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**Interconnection between Distributed Communication System
of Mass Transit Railway Corporation and
the Mobile Network Operators
within Mass Transit Railway Main Lines and
Lantau Airport Railway**

**Statement by the Telecommunications Authority
27 January 2000**

Background

The Telecommunications Authority (TA) received a joint request from Hutchison Telephone Company Limited, Cable & Wireless HKT CSL Limited, SmarTone Mobile Communications Limited, Mandarin Communications Limited, New World PCS Limited and Peoples Telephone Company Limited (the Mobile Network Operators, who for the purpose of the joint request for determination, comprise all the Public Mobile Radiotelephone Services (PMRS) and Personal Communications Services (PCS) operators licensed to operate mobile telephone services in Hong Kong) dated 9 July 1999 for a determination regarding the terms and conditions of agreements for interconnection between the networks of the Mobile Network Operators and the Distributed Communication System (DCS) operated by Mass Transit Railway Corporation (MTRC) within the Mass Transit Railway (MTR) main lines and Lantau Airport Railway (LAR).

2. The Mobile Network Operators have entered into interconnection agreements in 1994 and 1997 (the Agreements) with MTRC for the provision of PMRS and PCS respectively within MTR main lines and LAR. Since the execution of the Agreements, Hong Kong has experienced intensified competition in the market for mobile telephone services, leading to substantial decline in the prices for such services. The Mobile Network Operators have therefore expressed concerns about the fees currently being paid to MTRC for operating mobile services within the MTR network (MTRC fees). Under the Agreements, the Mobile Network Operators are required to pay MTRC in the form of “DCS

Access Fee”, “Common Telecommunications Equipment Rooms (CTER) Fee”, “Fibre Optic Access Fee”, “Maintenance Fee”, electricity charges, training fees and all other costs incurred by MTRC. In addition, the Mobile Network Operators are also required to make revenue sharing payments based on 20% of their call revenue (“Usage Fee”). The Mobile Network Operators represent that the intensified competition has slashed prices and their margin significantly. Under such market conditions, the Mobile Network Operators consider the MTRC fees as unreasonable and MTRC is making a super profit while the Mobile Network Operators suffer a margin squeeze. With an objective to review and revise the commercial terms of the Agreements, the Mobile Network Operators commenced negotiation with MTRC in December 1998. After more than half a year of negotiation, the parties have failed to resolve the disagreement over the DCS Access Fee, CTER Fee and, in particular, the Usage Fee. The Mobile Network Operators therefore formally requested the TA to make a determination under section 36A of the Telecommunication Ordinance.

3. Pursuant to paragraph 4 of the “Procedures for Making Determinations on the Terms and Conditions of Interconnection Agreements” (Procedures), the TA has appointed an Interconnection Determination Committee (IDC) to study the matter. The IDC has examined the request to decide whether it can be dealt with within the framework of section 36A. The interconnection in question is in relation to and between the DCS operated by MTRC under a Public Non-Exclusive Telecommunications Service (PNETS) licence and the networks for the PMRS and PCS operated by the Mobile Network Operators under their respective PMRS licences and PCS licences for the purpose of providing PMRS and PCS coverage within the MTR main lines and LAR. The IDC has formed a view that the matter falls within the framework of section 36A. However, before the TA decided whether a determination should be made, in accordance with the Procedures, the TA invited MTRC to make a representation as to why a determination should not be made under section 36A for the interconnection sought by the Mobile Network Operators.

4. A representation in writing dated 21 August 1999 was received from MTRC. In this representation, MTRC objected to the proposed

determination by the TA under section 36A of the Telecommunication Ordinance. The main reasons for objection are:

- (a) Parties should abide by agreements voluntarily entered into;
- (b) Interference with arm's length agreements with no right of appeal or compensation constitutes a deterrent to telecommunications infrastructure investment;
- (c) The TA was involved during the negotiations between MTRC and the Mobile Network Operators in relation to the PCS Agreements;
- (d) It is doubtful whether the TA has power to alter the agreements under the Telecommunication Ordinance;
- (e) The TA's position under its published Procedures curtails any power (if any) conferred on it by the Telecommunication Ordinance; and
- (f) It is Government's intention not to vary the provisions of agreements in the absence of a public interest requirement.

TA's Power to Make a Determination

5. The TA disagrees with MTRC's doubt about the TA's power to alter existing agreements under the Telecommunication Ordinance. Section 36A(1) confers a power on the TA to determine the terms and conditions of *any agreement* for the type of interconnection described in section 36A(3) and according to section 36A(2), such terms and conditions as manifested in a determination shall, unless the TA otherwise directs, be deemed to be of the essence of any agreement for the interconnection whether or not a different intention appears from the provisions of the agreement. This clearly shows that the TA has power under section 36A to determine the terms and conditions of an interconnection whether an agreement already exists or not.

6. However, the powers under section 36A will be used only when it is

in the public interest for the terms and conditions of an interconnection to be determined by regulatory intervention. For example, the interconnecting parties fail to reach commercial agreement after a reasonable period of negotiations and further delay would affect public interest in that development of competition would be hindered. In the case where a commercial agreement already exists, the hurdle for the public interest test is even higher. In such circumstances, only when there is *overwhelming* public interest grounds would the TA consider making a determination under section 36A of the Telecommunication Ordinance.

Case Analysis

7. In accordance with paragraph 6, in considering whether to process the request for determination, the TA has had due regard to the importance of a free-market economic system in which the Government should not interfere with contracts voluntarily entered into by the parties concerned. Although the TA has taken into account that the operating margin in the market for mobile telephone services has been reducing since the entry into the Agreements, he considers that operators should abide by the terms and conditions set out in the legally binding agreements, unless there is a significant public interest consideration which justifies the contrary. The Mobile Network Operators should not expect the industry regulator to interfere later on in their favour when there is an unfavourable change in the operating environment. Moreover, the TA notes that the operators concerned are major business entities with sufficient legal and business advisory supports to evaluate the terms and conditions before entering into any agreements voluntarily.

8. In evaluation of the financial burden on the Mobile Network Operators, the TA has considered the fact that access fees and rentals for cell sites generally constitute about one fifth of the Mobile Network Operator's total operating expenses. Comparing with the interconnection fees of the various road tunnels and in view of the wide coverage and expected larger usage of MTRC, there is no *prima facie* evidence to show that the MTRC fees are excessive in the sense that they are disproportionate when compared to other access fees and rentals accepted by the Mobile Network Operators.

9. The TA has considered the MTRC fees' implication from the public interest perspective (including by reference to the factors listed in paragraph 7 of the "Guidelines to Assist the Interpretation and Application of the Interconnection Provisions of the Telecommunication Ordinance" (Guidelines)). The Mobile Network Operators have not demonstrated whether the MTRC fees are excessive to such an unreasonable level as to affect their ability to offer telecommunications services to the community in an economically efficient manner. As the MTRC fees are imposed on the Mobile Network Operators on similar terms under the Agreements, the issue as to whether the MTRC fees would affect the operators' ability to compete does not arise as a public interest concern. MTRC, on the other hand, submits that it has incurred significant upfront costs for the provision of interconnection facilities inside the MTR network. It takes the view that should subsequent changes be allowed to be made to the Agreements by the TA in the absence of a public interest requirement, investors might be discouraged from making substantial investments in the telecommunications infrastructure.

10. The TA has also taken into account the economic and social factors stipulated in paragraph 9 of the Procedures and paragraph 7 of the Guidelines, in particular, the benefits to consumers. Nonetheless, no submission has been made by the Mobile Network Operators as to how the customers would benefit from the proposed determination. It appears from their submission that the major concern of the Mobile Network Operators is their commercial interest but they have not expressed any intention of passing the benefit arising from the determination to their customers.

11. The TA is also cautious about the regulatory implications of such a determination. While the TA adopts the interpretation that he has the power to alter or amend an existing interconnection agreement under section 36A, it is not the intention of the TA to upset any binding contractual arrangement in the absence of an overwhelming public interest requirement.

Conclusion

12. After taking into account the recommendations made by the IDC and intensive study of the case from legal, social and economic perspectives (including the factors listed in paragraph 9 of the Procedures and paragraph 7 of the Guidelines), the TA has not found sufficient justification based on public interest grounds for him to interfere with an existing commercial agreement in this case. The TA takes the view that the Mobile Network Operators' joint request for determination should be declined.

13. The TA is aware of some adjustments on the terms and conditions of the Agreements offered by MTRC, including the annual increment of the CTER fee from a 10% flat rate to CPI-based arrangement. The TA believes that the Mobile Network Operators could continue their negotiation with MTRC with a view to securing a mutually acceptable agreement within a reasonable time.

Office of the Telecommunications Authority
27 January 2000