in the Application.

## Conclusion

23. 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.

24. 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 2G and 3G 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$[✂ ] per system for the Installation and, unless and until the parties reach a commercial agreement or the fee is determined by an arbitrator, be adjusted on 16 July of each year[2] thereafter by –

(a) the inflation rate[3]; or

(b) where the inflation rate is zero or negative, there shall be no change to the monthly fee by reference to that relevant year.

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**
**27 September 2018**

[2] The fee was adjusted annually on the anniversary date of the Agreement (i.e. 16 July of the year).

[3] "inflation rate" means, in relation to any review date (i.e. 15 July of each year), the figure which is equal to the percentage difference between the Consumer Price Index (B) most recently published (by Census and Statistics Department of Hong Kong) on or before such review date and the Consumer Price Index (B) published in the corresponding month of the previous year.