

**PERFORMANCE BOND**

**THIS PERFORMANCE BOND** is made on

**DATE:** [Insert date]

**BY:**

(1) [Insert name of bank providing the Performance Bond]

a banking corporation incorporated in

[Insert place of incorporation of the bank]

[with limited liability\*] whose [registered office/principal place of business in Hong Kong\*] is at  
(\* delete as appropriate)

[Insert address of bank providing the Performance Bond]  
(the "Bank").

**IN FAVOUR OF:**

(2) **THE TELECOMMUNICATIONS AUTHORITY OF HONG KONG** appointed under section 5 of the Telecommunications Ordinance whose address is at 29th Floor, Wu Chung House, 213 Queen's Road East, Wanchai, Hong Kong (the "Authority").

**WHEREAS:**

Pursuant to Special Condition 3 of the Mobile Carrier Licence dated

[Insert date]
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(the "Licence"), the Licensee is required to provide to the Authority a Performance Bond issued by a Qualifying Bank (as defined below) which shall remain in full force for the duration of the Licence. The Bank is a Qualifying Bank.

**1. INTERPRETATION**

**1.1 Definitions**

In this Performance Bond:

"Bonded Sum" means an amount of 

[Insert Bonded Sum amount]
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 HK\$ ;

"Business Day" means a day other than a Saturday or Sunday on which the banks in Hong Kong are open for general business;

"Hong Kong" means the Hong Kong Special Administrative Region of the People's Republic of China;

"Licensee" means 

[Insert name and registered office or principal place of business of Licensee]
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"Ordinance" means the Telecommunications Ordinance (Cap. 106);

"Qualifying Bank" has the meaning given to it in Special Condition 3.4;

"Regulation" means the Telecommunications (Method for Determining Spectrum Utilization Fees) (Third Generation Mobile Services) Regulation;

"Spectrum Utilization Fee" means the fee determined in accordance with Special Condition 2.1; and

"subsidiary" has the meaning given to it in the Companies Ordinance (Cap. 32).

**1.2 Construction**

In this Performance Bond, unless the contrary intention appears, a reference to:

- (a) a provision of law is a reference to that provision as amended, extended or re-enacted;

- (b) a reference to any document shall include that document as it may be amended, novated or supplemented from time to time;
- (c) a clause is a reference to a clause of this Performance Bond;
- (d) a person includes its successors and assigns; and
- (e) headings are for convenience only and are to be ignored in construing this Performance Bond.

**2. PERFORMANCE BOND**

2.1 On the occurrence of all or any of the following events:

- (a) failure of the Licensee to pay all or any of the Spectrum Utilization Fee due to insolvency of the Licensee;
- (b) surrender of the Licence by the Licensee;
- (c) a decision by the Chief Executive in Council to cancel or suspend the licence or the Authority to cancel, withdraw or suspend the Licence pursuant to section 34(4) of the Ordinance; or
- (d) the Licensee ceasing to provide telecommunications services over the telecommunications network pursuant to the Licence,

the Bank shall on demand made by the Authority in writing and without evidence that the relevant events have in fact occurred pay, satisfy and discharge without cavil or delay the Bonded Sum.

2.2 The obligations under this Performance Bond constitute direct primary, irrevocable and unconditional obligations of the Bank.

2.3 This Performance Bond shall continue in full force and effect until payment by the Bank to the Authority of the Bonded Sum in full in accordance with subclause 2.1 provided that no demand may be made under this Performance Bond after

[Insert expiry date] <sup>1</sup>
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2.4 For the purposes of this clause, "insolvency" of the Licensee includes where the Licensee goes into liquidation whether compulsory or voluntary or if an order is made or a resolution is passed for the winding up or a receiver or an administrator is appointed or it enters into any arrangement or composition with its creditors generally or ceases to carry on business or to be able to pay its debts when they fall due or becomes subject to other proceedings analogous in purpose or effect including, without limitation, the appointment of a receiver, trustee or liquidator for any such purpose.

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<sup>1</sup> Note: the expiry date shall be the date on which the payment of the Spectrum Utilization Fee in respect of the latest Royalty Year covered by this Performance Bond is due except that, where are less than 5 years remaining under the Licence, the expiry date shall be 12 months after the due date for payment of the Spectrum Utilization Fee for the last Royalty Year.

**3. MAXIMUM LIMIT**

The maximum amount for which the Bank shall be liable under this Performance Bond shall not exceed the aggregate of:

- (a) the Bonded Sum; and
- (b) the aggregate of all sums payable under clauses 4 and 7.

**4. INTEREST AND COSTS**

The Bank shall pay interest on the Bonded Sum from the date of demand to the date of payment in full (both dates inclusive) compounded quarterly (both before and after judgment) at 2 per cent. per annum over the prime rate quoted by The Hongkong and Shanghai Banking Corporation Limited from time to time. The interest shall be payable on demand and accrue from day to day on the basis of the number of days elapsed and a 365 day year.

**5. WAIVER OF DEFENCES**

The liability of the Bank under this Performance Bond shall remain in full force and effect and not be prejudiced, affected, discharged, impaired or diminished by any act, omission or circumstance which, but for this condition, might prejudice, affect, discharge, impair or diminish that liability including, without limitation, and whether or not known to the Bank:

- (a) any time or waiver granted to, or release of or composition with, the Licensee or any other person;
- (b) any suspension, cancellation, revocation, withdrawal or amendment of, or variation to, the Licence (including, without limitation, extensions of time for performance) or any concession or waiver by the Authority, the Government of Hong Kong, the Chief Executive in Council, the Chief Executive or, without limitation, any other person in respect of the Licensee's obligations under the Licence;
- (c) any forbearance or waiver of any right, power or remedy the Authority, the Government of Hong Kong, the Chief Executive in Council or the Chief Executive or, without limitation any other person, may have against the Licensee;
- (d) any act or omission of the Licensee pursuant to any other arrangement with the persons referred to in (c) above or with the Bank; or
- (e) the liquidation, administration, dissolution, lack of capacity or authority, or any change in the name or constitution of the Licensee or the Bank.

**6. ADDITIONAL SECURITY**

This Performance Bond is in addition to and not in substitution for or prejudiced by any present and future guarantee, lien or other security held by the Authority as security for the obligations of the Licensee. The Authority's rights, powers and

remedies under this Performance Bond are in addition to and not exclusive of those provided by law.

**7. NO DEDUCTIONS AND TAXES**

All sums payable under this Performance Bond shall be paid in full without set-off or counter-claim and free and clear of, and without deduction of or withholding for, or on account of, any present or future taxes, duties or other charges. If any payment is subject to any tax, duty or charge, or if the Bank is required by law to make any deduction or withholding, the Bank shall pay the tax, duty or charge and shall pay to the Authority any additional amounts as shall result in the Authority receiving a net amount equal to the full amount which it would have received had no payment, deduction or withholding been required.

**8. PAYMENTS**

All payments to be made by the Bank under this Performance Bond shall be made in immediately available funds in the currency and in the manner as the Authority may specify.

**9. WARRANTY**

The Bank warrants that this Performance Bond constitutes its legally binding obligations enforceable in accordance with its terms (subject to insolvency laws and creditors' rights generally and principles of equity) and does not conflict with any law, regulation or instrument binding on or relating to the Bank and that this Performance Bond is within its powers and has been duly authorised by it.

**10. INFORMATION AND CONSENTS**

The Bank shall:

- (a) supply the Authority with publicly available information as to itself and (if applicable) its subsidiaries as the Authority may reasonably request;
- (b) promptly obtain all official and other consents, licences and authorisations necessary or desirable for the entry into and performance of its obligations under this Performance Bond, whether or not performance has become due; and
- (c) promptly notify the Authority if the Bank ceases to be a Qualifying Bank.

The Bank warrants that all consents, licences and authorisations required or desirable under existing law in accordance with this clause have been obtained.

**11. NOTICES**

11.1 All documents arising out of or in connection with this Performance Bond shall be served:

- (a) on the Authority, at 29th Floor, Wu Chung House, 213 Queen's Road East, Wanchai, Hong Kong marked for the attention of the Authority; and

(b) on the Bank, at its address stated in this Performance Bond.

11.2 The Authority and the Bank may change their respective nominated addresses for service of documents to another address in Hong Kong by giving not less than five Business Days' prior written notice to each other. All notices, demands and communications must be in writing.

11.3 Any notice, demand or communication sent to the Authority or the Bank as provided in this clause shall be deemed to have been given, if sent by post, two Business Days after posting (and in proving delivery it shall be sufficient to provide that the notice, demand or communication was properly addressed and put in the post), if delivered by hand, at the time of delivery or, if sent by facsimile, at the time of despatch.

**12. ASSIGNMENTS**

The Bank shall not assign, transfer, novate or dispose of any of its rights and obligations under this Performance Bond. The Authority may assign all or any part of its rights and benefits under this Performance Bond at any time without the consent of the Licensee or the Bank.

**13. REMEDIES AND WAIVERS**

No delay or omission of the Authority in exercising any right, power or remedy under this Performance Bond shall impair that right, power or remedy or constitute a waiver of it nor shall any single or partial exercise of any right, power or remedy preclude any other or further exercise of it or the exercise of any other right, power or remedy. The rights, powers and remedies provided in this Performance Bond are cumulative and not exclusive of any rights, powers or remedies which the Authority would otherwise have.

**14. GOVERNING LAW AND FORUM**

14.1 This Performance Bond shall be governed by laws for the time being in force in Hong Kong and the Bank agrees to submit to the non-exclusive jurisdiction of the courts of Hong Kong.

14.2 The Bank irrevocably appoints

[Insert name of agent]	of
[Insert registered office or principal place of business of the agent together with name of employer if the agent is an individual]	

as its agent for service of process in connection with proceedings in the Hong Kong Courts and agrees that any process shall be sufficiently and effectively served on it if delivered to that agent at that address, or in any other manner permitted by law. Nothing in this clause is to limit right of the Authority to take proceedings against the

Bank in any other court of competent jurisdiction but this provision applies only to the extent that it does not prejudice the above agreement as to the jurisdiction of the Hong Kong Courts.

14.3 The Bank irrevocably and generally consents in respect of any legal action or proceedings anywhere (whether for an injunction, specific performance, damages or otherwise) arising out of or in connection with this Performance Bond to the giving of any relief or the issue of any process in connection with it including, without limitation, the making, enforcement or execution against any assets whatsoever (irrespective of their use or intended use) of any order (whether or not pre-judgment) or judgment which may be made or given there, and irrevocably and unconditionally waives, in any such action or proceedings anywhere, any immunity from that action or those proceedings, from attachment of its assets prior to judgment, other attachment of assets and from execution of judgment or other enforcement.

**15. COUNTERPARTS**

This Performance Bond may be executed in any number of counterparts, and this has the same effect as if the signatures on the counterparts were on a single copy of this Performance Bond.

**IN WITNESS** of which this Performance Bond has been executed and delivered as a deed on the date which appears first on page 1.

<p><b>**EXECUTED</b> as a deed by</p>	<p>[Insert name of bank providing the Performance Bond]</p>
<p>acting by</p>	<p>[Insert name of first bank signatory]</p>
<p>SIGNED</p>	<p>[Signature of first bank signatory]</p>
<p>and</p>	<p>[Insert name of second bank signatory]</p>
<p>SIGNED</p>	<p>[Signature of second bank signatory]</p>

\* delete as appropriate

\*\* execution clause to be amended as appropriate in accordance with the bank's constitutional documents