Guidelines on the Application of the Principles for the Determination of Fees in Arbitration Proceedings for Access to Land for the Extension of Coverage of Public Mobile Services

Statement by the Telecommunications Authority

31 July 2001

Introduction

In view of the importance of mobile telecommunications services to Hong Kong as a business and telecommunications hub in the region, the Government has the policy objective of facilitating the provision of ubiquitous coverage for public mobile radio services throughout the territory, not only for the existing services, but also for the new generation of mobile services (e.g. the third generation (3G) mobile services).

2. Against this background, the Telecommunication (Amendment) Ordinance 2000 (the Amendment Ordinance) was enacted on 16 June 2000. The Amendment Ordinance, amongst other things, improves the arrangement for access to land by mobile network operators to install and operate radiocommunications systems for the provision of services to areas which would not otherwise be satisfactorily covered.

3. Section 14(1A) of the Telecommunications Ordinance (as amended by the Amendment Ordinance) (the Ordinance) empowers the Telecommunications Authority (TA) to authorize mobile network operators to gain access to land to install, operate, maintain and inspect radiocommunications installations if it is in the public interest to do so after considering a number of factors as set out in section 14(1B). The TA has set out, and attached at Appendix A, the "Procedures for Processing Applications for Authorization of the Telecommunications Authority Pursuant to Section 14(1A) of the Telecommunications

Ordinance" for the purpose of giving guidance to mobile network operators, landlords and other interested parties on the procedures to be followed by the TA in processing the application.

4. In accordance with section 14(2)(ii), the mobile network operators authorized under section 14(1A) shall pay a fair and reasonable fee to the person having a lawful interest in the land (the landowner). Under section 14(5)(a) of the Ordinance, the mobile network operators and the landowners should in the first instance endeavour to come to a commercial agreement as to the access fee to be paid. In the absence of such agreement within a reasonable time, the access fee, and the terms and conditions in accordance with which it shall be payable, shall be determined by arbitration (section 14(5)(b)).

5. Under section 14(6)(a)(i), the arbitrator shall determine the fee having regard to the principle that the fee to be paid shall be fair and reasonable in all the circumstances of the case including, but not limited to, factors relating to cost, property-value and the benefits to be derived from the authorization granted by the TA. Under section 6D(2)(b), the TA has the duty to issue the guidelines on the application of the principle referred to in section 14(6)(a) as soon as practicable. The arbitrator shall have regard to the guidelines issued by the TA in applying the principle in the determination of the fee (section 14(6)(a)(ii)).

6. In accordance with section 6D(3) of the Ordinance, before the TA issues the guidelines on the application of the principle for the determination of the fee by the arbitrator, he must carry out such consultation with the persons who may be affected by the operation of the authorization, and on the factors to be taken into account for the purposes of the application of such principle in the arbitration proceedings, as is reasonable in all the circumstances of the case. The TA therefore issued the consultation paper entitled "Consultation Paper on the Guidelines to be Issued on the Application of the Principles for the Determination of Fees in Arbitration Proceedings for Access to Confined Areas for the Extension of Coverage of Public Mobile Services" (the Consultation Paper) on 21 July 2000.

7. In the Consultation Paper, the TA set out the factors that may be

relevant and applicable to the determination of access fee by arbitration under section 14(5)(b)(i) of the Ordinance. The paper covered various scenarios of radiocommunications installations in "land" that may fall within the scope of section 14(1A). The consultation targeted the persons that may be affected by the operation of the authorization and discussed the factors to be taken into account by the arbitrator in the determination of access fee under section 14(5)(b)(i), including the appropriateness of their application to different scenarios of radiocommunications installations, the applicability of considering a combination of the factors, and the practical difficulties in applying the factors under different scenarios.

8. In response to the Consultation Paper, a total of 13 companies and one business association made their submissions. The respondents included:

(a) New World PCS Limited (New World PCS)
(b) Peoples Telephone Company Limited (Peoples)
(c) Mandarin Communications Limited (Sunday)
(d) SmarTone Mobile Communications Limited (SmarTone)
(e) Pacific Century CyberWorks
(f) Hutchison Telephone Company Limited (Hutchison Telephone)
(g) MTR Corporation Limited (MTRC)
(h) The Real Estate Developers Association of Hong Kong
(i) Airport Authority Hong Kong (Airport Authority)
(j) Kowloon-Canton Railway Corporation (KCRC)
(k) New Hong Kong Tunnel Co. Ltd.
(l) Tate's Cairn Tunnel Co. Ltd.
(m) Western Harbour Tunnel Co. Ltd.
(n) Route 3 (CPS) Co. Ltd.

Note: The tunnel operators named in (k) to (n) (the tunnel operators) submitted a joint submission.

9. The purpose of this Statement is to present and analyze the comments raised by the industry and the persons who may be affected by the operation of section 14(1A) regarding the Consultation Paper and the TA's conclusions on the factors and considerations that would be

incorporated into the guidelines to be issued by the TA under section 6D(2)(b) on the application of the principle referred to in section 14(6)(a) in any arbitration proceedings.

Underlying Principles in Determination of Access Fees

The Consultation Paper

10. In the Consultation Paper, the TA proposed that the arbitrator, in the determination of the fee, should first consider the applicability of the factors relating to cost, property-value and the benefits to be derived from the authorization and other relevant factors. He should then form a view on the level of fee which is fair and reasonable in all the circumstances of the case having regard to the appropriate level based on the applicable factor or a mixture of the applicable factors.

Views Received

11. Submissions from the mobile network operators and the landowners generally agreed with the underlying principle stated in section 14(6)(a) of the Ordinance that the fee "shall be fair and reasonable in all the circumstances of the case, including, but not limited to, factors relating to costs, property-value and the benefits to be derived from the authorization concerned."

12. As the Consultation Paper set out a number of factors (based on cost, market-value, benefit sharing, or a mixture of these factors) for the consideration of the arbitrator, MTRC was concerned about the question of under what circumstances and in which way the factors would be applied, and how would the options of factors be prioritized in the determination of the relevant access fees.

13. The Real Estate Developers Association considered that the fee should at least cover cost reasonably incurred by the landowner, but "market value" should be the major criterion in determining access fees. In its view, the arbitrator should estimate the value deemed agreeable both by a willing lessor and a willing lessee in an arm's length transaction wherein the parties have each acted knowledgeably, prudently

and without compulsion. Cost recovery should only be used as a fallback.

14. The Airport Authority shared a similar view, suggesting that the arbitrator should consider the cost approach when no comparable reference can be made.

15. MTRC opined that the cost-based charges should only be considered as the floor of access fees. In its view, market value-based charging principles should be the major criterion in the determination of the relevant access fees.

16. The tunnel operators submitted that the arbitrator must not be limited to the factors relating to cost, property-value and benefits. They considered that the arbitrator in any fee determination should primarily take account of the level of access fees under existing commercial agreements which represents the market value, determined by commercial negotiations and should be the primary factor in the guidelines.

17. The tunnel operators raised an additional factor to be considered by the arbitrator. They considered that under the tunnel legislation and project agreement, the tunnel operators have a statutory and contractual right to charge a fee, determined by commercial negotiations and that their decisions in investing in the tunnels were partly based on the continuation of such right.

18. All the mobile network operators commented that since the existing arrangements with the landowners and thus level of access fees are established under a monopoly environment, they should not be used as benchmarks in the determination of the new access fees. For example, Pacific Century CyberWorks considered that in the absence of multiple suppliers, there are no direct substitutes for the confined areas used for installing radiocommunications equipment. In their opinion, the market is imperfect and landowners are in a position analogous to monopolists. Therefore the access fees that mobile network operators pay to landowners prior to the enactment of the amendment to section 14 has been distorted by the imperfect market and should not be taken into

account by the arbitrator.

19. Hutchison Telephone considered that the arbitrator should not be bound to consider and apply all of the factors relating to cost, property-value and the benefits to be derived from the access authorization. It submitted that in addition to the factors, "public interest" should be an overriding principle which should be upheld and taken into account in the arbitration process. This view on "public interest" is shared by Peoples Telephone and Pacific Century CyberWorks.

TA's Responses and Conclusions

20. As regards whether the arbitrator should take into consideration additional factors other than those relating to cost, property-value and the benefits to be derived from the access authorisation, according to section 14(6)(a)(i), the arbitrator is not restricted to the three factors only. Moreover, the arbitrator should have regard to the guidelines issued by the TA under section 6D(2)(b) on the application of the principle referred to in section 14(6)(a)(i), including the three factors and any other relevant factors set out in the guidelines issued by the TA.

21. Before the establishment of the new regime under section 14(1A), the mobile network operators did not have recourse to authorization under section 14(1A) and determination of fee by arbitration under section 14(5)(b). The TA considers that the fees in the existing commercial agreements negotiated before the new regime took effect should not be regarded as the benchmark for reference by the arbitrator.

22. In the arbitration proceedings, the arbitrator should apply the principle stipulated in section 14(6)(a)(i) to arrive at a fair and reasonable access fee in all the circumstances of the case. Against the legislative background of facilitating the provision of ubiquitous coverage for public mobile radio services throughout the territory, in the view of the TA, determination of a fair and reasonable fee by the arbitration should in the circumstances simulate the outcome under a competitive market environment. In situations where the landowners command a monopoly position in the supply of space for the installation and operation of

radiocommunications equipment by mobile network operators, the access fees would not be arrived at in a competitive environment and would include an element of "monopoly rent". Too high the levels of access fees would work against "public interest", as mobile network operators could not offer telecommunications services in an economically efficient manner. In particular, mobile network operators might pass on the high access fees to end-users, thereby making them consume less of the mobile services than they would have consumed if the access fees were arrived at in a competitive environment. In the extreme situation, the mobile network operators might not be able to reach agreement with the landowners on the access fees, and this would deprive the general public of the benefits of ubiquitous coverage for mobile services throughout the territory.

23. In the opinion of the TA, the principle as stipulated in section 14(6)(a)(i) would be best implemented by simulating as much as possible the market mechanism in a competitive market environment. Under a competitive market, the access fees could reflect the underlying value of the land access to mobile network operators and hence the fair and reasonable prices they are willing to pay for the access. Meanwhile, the fees would fairly and reasonably compensate the landowners for providing the land access. The policy intent of section 14(1A) as regards its "public interest" element would in this way be safeguarded in the arbitration proceedings.

24. As regards whether the "statutory and contractual right" of the tunnel operators to charge a fee is a relevant factor, the TA considers that the arbitrator has a duty to set a fee which meets the standard stipulated in section 14(6). The question of "statutory and contractual right" of the tunnel operators has been fully considered by the legislature in the enactment of section 14(6). The arbitration proceedings would not take away the tunnel operators' right to negotiate fees or charges for the installation within their tunnels. On the contrary, it serves to establish a fall-back mechanism for ensuring ubiquitous network coverage in confined areas, including tunnels, if agreements cannot be reached within a reasonable period of time. Amendments to section 14(1A) were enacted after having taken into account, and in a manner consistent with, the relevant provisions in the tunnel legislation. The interest of the

parties is expected to be safeguarded by the determination process through the arbitration proceedings. The arbitrator should simply implement the legislative intent enshrined in section 14(6).

25. The TA has considered MTRC's suggestion of prioritizing the factors to be considered by the arbitrator. However, he has decided against prioritizing the factors. He considers that different factors, or different mixtures of factors, would be applicable to different circumstances. The TA therefore intends to leave this flexibility to the arbitrator who should first consider which factor, or mixture of factors, would produce fees which in the judgement of the arbitrator are fair and reasonable in all the circumstances of the case. The arbitrator should cross-check the fairness and reasonableness of the level of fees determined by the consideration of one factor or a mixture of factors against that determined by the consideration of another. Where the arbitrator considers a factor, or a mixture of factors, is not applicable or the data relating to the factor(s) are not available, the arbitrator should use the other factors.

Applicability to "Land" and "Confined Areas"

The Consultation Paper

26. In the Consultation Paper, the TA envisaged that the "land" which would satisfy the factors for granting authorization under section 14(1A) would include "confined areas" such as tunnels, railway premises, airport terminals, large shopping arcades, etc. to which coverage cannot be extended unless the radiocommunications equipment of the mobile network operators are physically installed within those areas.

Views Received

27. There are common views from the mobile network operators to expand and clarify the definition of "land" and "confined areas" to be included in this Statement. A number of mobile network operators commented that the definition should include areas (indoor or outdoor) such as office buildings, open areas within large housing projects (especially those under the control of a single property landowner), large

open areas such as amusement parks, etc. Peoples Telephone suggested access to Mass Transit Railway stations and railways, bus terminals, piers, parks and playgrounds should be mandatory. Access to areas the coverage of which involves public interest should also be opened subject to the TA's discretion if there are no feasible technical alternatives to cover the areas.

TA's Responses and Conclusions

28. The TA would only authorize access under section 14(1A) if it is in the public interest to do so and after considering a number of factors set out in section 14(1B) such as availability of alternative locations or technical alternatives to the installation. Under section 14(1A), the TA may authorise radiocommunications installation in, over or upon any "land"[1] for the purpose of providing a radiocommunications service to a public place[2]. Confined areas (or indoor areas within large building complexes) such as tunnels, railway premises, airport terminals, large shopping arcades, etc. are likely to fulfil the requirements under section 14(1B). Other areas proposed by the mobile network operators, including open areas such as amusement parks, would be studied on a case by case basis as to whether the matter in question satisfies the public interest test and the requirements of section 14(1B). For example, the TA will consider whether the areas can be efficiently covered, to the extent of meeting users' expectation and demand, by base stations located outside the areas.

Relevant Costs

The Consultation Paper

29. In the Consultation Paper, the TA proposed that the arbitrator should consider, but the considerations should not be limited to, the following costs:

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[1] According to section 14(10), land in subsection 14(1A) does not include land for the exclusive occupation or use of any person whilst the land is being so occupied or used.

[2] "Public place" is defined in the Telecommunications Ordinance to mean a place to which the public or a section of the public may or are permitted to have access from time to time, whether by payment or not, but does not include a vessel, aircraft, vehicle or other means of transport.

(a) staff costs in vetting the plans submitted by the mobile network operators, liaison with the mobile network operators and supervision on-site in the installation and subsequent operation, maintenance and inspection of the radiocommunications installations in the areas concerned;

(b) cost of any additional facilities provided by the landowners for the installation, operation, maintenance and inspection of the radiocommunications installations in the areas concerned (such as electricity consumed, backup power supplies, cabling facilities, etc.);

(c) any increase in operating expenses of the landowners as a result of allowing the installation, operation, maintenance and inspection of the radiocommunications installation in the areas concerned;

(d) cost of capital of any capital expenditures or assets invested to allow the installation, operation, maintenance and inspection of the radiocommunications installations in the areas concerned;

(e) opportunity cost of the space, equipment, or other facilities being occupied to allow the installation, operation, maintenance and inspection of the radiocommunications installations in the areas concerned. This may include, for example, the retail value of the relevant space, or lease revenue from the space for other uses such as installation of cables or other equipment for electricity transmissions or public media broadcasting;

(f) any intangible costs such as compensation on the inconvenience incurred; and

(g) restoration of any damage to the existing facilities in the areas concerned as a result of installation operation, maintenance and inspection of the mobile radio systems.

Views Received

30. Almost all mobile network operators supported full recovery of direct and tangible incremental cost of additional capital expenditure and

assets attributable to the installation and operation of the equipment for the mobile radio services. SmarTone considered that the appropriateness of the cost incurred by the landowners should be examined to see whether they are fair and reasonable, and that mobile network operators should be given the option of providing additional facilities by themselves. Hutchison Telephone considered that the cost should be on an incremental basis, necessary, reasonably incurred for the said purpose, verifiable and supported by evidence. SmarTone suggested that the economies of scale arising from a number of operators installing similar equipment in the confined areas should be considered by the arbitrator in the determination of the access fees so as to allow the sharing of the relevant common costs.

31. Some of mobile network operators commented that opportunity costs (item (e) in paragraph 29) are difficult to measure unless there are proven market values of the space and other facilities provided to the mobile network operators. They considered that allowing access to some common areas such as unused rooftops and space for base stations, etc. that have no commercial value currently should give rise to zero opportunity cost. Peoples Telephone considered that the opportunity cost should be restricted to the financial loss which would not have been suffered by the landowner but for the radiocommunications installation erected by the operator. Hutchison Telephone pointed out that the fees paid by other utilities for the use of space for, for example, electricity transmissions and public media broadcasting are not true market values comparable as they are established under a monopolistic environment.

32. Mobile network operators objected to the inclusion of intangible costs (i.e. item (f) in paragraph 29), which could be very subjective in nature and difficult to identify and quantify in monetary terms.

33. Both MTRC and the Real Estate Developers Association agreed to the principle of full cost recovery. MTRC proposed that the cost should include also the cost for co-ordination of different operators' requirements, capital cost to restore the aesthetics of landowner's properties, costs of additional consultancy, design, etc. which might be incurred *after* the installations (due to the existence of such installations) for the purpose of safeguarding the core business's systems against radio interference, and the cost of final removal and decommissioning after the

expiry of the agreement should also be considered. The Airport Authority also suggested including "studies" (e.g. radio interference studies) as one of the cost items. KCRC commented that the company could not accept relevant costs that are less than those prescribed in the Corporation's by-laws.

34. The tunnel operators submitted that the overall investment and related investment risks in the tunnels must be taken into account in any fee determination proceedings, rather than incremental costs. They further submitted that the scope of radiocommunications service and installation provided to the mobile network operators would affect the cost incurred by the tunnel operators.

TA's Responses and Conclusions

35. The TA considered that the incremental costs incurred by the landowners as a result of allowing access by the mobile network operators should be included. Thus if additional work on consultancy, design, etc. would indeed be carried out for the purpose of safeguarding the core business's systems against radio interference, the TA sees no reason why this should not be included if such costs are directly attributable to the installation, operation, maintenance and inspection of the radiocommunications installations. However, there must be reasonable causal link between the work and the provision of access. Where some work is carried out to serve multiple purposes, only a reasonable proportion of the cost causally related to the provision of access should be covered by the access fee.

36. The TA considers that items (a) to (c) in paragraph 29 is broad enough to cover the costs identified by the landowners such as the costs for co-ordination of different operators' requirements, capital cost of additional facilities in connection with the installations, capital costs to restore the aesthetics of landowner's properties and the costs of final removal and decommissioning after the expiry of the agreement.

37. The TA considered that the inclusion of the opportunity cost is justifiable. If the landowner has lost the rental from alternative use of the space made available to the mobile network operators, the TA sees no

reason why the access fee should not compensate the landowner for the foregone revenue. The TA also does not see great difficulty in quantifying the opportunity cost.

38. The TA accepts that intangible costs referred to in item (f) of paragraph 29 could be difficult to measure and could lead to endless arguments. He is prepared to omit this type of costs from the list of cost items.

39. Having considered the comments, the TA concludes that the arbitrator should consider, but the considerations should not be limited to, the following costs:

(a) staff costs in vetting the plans submitted by the mobile network operators, liaison with the mobile network operators and on-site supervision in connection with the installation, operation, maintenance and inspection of the radiocommunications installations in the areas concerned;

(b) cost of any additional work carried out, or facilities provided, by the landowners for the installation, operation, maintenance and inspection of the radiocommunications installations in the areas concerned (such as consultancy studies on potential interference, electricity consumed, backup power supplies, cabling facilities, etc.);

(c) any increase in operating expenses of the landowners as a result of allowing the installation, operation, maintenance and inspection of the radiocommunications installations in the areas concerned;

(d) cost of capital of any capital expenditures incurred or assets invested in to allow the installation, operation, maintenance and inspection of the radiocommunications installations in the areas concerned;

(e) opportunity cost of the space, equipment, or other facilities being occupied to allow the installation, operation, maintenance and inspection of the radiocommunications installations in the areas concerned. This may include, for example, the revenue from leasing the space for other uses such as the installation of cables or

other equipment for electricity transmissions or public broadcasting; and

(f) restoration of any damage to the existing facilities in the areas concerned as a result of installation operation, maintenance and inspection of the radiocommunications installations.

Cost of Capital

The Consultation Paper

40. In the Consultation Paper, the TA proposed that the cost of capital should reflect the risk of the capital investment. The TA sought views on whether the cost of capital should be based purely on the risk of investment in the new capital expenditure or assets to allow access by the mobile network operators, or should more appropriately take into consideration the investment and operational risk of the property development as a whole. The TA also proposed that the guaranteed rate of return of the franchised operation (such as the Build-Operate-Transfer tunnels), and the internal rate of return of the relevant property project could be used as the benchmark of cost of capital.

Views Received

41. All submissions from the mobile network operators suggested that only risk of the additional investment to enable access by mobile network operators should be taken into account in the determination of the access fees since the mobile network operators should not bear the risk of the landowner's core business. Based on such reason, they are all opposed to the use of the cost of capital or internal rate of return for the whole project as the reference in the access fees calculation.

42. There were also proposals that instead of evaluating the cost of capital separately for each project, or the particular confined areas, the arbitrator should use other market rates as the simple and straight-forward benchmarks. Hutchison Telephone suggested using the rate of return of similar projects as the ceiling of the cost of capital used in the access fees determination, or simply using the prime lending rate or

Hong Kong Interbank Offer Rate as the ceiling. For new buildings, mobile coverage should be analogous to other utilities such as water, the related cost of capital should be regarded as zero. SmarTone proposed to adopt as benchmark the cost of capital currently adopted by the TA in determining interconnection-related charges.

43. MTRC opined that the cost of capital should be benchmarked against the internal rate of return of commercial projects such as advertising panels and station kiosk rental instead of the whole core project. The Airport Authority and the tunnel operators suggested to use the internal rate of return of the investment project as a whole. The Real Estate Developers Association further submitted that the reasonable internal rate of return should be equivalent to the reasonable internal rate of return of the relevant property and the access fees would not dilute or enhance the return of the lessor's investment.

TA's Responses and Conclusions

44. As the investment or capital expenditure to enable the installation, operation, maintenance and inspection of the radiocommunications equipment in the confined areas concerned is in general insignificant compared with the overall investment or capital expenditure of the project for the construction and fitting out of the whole premises[3], and it is unlikely that the landowner would have to separately find capital for such incremental investment or capital expenditure, the TA is of the view that it is inappropriate to separate the investment or capital expenditure (and thus a separate cost of capital) to enable the access and equipment installation by mobile network operators from the rest of project. The cost of capital to be used for access fee determination should therefore be the cost of capital of the project as a whole.

45. Regarding the use of a simple market rate as benchmark or

[3] MTRC challenged the statement in the Consultation Paper that "the additional capital expenditure incurred [to allow access of the mobile network operators] could just be of a marginal amount over the original capital expenditure for the project". The TA considers that the reason for this statement is obvious. The additional capital expenditure to allow access of the mobile network operators would typically be to add some trunkings, or to make available some space in equipment rooms for the equipment of the mobile network operators. This certainly cannot be compared with the capital expenditure for the entire project, e.g. construction of the tunnel.

ceiling, the TA is concerned that since each development project is of different nature and with different business risk, the rate of return could vary widely. As such, it would be inappropriate to establish a benchmark or ceiling rate for the cost of capital to be applied in all cases with reference to the Prime Lending Rate of a major bank or the Hong Kong Interbank Offer Rate. For the same reasons, using the cost of capital applied for the determination of charges for network-to-network interconnection is also not appropriate as the investment in question is different. The arbitrator should therefore evaluate the business plans of the landowners and, if necessary, seek expert opinions from financial institutions so as to determine the suitable level of cost of capital for the calculation of access fees.

Property-value

The Consultation Paper

46. In the Consultation Paper, the TA proposed that the arbitrator should consider the market rates of property equivalent to the accommodation or space occupied by the mobile network operators in the areas concerned. The TA further suggested that the arbitrator may consider one of the two approaches below:

(a) For certain confined areas such as shopping arcades, the access fees could be based on the market rates of the property of these areas such as the lease value of space in the relevant establishments or equivalent premises around similar locations which are operating in a relatively free and competitive market environment;

(b) For projects that are constructed for specific or sole functions, such as tunnels and railways, and for which no direct substitutes can be identified, the arbitrator could consider applying a premium market rate (e.g. the high-end of market access fees in a relevant sample) for access to similar establishments in the neighbourhood but under a relatively free and competitive market environment.

Views Received

47. The mobile network operators expressed various views regarding the adoption of property-value as a factor to determine the access fees. Hutchison Telephone considered that the "cost plus" approach is preferred to the "market value" approach as a free and competitive market does not exist in most of the confined areas. New World PCS argued that it would only be suitable for properties such as shopping arcades for which there is an already established market on rental of similar properties. SmarTone agreed that property-value under a free market mechanism could be a basis but considered it inappropriate to extend the value of space for retail sales to space used for installation of telecommunications equipment. Pacific Century CyberWorks submitted that the arbitrator should only take into account the value of alternative uses of the facilities provided to the mobile network operators. Most operators suggested that the arbitrator should take into consideration the inferiority of the spaces for equipment installation, e.g. unused rooftops, unusable corners, etc. and apply appropriate discounts to the property-value.

48. All submissions from the mobile network operators objected to the proposal of using a premium rate for access to neighbouring establishments for some unique confined areas such as tunnels, etc. (i.e. the proposal in paragraph 46(b) above) since such comparable establishments would be difficult to identify. Instead, they suggested the use of the rates adopted by the Government Property Agency for similar structures. As for the use of duct routes, trunks, etc. in the confined areas that the developers provide to other utility companies at no charge, New World PCS claimed that same treatment should be granted to the mobile network operators, as no additional cost is incurred in the provision.

49. MTRC suggested the use of the commercial rental rates for railway station space as the reference for property-value of the confined areas. MTRC considered that the approach in paragraph 46(a) should be applied and did not consider it inappropriate to apply paragraph 46(b) above. The Real Estate Developers Association opined that the arbitrator should take into account the strategic significance of the

locations of different projects in the determination of the market rent - location, in their opinion, should be the major criterion in the determination of access fee. Both the Real Estate Developers Association and the tunnels operators agreed to use the existing agreements between the landowners and mobile network operators as the benchmark and use the cost-based principle only as a fallback.

TA's Responses and Conclusions

50. Judging from the various views from the submissions, the TA agrees that it is more appropriate to use the property-value as the benchmark in the determination of access fees when prices based on market transactions could be established. Such market prices should be adjusted for the inferiority of the space, ducts, trunks, rooftops, corners, etc., or the strategic location of the premises to which access is sought, since such factors would affect the opportunity costs of the land.

51. In the case of some specific confined areas such as tunnels, etc. for which a comparable establishment in the market cannot be easily found, the TA suggested in the Consultation Paper the use of a premium rate for access to similar establishments in the neighbourhood as the benchmark. The TA still considers that this approach is appropriate - the arbitrator could consider the lease rate or property-value of spaces in some premium and strategic locations in Hong Kong, such as the roof tops of buildings in the central business districts, as benchmark of such premium rate. The reason is that providing coverage in the central business districts is as important to the mobile network operators as providing coverage in the tunnels. However, the supply of rooftop sites in the central business districts would be reasonably competitive. The access fees based on such a benchmark could simulate the efficient prices, under a competitive market environment, of a radio site for the provision of coverage to strategic areas to meet customers' expectation. A fee so determined would reflect the strategic locations and unique market condition of these specific confined areas, as well as prevent the landowners from obtaining excessive monopoly rents.

Benefits Derived from Authorization

The Consultation Paper

52. In the Consultation Paper, the TA listed the benefits that may be gained by the mobile network operators in obtaining access:

(a) Incremental profit from the additional revenue generated from the calls made, or continued, in the areas concerned;

(b) Incremental profit from the increase in market share, or avoidance of profit reduction due to loss of market share, in the provision of public mobile services by providing better quality of service compared with competitors; and

(c) Any benefit derived from or penalty avoided in fulfilling licence obligations under the licences of the mobile network operators.

53. On the other hand, the TA listed the benefits that may be gained by the landowners by allowing access:

(a) Increased customer satisfaction and patronage in the areas concerned as a result of better quality of mobile service coverage in the areas; and

(b) Any benefit derived from or penalty avoided in fulfilling obligations concerning provision of mobile radio coverage under contractual agreement.

Views Received

54. In response to the charging principle based on the benefits derived from authorization of access in the confined areas, all mobile network operators argued that it is difficult to single out the incremental benefit from the access in particular confined areas. Pacific Century CyberWorks argued that it is inappropriate to introduce a benefit-sharing mechanism between mobile network operators and the landowners in the determination of access fees and that the landowners are already

adequately compensated by a fee based on the incremental cost incurred. Besides, a number of operators claimed that since there are mutual benefits for both the mobile network operators and the landowners, the benefits to the parties should offset each other and thus should not be considered in the access fee. All submissions from the mobile network operators also expressed their objection to including the penalty avoided in fulfilling license obligations as part of the incremental benefits, since they have already incurred substantial investment in building the telecommunications infrastructure in those areas and it was also in the public interest to have coverage in the areas. In their view, inclusion of such benefits would encourage the landowners to stall and delay the access. Sunday suggested to confine the relevant benefits within 10% of mobile operator's revenue gained in the concerned property.

55. The landowners held different views in these aspects. In particular, both MTRC and the tunnel operators pointed out that the access by the mobile network operators in their properties would only bring in minimal incremental benefit to their core business since the choice of transportation mode is hardly related to the mobile phone coverage. MTRC submitted that incremental benefit to the landowners should not be considered by the arbitrator. MTRC further submitted that it is not appropriate to use the increase in market share of individual operators as reference of incremental benefits as these values vary with the operator's different investment strategy. Instead, it suggested to measure the call revenue from calls initiated and terminated, or continued, within the confined area. The Airport Authority commented that the ratio for sharing should be based on the revenue for the mobile network operators versus the number of occupants benefiting from the use of mobile phones in the property owned by the landowner and this ratio will vary for different properties.

TA's Responses and Conclusions

56. The TA notices the practical problem of identifying the full picture of incremental benefits to the mobile network operators and the landowners derived from the authorization of access in a specific confined areas. However, the principle that the access fee (magnitude and direction) should be determined by the balance of the benefits

derived by both parties is basically sound. In the arbitration proceedings, the arbitrator should form his own view on the balance of the benefits having considered the submissions of both the mobile network operators and landowners.

Other Economic Considerations

<u>Tie-in Package</u>

The Consultation Paper

57. In the Consultation Paper, the TA invited views on the relevance to the determination of access fees in an arbitration proceedings of the inclusion of rental for space for advertisements within, or in the approach to, the confined areas.

Views Received

58. The mobile network operators generally disagreed to the inclusion of such tie-in packages in access fee, while the landowners have no particular comments on this aspect. SmarTone considers that other packages existing in the current access arrangement should not be used as a reference in the determination of access fees as they were established under a distorted market environment where the mobile network operators had little bargaining power in the negotiations. In its view, the TA's prime objective of including this item in the Consultation Paper was to avoid the landowners retrieving further monopoly rent from the tie-in packages.

59. The Airport Authority considered that the advertising revenue from any tie-in package should be considered by the arbitrator in the determination of access fees.

TA's Responses and Conclusions

60. Taking into account of the industry comments, the TA considers that it is preferable that access arrangements are not tied-in with contracts for the provision of advertisement space. Each contract should

preferably be self-contained in the considerations under the contract. Accordingly the arbitrator should not determine fees for access which is packaged with the provision of advertisement space.

Annual Adjustments

The Consultation Paper

61. In the Consultation Paper, the TA sought views on whether the annual fee adjustment factors, inflation, annual growth in the number of mobile service subscribers, or the number of tunnel/railway users or site visitors, should be taken into account in the arbitration proceedings.

Views Received

62. All submissions from the mobile network operators disagreed with the use of growth in the number of subscribers and site visitors as benchmarks for annual adjustment of the access fees. They argued that there are problems in separating the effect on subscriber growth due to the expanded coverage in the confined areas from other relevant factors. Besides, the decreasing average revenue per user has resulted in significant deviation of the operators' revenue growth from the subscriber growth and thus it would be unfair to use such growth as the reference for annual adjustment. Instead, they generally accepted the approach of inflation indexing (but commented that the effect of deflation should also be included) if cost-based charging principle is being adopted. However, as New World PCS put forward in its submission that if the access fees are derived from the principles of property-value or benefit derived, the annual adjustment should be based on the revised valuation of the relevant property or benefit. To ensure a stability of business relation, Sunday suggested to fix the access fees for at least three years and adjustments afterwards should be subjected to commercial negotiation.

63. Views from the landowners regarding the annual adjustment of the access fees are mixed. MTRC responded that there should be different considerations for different categories of fees and the adjustment should follow the principles commonly adopted in the

commercial market. While the Airport Authority suggested that the annual adjustment should also be determined by the arbitrator as well, KCRC agreed to the inflation indexing approach.

TA's Responses and Conclusions

64. Judging from the industry comments, the TA accepts that inflation indexing is the commonly accepted and cost effective option. Nevertheless, the TA also agrees that if the access fees are based on property-value, or the benefit derived, the adjustment mechanism should instead be linked to the change in property-value or revenue growth, as appropriate. Again, the TA encourages the mobile network operators and the landowners to negotiate for the commonly accepted mechanism. Should that fail, the arbitrator should determine both the level of access fees and the annual adjustment mechanism.

Matters not Raised in the Consultation Paper

65. In addition to the major areas that the TA has put forward in his Consultation Paper, the mobile network operators and landowners also raised a number of factors that require the TA's considerations.

66. Concerns of the landowners covered wider perspectives. MTRC emphasized that the relevant parties should be allowed in a commercial negotiation to make the deal commercially viable and both negotiating parties could come to an agreement using all possible alternatives that are acceptable to both parties. There should not be any constraints in the offers for access fees. The TA's preference is for commercial settlement of the access fees. The guidelines issued under section 6D(2)(b) are not intended to constrain the commercial negotiations. However, as the arbitrator will have regard to these guidelines in making a determination if necessary, it can be expected that the negotiating parties would also consider the guidelines in their negotiations. This would have the benefits of shortening the negotiation time.

67. Separately, both MTRC and the Real Estate Developers Association raised the concerns over the settlement arrangements.

MTRC suggested that the TA should set guidelines for the determination of interim fees to avoid delay to the determination of interim fees. It suggested that the interim fees could simply be based on the previous similar agreements and be applied until the arbitration is concluded. Any excess payment could be reimbursed with interests. The TA notes that an interim payment arrangement has already been established under section 14(1D)(a) to cater for the period before the arbitrators make a decision and according to section 14(1D)(a), the interim fee (including the terms and conditions in accordance with which it shall be payable) would be specified by the TA upon application. The TA may consider the need for issuing guidelines for setting the interim fee although this is not a statutory requirement.

68. The Real Estate Developers Association proposed to set up a specific timeframe for the determination so as to avoid delayed payment. Moreover, a minimum period of licence (1 year), with 6-month written notice of termination by either party should also be incorporated into the arrangement. The timeframe for TA's process is already specified in Annex A. It is more appropriate for the arbitrator to decide the timeframe for the arbitration. As regards the terms of the licence (for land access), the TA believes that flexibility should be given to the arbitrator in deciding all relevant terms in the commercial agreement, including the period of the agreement. The arbitrator should also determine how the cost of determination should be shared between the mobile network operator and the landowner.

69. The Airport Authority focused on the operational safety and security, which are its prime concern when determining access and the relevant fees. It suggested minimization of access to restricted airside areas and sharing of common antenna systems. It further suggested that the arrangement should be based on the "access to use the antenna system (provided by the landowner)" instead of "renting a space for antenna installation (by the licensees)". With respect to safety concerns in some cases, such as the airport and railways, the TA agrees that these should be the priority factors to be considered before the TA makes the authorization under section 14(1A). Landowners will be given reasonable opportunity to make representations to the TA on safety matters under section 14(1B)(c). If the landowner establishes a

common antenna system for sharing by the mobile network operators, then the TA agrees that the access arrangement is not one under section 14, but rather an interconnection between the landowner's system and the mobile networks under section 36A. However, whether to set up a common antenna system is a matter for the landowners. If the landowners do not set up common antenna systems, the mobile network operators may still wish to seek access to land under section 14 in order to provide coverage in the areas concerned.

Conclusions

70. Having considered the inputs from the mobile network operators and the landowners regarding the access arrangements to the confined areas for the extension of coverage of public mobile services and the determination of the relevant access fees, in exercise of the powers conferred in section 6D(2)(b), the TA issues the guidelines in Appendix B on the application of the charging principle referred to in section 14(6)(a)(i). The arbitrator shall have regard to the guidelines, drawing reference to the background and rationale given this Statement where appropriate, in applying the principle on the determination of the access fees (section 14(6)(a)(ii)).

Office of the Telecommunications Authority
31 July 2001

Appendix A

Procedures for Processing Applications for Authorization of the Telecommunications Authority Pursuant to Section 14(1A) of the Telecommunications Ordinance

Introduction

This document is issued for the purpose of providing practical guidance to mobile network operators, persons having lawful interests in lands or landowners (the "landowners") and other interested parties on the procedures to be followed by the Telecommunications Authority (TA) in processing applications for authorization under section 14(1A) of the Ordinance.

2. Under section 14(1A), the TA may authorize a licensee to place and maintain a radiocommunications installation in, over or upon any land for the purpose of providing a radiocommunications service to a public place after he is satisfied that the authorization is in the public interest and he has taken into account the factors set out in section 14(1B).

3. Where an authorization has been made under section 14(1A), the fee payable to the landowner may be determined by an arbitrator under section 14(5). The TA may specify under section 14(1D) an interim fee payable before the determination by the arbitrator.

4. The policy intent of section 14(1A) is to enable mobile network operators to extend their coverage into shielded areas which cannot be covered unless the radiocommunications installation is physically inside the areas concerned, e.g. road tunnels, mass transit tunnels, large commercial complexes or transportation terminals.

Stage 1: Consideration of Application for Authorization

5. A licensee who seeks TA's authorization pursuant to section 14(1A) should make a written application to the TA in respect of the following, together with supporting documents/evidence:

A. Background and reason(s) for seeking authorization:

(a) information on and description of the land for placing the radiocommunications installation and the public place to which public radiocommunications service coverage would be provided by the installation, e.g. the landowner, location, geographical and architectural characteristics, its surrounding, etc;

(b) if there is an existing licence or agreement for access to the land concerned, details about the principal terms of the existing licence or agreement, including the technical arrangements and location of the radiocommunications installation and duration of the licence or agreement, e.g. effective and expiry dates of the licence or agreement, number of antennae, other equipment, location and size of equipment room, access/licence fee and their details including its structure or method of calculation, etc; a copy of the licence or agreement should be provided;

(c) details of any negotiation process between the licensee and the landowner including the period within which the negotiations took place, the issues discussed, any plan to change the existing installation and any point of agreement/disagreement; copies of the relevant records/documents of the negotiation process should also be provided; and

(d) whether the landowner is aware of the making of the application and its contact details (e.g. name and position held of the contact person, telephone number, address, etc.) for the case.

B. Representation as to why the authorization should be granted:

(a) substantiate that the authorization is in the public interest;

(b) substantiate the application with sufficient technical information in respect of each of the factors as listed under section 14(1B)(b) as follows:

   (i) whether an alternative location can be reasonably utilized for 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 applicant 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 applicant and the public of the alternatives, if any, referred to in subparagraph (ii).

C. Preferred position of the authorization, if granted:

(a) the land for placing the radiocommunications installation;

(b) the public place to where the radiocommunications service would be provided by the radiocommunications installation;

(c) the network(s) for public radiocommunications service that the installation would serve;

(d) the preferred position, with substantiation, in respect of the

terms and conditions of the authorization, including the technical requirements, if any, that are required to be specified in the authorization, if granted;

(e) whether there is intention to ask the TA to specify the interim fee pursuant to section 14(1D)(a) of the Ordinance in the event that section 14(1A) is applicable; and if yes, the proposed interim fee, with substantiation, including the terms and conditions in accordance with which it shall be payable.

D. Claim of confidentiality

Identification of any part of the application which is considered by the applicant to be confidential and may not be disclosed to the landowner if the application is to proceed to the "Further Proceedings" stage.

6. Upon receipt of the application, the TA will issue a letter of acknowledgement to the applicant.

7. The TA will examine the application to see whether it can be dealt with within the framework of section 14(1A). If the TA considers that the application cannot be so dealt with, the TA will notify the applicant within two weeks of the receipt of the application.

Stage 2: The Proceedings: Prima Facie case

8. If the TA considers that the application can be dealt with within the framework of section 14(1A), the TA will first examine the facts of the case submitted by the applicant, and see if a *prima facie* case could be established based on the "public interest" consideration under section 14(1B)(a).

9. Without limiting the generality of section 14(1B)(a), the TA may in considering the public interest under section 14(1B)(a), where appropriate, take into account any of the relevant factors including, but

not limited to, the following:

(a) the promotion and facilitation of the rollout of reliable coverage, or preservation of existing reliable coverage, of public radiocommunications services to the public place where there is pubic demand for such public radiocommunications services;

(b) the promotion or restoration of fair competition in the market for public radiocommunications services, and the avoidance or elimination of any discrimination in the provision of access and/or the imposition of any terms or conditions for access on any public radiocommunications services operator;

(c) the maintenance of a light-handed regulatory environment, which avoid regulatory intervention unless so justified on public interest grounds; and

(d) any other factors as the TA may consider applicable on a case by case basis.

10. In deciding whether a *prima facie* case on "public interest" can be established under section 14(1B)(a), the TA will also consider the following factors set out in section 14(1B)(b):

(a) whether an alternative location can be reasonably utilized for placing the radiocommunications installation to which the authorization, if granted, will relate;

(b) whether or not there are technical alternatives to the installation;

(c) 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;

(d) 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

(e) the costs, time, penalties and inconvenience to the licensee and the public of the alternatives, if any, referred to in subparagraph (b).

11. In the course of consideration of the application, the applicant and the landowner, where necessary, may be requested by the TA to furnish further information for the above consideration.

12. If a *prima facie* case could not be established, the TA will reject the case and notify the applicant accordingly. The TA may issue the draft decision for comment by the applicant before issue.

13. The TA will make a decision on whether a *prima facie* case could be established within one month of the receipt of the application.

Stage 3: Further Proceedings

14. If a *prima facie* case could be established, the TA will forward the application together with the TA's preliminary assessment to the landowner for comments and to make representations thereon according to section 14(1B)(c). In forwarding the application to the landowner for comments, the TA will consider the claim of confidentiality made by the applicant, seek further representation from the applicant where necessary on such claim and decide whether the parts concerned of the application should be forwarded to the landowner. The TA will also send the preliminary assessment of the application to the applicant for information.

15. The landowner will be invited to make representation under section 14(1B)(c), within three weeks of the invitation, whether the authorization under section 14(1A) should be made, and if affirmative, the terms and conditions (including any technical requirements that the landowner proposes that the TA should specify under section 14(1B)(d)) upon which such authorization should be granted.

16. The landowner should also indicate any claims for confidentiality on any part(s) of its representation and/or supporting

documents/evidence, together with reasons, on the basis that the representation (and supporting documents/evidence) submitted will be forwarded to the applicant for comments and making representations thereon.

17. Subject to the consideration of, and if necessary, seeking landowner's further representation on, a request by the landowner that the confidentiality of the whole or part of its submission should be maintained, the applicant will be given a copy of the landowner's representation and invited to comment on it within two weeks of the invitation.

18. With the due consideration of all relevant information, representations and the results of technical assessment, the TA may, where appropriate, prepare a preliminary analysis, within three weeks of the receipt of the applicant's comments on the landowner's representation, in respect of sections 14(1B)(a), (b) and (c) for the application and invite each party to make written comments about the preliminary analysis. Each party will be given two weeks to comment on the preliminary analysis.

19. The TA will analyse the written submissions, if any, and make a decision on whether or not an authorization pursuant to section 14(1A) should be granted. The TA will make a decision and inform the applicant of his decision with reasons in writing within three weeks of the receipt of the comments from the parties on the preliminary analysis.

20. In granting an authorization pursuant to section 14(1A), the TA will give reasons in writing for the grant of the authorization, and specify in writing the technical requirements, if any, of the right of access arising from the authorization as stipulated by section 14(1B)(d), and shall, upon application made to him by the applicant or the landowner, specify in writing an interim fee (including the terms and conditions in accordance with which it shall be payable) to be paid by the applicant to the landowner as stipulated by section 14(1D)(a).

Other Procedures

21. The Office of the Telecommunications Authority (OFTA) shall maintain a register of authorizations made by the TA and publish materials on the authorizations that may be made available to the public.

22. The time specified in the preceding paragraphs for the steps in processing the applications may be shortened at the discretion of the TA to deal with urgent or straightforward cases.

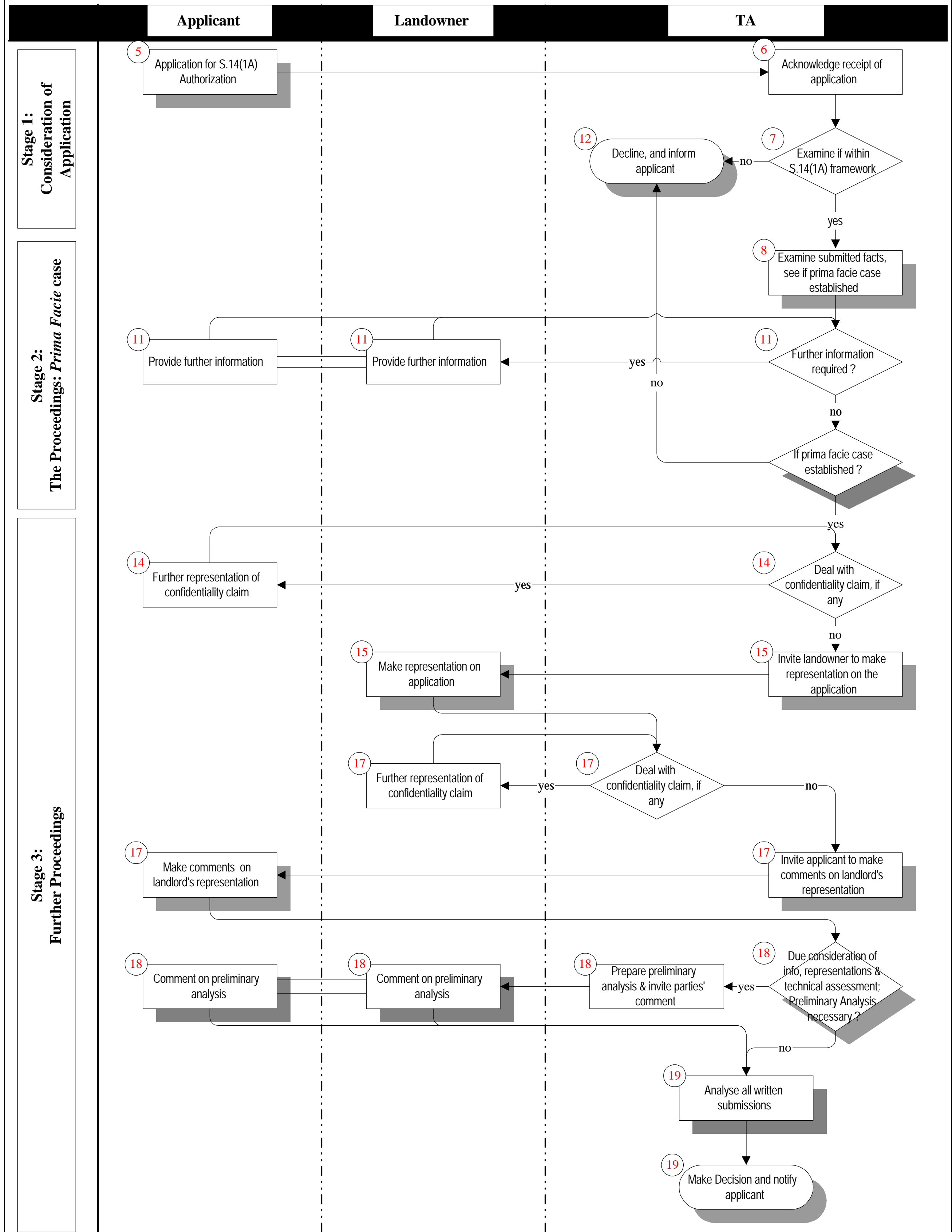
23. In circumstances where complex analysis or study is involved before a decision can be taken, or where any other factors exist that make it necessary to lengthen the steps in processing the applications, the TA may at his discretion extend such period as appropriate and duly inform both parties with reasons.

24. Should circumstances arise where, in the TA's opinion, it is either not possible or in the best interests of the regulation of telecommunications to adhere to these procedures, the TA will give written notice to this effect to the parties concerned. In addition, the TA reserves the right to amend these procedures.

Office of the Telecommunications Authority
31 July 2001

Illustration of Procedures for Processing Applications for Authorization of the Telecommunications Authority Pursuant to Section 14(1A) of the Telecommunicatioins Ordinance

Note:
1. This diagram is for illustration only.
2. Numbers in circles correspond to the paragraph numbers in the procedure document.



Appendix B

Guidelines Issued by the Telecommunications Authority under Section 6D(2)(b) of the Telecommunications Ordinance on the Application of the Principle Referred to in Section 14(6)(a) for the Determination of Fees in Arbitration Proceedings for Access to Land for Radiocommunications Installations

Introduction

Section 14(1A) of the Telecommunications Ordinance (the "Ordinance") empowers the Telecommunications Authority ("TA") to authorise a licensee to gain access to land to install, operate, maintain and inspect radiocommunications installations in, over or upon any "land"[4] for the purpose of providing a radiocommunications service to a public place[5], if it is in the public interest to do so and after considering a number of factors as set out in section 14(1B). In accordance with section 14(2)(ii), a licensee authorised under section 14(1A) shall pay a fair and reasonable fee to the person having a lawful interest in the land (the "landowner").

2. Under section 14(5)(a), the licensee and the landowner should in the first instance endeavour to come to a commercial agreement as to the access fee to be paid under section 14(2)(ii). In the absence of such agreement within a reasonable time, the access fee, and the terms and conditions in accordance with which it shall be payable, shall be determined by arbitration (section 14(5)(b)). In accordance with section 14(6)(a)(i), the arbitrator (the "Arbitrator") shall determine the fee having regard to the principle that the fee to be paid shall be fair and reasonable

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[4] According to section 14(10), land in subsection 14(1A) does not include land for the exclusive occupation or use of any person whilst the land is being so occupied or used.

[5] "Public place" is defined in the Ordinance to mean a place to which the public or a section of the public may or are permitted to have access from time to time, whether by payment or not, but does not include a vessel, aircraft, vehicle or other means of transport.

in all the circumstances of the case, including, but not limited to, factors relating to cost, property-value and the benefits to be derived from the authorisation granted by the TA under section 14(1A).

3. The TA, in exercise of his power under section 6D(2)(b), having carried out such consultation

(a) with the persons who may be affected by the operation of section 14(1A); and

(b) on the factors to be taken into account for the purpose of section 6D(2)(b)

as is reasonable in all the circumstances of the case, HEREBY issues the guidelines on the application of the principle referred to in section 14(6)(a)(i) (the "Guidelines"). In any arbitration proceedings for the purpose of section 14(5)(b), the Arbitrator shall, in accordance with section 14(6)(a)(ii), give regard to the Guidelines in applying the principle referred to in section 14(6)(a)(i) in the determination of the fee. The Arbitrator may refer to the accompanying TA Statement issued on the same date for the background and rationale of the Guidelines.

Underlying Principles

4. Under section 14(6)(a), the underlying principle is that the fee shall be fair and reasonable in all the circumstances of the case, including, but not limited to, factors such as relevant costs, property-value and the benefits that can be derived from the authorisation granted under section 14(1A).

5. The fees in the commercial agreements negotiated before the new regime under section 14 introduced by the Telecommunication (Amendment) Ordinance 2000 took effect should not be regarded as the benchmark for reference by the Arbitrator.

6. In the case where the landowner commands a "monopoly" type of control over the land in question, the principle stipulated in section 14(6)(a)(i) would be best implemented by simulating as much as possible

the market mechanism in a competitive market environment.

7. The question of "statutory and contractual right" of the tunnel operators to charge a fee has been fully considered by the legislature in the enactment of section 14(6). The Arbitrator needs not consider it as a relevant factor in the arbitration.

8. The Arbitrator should first consider which factor, or a mixture of the factors, as set out in the Guidelines, would produce fees which in the judgement of the Arbitrator are fair and reasonable in all the circumstances of the case. The Arbitrator should cross-check the fairness and reasonableness of the level of fees determined by the consideration of one factor or a mixture of factors against that determined by the consideration of another. Where the Arbitrator considers a factor, or a mixture of factors, is not applicable or the data relating to the factor(s) are not available, the Arbitrator should use the other factors.

Relevant Costs

9. The Arbitrator should allow full recovery of relevant costs incurred by the landowners to enable the installation, operation, maintenance and inspection of the radiocommunications installations in the areas concerned. Relevant costs can cover both direct costs and indirect costs incurred.

10. The Arbitrator should exclude intangible costs from the calculation of access fees.

11. The Arbitrator should consider, but the considerations should not be limited to, the following costs:

(a) staff costs in vetting the plans submitted by the licensees, liaison with the licensees and on-site supervision in the installation, operation, maintenance and inspection of the radiocommunications installations in the areas concerned;

(b) directly attributable cost of any additional work carried out, or

facilities provided, by the landowners for the installation, operation, maintenance and inspection of the radiocommunications installations in the areas concerned (such as consultancy studies on potential interference, electricity consumed, backup power supplies, cabling facilities, etc). Where some work is carried out to serve multiple purposes, only a reasonable proportion of the cost causally related to the installation, operation, maintenance and inspection of the radiocommunications installations in the areas concerned should be covered by the access fee;

(c) any increase in operating expenses of the landowners as a result of allowing the installation, operation, maintenance and inspection of the radiocommunications installations in the areas concerned;

(d) cost of capital of any capital expenditures incurred or assets invested in to allow the installation, operation, maintenance and inspection of the radiocommunications installations in the areas concerned;

(e) opportunity cost of the space, equipment, or other facilities being occupied to allow the installation, operation, maintenance and inspection of the radiocommunications installations in the areas concerned. This may include, for example, the revenue from leasing the space for other uses such as the installation of cables or other equipment for electricity transmissions or public broadcasting; and

(f) restoration of any damage to the existing facilities in the areas concerned as a result of installation operation, maintenance and inspection of the radiocommunications installations.

Cost of Capital

12. The cost of capital referred to in item (d) in paragraph 11 should be the cost of capital of the project as a whole.

13. The Arbitrator should evaluate the business plans of the landowners and, where necessary, seek expert opinions from financial institutions so as to determine the suitable level of cost of capital for the calculation of access fees.

Property-Value

14. The property-value should be considered as a benchmark in the determination of access fees when prices based on market transactions could be established.

15. The market prices should be adjusted to reflect the inferiority of the space, ducts, trunks, rooftops, corners, etc., or the strategic location of the premises to which access is sought since such factors would affect the opportunity costs of the land concerned.

16. For certain confined areas such as the shopping arcades, the Arbitrator may consider using, as a basis in the determination of the access fee, the market rates of the property of these areas such as the lease value of spaces in equivalent premises around similar locations which are operating under a relatively competitive market environment.

17. For projects that are constructed for specific or sole functions, such as the tunnels and railways, for which no direct substitutes can be identified, the Arbitrator may consider the use of a premium rate for access to similar establishments in the neighbourhood as the benchmark. The Arbitrator could consider the lease rate of spaces in some premium and strategic locations in Hong Kong, such as the rooftop of buildings in central business districts, which are established under a competitive market environment, as the benchmark of such premium rate.

Benefits Derived from Authorisation

18. The Arbitrator should form his own view on the balance of the benefits derived from the authorisation by the licensees and the landowners, after considering the submissions from both parties. The Arbitrator may then adopt, where he considers it fair and reasonable in all the circumstances of the case, a benefit-sharing approach in the

determination of access fees.

Other Economic Considerations

Tie-in Packages

19. It is preferable that the access arrangements are not tied-in with contracts for the provision of advertisement space. Each contract should preferably be self-contained in the considerations under the contract. Accordingly the arbitrator should not determine fees for access which is packaged with the provision of advertisement space.

Annual Adjustment Mechanism

20. The Arbitrator may consider inflation indexing as an option. Nevertheless, if the access fees are based on property-value, or the benefit derived, the adjustment mechanism should instead be linked to the change in property-value or revenue growth, as appropriate.

Cost Sharing and Economies of Scale

21. The Arbitrator should consider cost-sharing and economies of scale when multiple licensees are authorized to have access to and share the land concerned.

Office of the Telecommunications Authority
31 July 2001