

**Responses to Submissions from BOT Tunnel Operators of
25 and 27 October 1999 on new section 14 of the
Telecommunication (Amendment) Bill 1999**

Determination of access fees by the TA in the event commercial negotiations fail

Given the high and ever increasing mobile penetration rate (53% in August 1999, up 1% from July 1999 or 41% from a year before) in Hong Kong, we firmly believe that there is sufficient public interest to justify the setting up of a mechanism to ensure ubiquitous coverage of mobile networks in shielded areas, including tunnels, if commercial agreements cannot be reached under the existing framework. However, the Bill provides that such power of intervention must satisfy statutory checks and balances stipulated in the new section 14. We should note that the tunnel Ordinances are founded on the principle of *a reasonable, but not excessive* return on investment (whether by reference to the general principle or by a specific toll increase mechanism) and do not conflict in principle with our proposal, whereby the access fees the TA will determine under section 14 must be *fair and reasonable* in all circumstances of the case. We should reiterate, therefore, that we are proposing a well-balanced approach taking into public interest involved under the new section 14 to support our policy on ubiquitous coverage for mobile telecommunications services in Hong Kong. Given the above, the claim that our proposal breaches the free market economy is not founded in our view. We are dedicated to implementing the policy of free trade and free economic principles, and to provide an economic and legal environment for encouraging investments as guaranteed under the Basic Law. Not only must existing contracts be respected, commercial agreements will always be given primacy and preference.

TA as the regulator and his guidelines for consultation

2. BOT tunnels and mobile operators had made depositions to the Bills Committee on their views on whether the TA is the suitable body to be empowered to determine access fees to be paid by mobile operators to BOT tunnels in the event they fail to reach commercial agreements. We welcome in particular the independent, third-party endorsement from the Consumer Council that TA is an appropriate body to assume this role. We wish to emphasise that, in line with the established practice, prior to making decisions of significance and public interest, the TA has

undertaken to conduct public consultation on the charging principles in determining the access fees to shielded areas. The Office of Telecommunications Authority (OFTA) will consider the cases and co-opt outside expertise if necessary. In the consultation exercise, landowners, tunnel operators and other bodies owning/running shielded areas will be invited to give comments. They may also engage their own professionals to give expert opinion to the TA.

3. The TA will in due course make available his outline of the consultation document, which will give Members and parties concerned assurance on the openness and fairness on the consultation exercise, the guidelines the TA will formulate and any decision he may make as empowered under the new section 14 upon passage of the Bill. However, we do not consider it appropriate to conduct formal consultation before the power is confirmed through the passage of the Bill. In addition, TA is bound by the administrative rules of natural justice not only to exercise his power reasonably but also to consult as appropriate and take into account relevant considerations for the purpose of performing his statutory functions.

International practices

4. At the request of the Bills Committee, we provided details of regulatory measures in overseas jurisdiction whereby their regulators have powers in one form or another to step in or have involvement in the negotiations to provide for access by telecommunications network operators in general [see CB(1)1960/98-99]. Our research showed that there is a range of different treatment on the issue of access. Access to land for the rollout of telecommunications networks is not entirely left to market forces even in the countries which have similar pro-competition policies as in Hong Kong. As the problems encountered in different places are different, we highlighted in our submission that the powers of the regulatory authorities vary. Our policy and our proposal under the new section 14 in the Bill are justified on the basis the circumstances in Hong Kong, which warrant sufficient public interest to set up a mechanism to ensure ubiquitous coverage of mobile networks in shielded areas, including tunnels, if commercial agreement cannot be reached under the existing framework.

Information Technology and Broadcasting Bureau
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