**Bills Committee on the Telecommunications (Amendment) Bill 1999**

**Access Right of Mobile Network Operators into Shielded Areas**
**- Response to the further submission**
**from BOT tunnel companies' dated 15 February 2000**

The BOT tunnel companies has made further submission to the Bills Committee [LC Paper No. CB(1)998/99-00] claiming that the amended section 14 of the Telecommunication (Amendment) Bill 1999 ("the Bill") infringes on all the Ordinances and Project Agreements governing their tunnels, and that the Bill is unconstitutional as it is in contravention of Articles 105 and 160 of the Basic Law. We firmly disagree with these views. Our detailed response to similar allegations has already been set out in our previous paper to the Bills Committee "Access Right of Mobile Network Operators into Shielded Areas – Response to the Lovell White Durrant on the Policy Considerations, Legal and Constitutional Issues" [LC Paper No. CB(1)820/99-00(01)]. The issues raised in the further submission of the BOT tunnel companies are similar to those raised in their previous submissions. They remain that the amended section 14 would extinguish the rights of tunnel companies, hence constitute a deprivation of property rights under Basic Law Article 105 and proper compensation must be paid to the tunnel companies. We believe that we have already addressed these issues in our previous papers (especially in [LC Paper No. CB(1)820/99-00(01)]) and this paper highlights the main points of our response.

2. We have nonetheless taken into account views of the various deputations, including BOT tunnel companies' and comments of the Bills Committee in introducing a number of Committee Stage Amendments (CSAs). Details have been set out in our paper "Committee Stage Amendments". Those directly related to issues raised by BOT tunnels are summarised in paragraphs 8, 14 and 15 below.

**Basic Law Articles 6 and 105**

3. There is no question that the proposed amendments to section 14 regarding access right of mobile network operators into shielded areas ("the Proposed Provisions") are in contravention of the Basic Law Articles 6 and 105. As set out in paragraphs 12-17 of the detailed response on the Basic Law Issues

"Response to Lovell White Durrant's Submission dated 10 December 1999 on the Legal and Constitutional Issues" ("Detailed Response") attached to the covering paper [LC Paper No. CB(1) 820/99-00 (01)], the Proposed Provisions obviously fall short of expropriating all the legal rights of the Tunnel Companies in respect of permitting access to their tunnels and determining the relevant fee. Under the existing tunnel legislation, BOT tunnel operators' right to determine access requests of mobile network operators for the purposes of installing radiocommunications installation is not absolute. Their consent to such installation is subject to C for T's approval.

4. Nor will the Proposed Provisions extinguish the Tunnel Companies' right to determine fees or charges for the installation of radiocommunications installations within their tunnels. Where the Telecommunications Authority (TA) exercises his authorization power under the Proposed Provisions, the authorized licensee and the relevant Tunnel Company shall endeavour to agree to the fee to be paid for the installation. It is only where such agreement is wanting within a reasonable time that the fee shall be determined by a third party (see the proposed section 14(5) of the Bill). Further, such fee to be determined shall be "fair and reasonable in all the circumstances of the case" . As set out in paragraphs 16 and 17 of the Detailed Response, the Proposed Provisions does not amount to a de facto deprivation in the light of European Human Rights Jurisprudence. Hence, the Proposed Provisions, if enacted, will not have the effect of "depriving" the property rights of the Tunnel Companies for the purposes of Article 105 of the Basic Law. No question of mandatory compensation arises.

**Reasonableness and Proportionality**

5. As set out in our paper [LC Paper No. CB(1)820/99-00(01)] and also pointed out by the LegCo Legal Adviser, reasonableness and proportionality are the two major considerations as to whether the Proposed Provisions are consistent with the Basic Law. We have assured Members in that paper that these two tests are met having regard to our policy considerations.

6. A major relevant consideration on the test of reasonableness is whether there are legitimate societal and community interests in the provision of ubiquitous coverage for mobile telecommunications services. This is surely the case because -

(a) Notwithstanding the importance of mobile telecommunications in Hong Kong (54% penetration), coverage of our mobile networks is not yet ubiquitous. The problem will intensify with the advent of the third generation mobile phone services, especially for potential new entrants.

(b) The Proposed Provisions aim to provide a proper mechanism to address access problems when commercial negotiations fail between mobile operators and facilities owners of shielded areas e.g. BOT tunnels. This would in turn help strengthen our position as a telecommunications and Internet hub in the region.

(c) The Proposed Provisions also have a pro-competition element. For Shielded areas which are also public areas but there is no alternative location for radiocommunications installation, the interests of mobile network users (over half of our population) would be affected if the concerned parties cannot reach a commercial agreement on access arrangements for extension of mobile service to those particular shielded areas. A very well-balanced framework is put forward in the new section 14 to achieve our policy of ubiquitous mobile service coverage under such circumstances.

7. Any effect of our proposal on any facility owner is proportionate to the policy objectives sought to be achieved. There are sufficient statutory checks and balances in the Proposed Provisions -

(a) The new section 14(1A)(a) requires that the installation is for the purpose of providing a radiocommunications service to a public place;

(b) The new section 14(1B)(a) requires that the authorisation must be in public interest;

(c) The new section 14(1B)(b) sets out that the factors to be taken into account before granting authorisation, including the availability of alternative location to place equipment and the availability of

technical alternative; and

(d) We will ensure primacy of commercial negotiations (section 14(5)), and intervene only upon market failure. Mobile operators will be required to pay access fees, which must be fair and reasonable in all circumstances of the case.

8. Moreover, we are prepared to build in additional procedural safeguards into the amended section 14 in the light of the discussion of this Committee. The **Committee Stage Amendments** include –

(a) Before granting the authorisation of access under section 14(1A), the TA shall provide a reasonable opportunity to the parties likely to be affected to make representations and shall consider such representations.

(b) In granting the authorisation, the TA shall provide in writing his reasons and technical requirements, if any.

(c) The TA shall issue guidelines on the charging principles for determination of access fees. Prior to issue or variation of the guidelines, he shall consult the parties likely to be affected.

Details of these proposed amendments are set out in another paper "Committee Stage Amendments".

9. We would like to point out that the above proportionality requirement does not have to meet a test of strict necessity as suggested in the Further Submissions of the BOT tunnel companies. We have set out in paragraphs 23-27 of the Detailed Submission to justify this.

10. While the BOT tunnel companies claim that there was no access problem insofar as BOT tunnels are concerned, it should be noted that the mobile network operators in their previous representations and submissions to this Bills Committee have, however, expressed problems encountered in gaining access to shielded areas including BOT tunnels.

11. To conclude, the Administration firmly assures Members that the

enactment of the Proposed Provisions would be consistent with the Basic Law.

**Tunnel Ordinances and Project Agreements**

12. BOT tunnel companies claim that the Government would be in breach of contract upon the implementation of the Proposed Provisions. 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 determined under the Proposed Provisions must be *fair and reasonable* in all circumstances of the case. Our view is that the project agreements do not confer the franchisees an extra right to determine access applications of utility operators in addition to that which has been already conferred to the franchisees by virtue of the relevant tunnel ordinances.

**Arbiter of the Fee**

13. Some Members and the BOT tunnel companies have expressed concern over the role of the TA to determine access fees into shielded areas when commercial negotiations fail between the concerned parties. We have explained before that the TA would be bound by the statutory checks and balances in the Proposed Provisions and would be subject to scrutiny of the legislature and public to act in a reasonable and impartial manner.

14. Nonetheless, having regard to the concerns expressed and taking into account some suggestions from the Bills Committee on the impartiality, real or perceived, of the arbiter of the access fees, we are prepared to consider that the access fee can be determined by **an independent arbitrator** under the Arbitration Ordinance, instead of by the TA, in order to meet our policy objective of the Proposed Provisions. We will move **Committee Stage Amendments** to introduce an arbitration mechanism under the amended section 14. The CSAs will also clearly delineate between the powers of the TA in granting authorisation and the powers of the arbitrator in determining access fees. We believe that this change will make our proposal all the more acceptable to parties concerned.

15. Finally, the BOT tunnel companies' concern over section 36AA on

sharing of facilities would have been addressed by our proposed CSA to confine the section to mandate licensees only (instead of any person) to share facilities owned or used by them.

Information Technology and Broadcasting Bureau
6 March 2000