

PRE-PROVISIONING AGREEMENT

DATED: *9th December 1994*

PARTIES:

- 1.
- 2.

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THIS AGREEMENT is made on: 9th December 1994

BETWEEN:

AND:

INTRODUCTION

- A. provides international telecommunications services in accordance with a licence granted to it under the *Telecommunication Ordinance*.
- B. The Hong Kong Government has announced that will be issued under the *Telecommunication Ordinance*, in accordance with which it may offer fixed telecommunications network services
- C. and the have not yet agreed on the terms and conditions on which to interconnect international public switched telecommunications network and public switched telecommunications network.
- D. Pending the conclusion of an interconnect agreement between and , has agreed to pre-condition certain of its exchanges to install and make available capacity which is planned to be used in providing an interface between network and network once the interconnection agreement is concluded.

OPERATIVE PROVISIONS

1. INTERPRETATION

- 1.1 In this Agreement the following words and expressions have the meanings given to them in this clause, unless the contrary intention appears.

"Additional Equipment" means equipment to be installed by which is reasonably necessary to establish, operate and facilitate the utilisation of the Interconnect Exchange Capacity at each respective Interconnect Gateway Exchange, including but not limited to ports, racks, line cards and cabling, as set out in the Schedule and amended in accordance with this Agreement from time to time.

"Confidential Information" has the same meaning as it has in the Confidentiality Agreement previously entered between and

"Interconnect Agreement" means one or more agreements (but not necessarily the entirety of the arrangement) between and for interconnection between their respective networks and services and dealing with the subject matter of this Agreement, which currently are being negotiated by the parties (and for clarification, includes any

determination of interconnection arrangements between the parties by OFTA pursuant to section 36A of the *Telecommunication Ordinance*).

"**Interconnect Exchange Capacity**" means the capacity at each Interconnect Gateway Exchange to be provisioned by _____ pursuant to this Agreement for the purpose of that capacity being available for use in relation to the interface which will be established between _____ international public switched telecommunications network and _____ public switched telecommunications network pursuant to the Interconnect Agreement, set out in the Schedule and amended in accordance with this Agreement from time to time.

"**Interconnect Gateway Exchange**" means the _____ exchanges set out in the Schedule, which are planned to support the initial interface between _____ international public switched telecommunications network and _____ public switched telecommunications network.

"**Licence**" means the _____ which is to be issued to _____ pursuant to the *Telecommunication Ordinance*.

"**Provisioning Cost**" means the relevant labour, equipment and other costs and charges reasonably incurred by _____ in accordance with this Agreement in planning, provisioning, installing and testing the Interconnect Exchange Capacity and the Additional Equipment in respect of each Interconnect Gateway Exchange, estimates of which costs are set out in the Schedule, as amended in accordance with this agreement from time to time.

"**Provisioning Date**" means the date on which the relevant Interconnect Exchange Capacity or Additional Equipment is to be made available to _____, as set out in the Schedule.

"**TA**" means the Telecommunications Authority of Hong Kong.

"**Technical Specifications**" means the technical specifications set out in the Schedule, as amended or modified by _____ for the purposes of its network (although those amendments or modifications may not materially detract from the specifications in the Schedule), and to the extent not set out in the Schedule, as published by the relevant supplier, in relation to the installation and testing of the Interconnect Exchange Capacity and the Additional Equipment.

1.2 In this Agreement unless, the context otherwise requires:

- (a) headings are for convenience only and do not affect the interpretation of this Agreement;
- (b) the singular includes the plural and vice versa;
- (c) the word person includes a body corporate, an unincorporated association or an authority;
- (d) a reference to a party includes its successors and permitted assigns;
- (e) a reference to a document, includes any amendment, replacement or novation of it;
- (f) a reference to a statute, ordinance or by-law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them; and

- (g) if a period of time is specified and dates from a given day or the day of an act or event, it is to be calculated exclusive of that day.

2. SCOPE OF THIS AGREEMENT

- 2.1 This Agreement is intended to regulate the relationship between the parties in respect of the Interconnect Exchange Capacity and the Additional Equipment prior to the conclusion of the Interconnect Agreement, or if the Interconnect Agreement is not concluded between the parties.
- 2.2 The parties acknowledge that the Interconnect Agreement will include terms and conditions on which the Interconnect Exchange Capacity and the Additional Equipment is to be made available by one party to the other party. To the extent that the terms and conditions in this Agreement are inconsistent with the terms and conditions of the Interconnect Agreement, the terms of the Interconnect Agreement prevail.
- 2.3 The parties agree to negotiate in good faith to agree as part of the Interconnect Agreement the terms and conditions which are to apply to the Interconnect Exchange Capacity and the Additional Equipment to replace the provisions of this Agreement. The terms and conditions of this Agreement are entirely without prejudice to the negotiations and agreement in connection with the Interconnect Agreement. Without limitation, the parties may also agree in respect of any amounts (if any) paid under this Agreement, that those amounts may be recovered under the Interconnect Agreement.

3. PROVISIONING OF INTERCONNECT EXCHANGE CAPACITY

- 3.1 In consideration of _____ agreeing to pay the Provisioning Cost to _____ in the circumstances set out in this Agreement, _____ agrees to use its reasonable endeavours (but in any event, no less a level of performance than would be undertaken for _____ own provisioning for similar levels of capacity) to plan, order, install (including installation testing) and configure in accordance with the Technical Specifications and for the provision of public switched telecommunications services (in each case so as to have available by the Provisioning Date), and have available by the Provisioning Date, the Interconnect Exchange Capacity and Additional Equipment in respect of each Interconnect Gateway Exchange for use on and from the Provisioning Date in accordance with the Interconnect Agreement, so as to facilitate interconnection between the parties on and from the Provisioning Date in accordance with the Interconnect Agreement.
- 3.2 _____ agrees to notify _____ as soon as reasonably possible if at any time it reasonably believes or has reason to believe that it will be unable to provide the Interconnect Exchange Capacity or Additional Equipment in accordance with this Agreement, and also advise _____ of the following actions in respect of the Interconnect Exchange Capacity or Additional Equipment as soon as it is reasonably able to do so:
- (a) _____ estimated time at which any externally sourced capacity or equipment is to be delivered to _____ ;
 - (b) at least two calendar weeks prior to the physical installation of the relevant capacity or equipment;
 - (c) commencement of the relevant tests in respect of that capacity or equipment; and
 - (d) completion of the installation of the capacity or equipment in accordance with this Agreement.

- 3.3 From time to time _____ may notify _____ that it requires further Interconnect Exchange Capacity or Additional Equipment. On receipt of such a notice, the parties must negotiate in good faith to determine the specific requirements for additional capacity or equipment required by _____ and any variation to the estimated Provisioning Costs or Provisioning Dates for any capacity or equipment. The agreed capacity and equipment will then be considered to be Interconnect Exchange Capacity and Additional Equipment in accordance with the other terms of this Agreement, and the relevant Schedules must be updated accordingly.
- 3.3A From time to time _____ may notify _____ that it no longer requires capacity or equipment previously agreed. On receipt of such a notice, the parties must negotiate in good faith to determine any variation to the estimated Provisioning Costs or Provisioning Dates for any remaining capacity or equipment. This Agreement is deemed to be terminated to the extent and in respect of the capacity or equipment which _____ notifies _____ is no longer required.
- 3.4 _____ must give _____ the assistance _____ reasonably requires, including the provision of information (other than commercially sensitive information), in the planning, ordering, installing, testing and making available of the Interconnect Exchange Capacity and the Additional Equipment.
- 3.5 (a) For the avoidance of doubt, the provisioning undertaken by _____ under this Agreement does not include commissioning and nothing in this Agreement gives _____ the right to use the Interconnect Exchange Capacity or to install its own equipment on the premises at which each Interconnect Gateway Exchange is located.
- (b) Once the Interconnect Exchange Capacity and Additional Equipment has been installed and tested and is available in accordance with this Agreement (on and from the Provisioning Date), further charges, in addition to any charges payable under this Agreement, may be payable by _____ in respect of the continued availability, use, maintenance, operation, upgrading, replacement or decommissioning of that Interconnect Exchange Capacity and Additional Equipment.
- (c) The parties acknowledge that the matters described in paragraphs (a) and (b) are to be addressed, amongst other matters, in the Interconnect Agreement.

4. COST OF PROVISIONING

- 4.1 Unless otherwise provided by this Agreement, the costs and charges to be paid in respect of the Interconnect Exchange Capacity and the Additional Equipment will be as set out in the Interconnect Agreement.
- 4.2 If this Agreement is terminated (whether in whole or in respect of any identified Interconnect Exchange Capacity or Additional Equipment), prior to execution by the parties of the Interconnect Agreement and other than due to default by _____, _____ will bear solely the Provisioning Costs in respect of the relevant Interconnect Exchange Capacity or Additional Equipment, together with:
- (a) with respect to equipment or capacity used or disposed of in accordance with clause 4.2A, an agreed loading of 20% per annum on the proportion of those Provisioning Costs attributable to the relevant capacity or equipment, during the period of holding of the relevant Interconnect Exchange Capacity and Additional Equipment from the date of termination to the date of use or disposal of that capacity or equipment, or the

time at which it ought reasonably to have been used or disposed, in accordance with mitigation obligations under this Agreement;

- (b) any costs reasonably incurred in arranging for that reuse or disposal; and
- (c) any other direct and foreseeable net loss (and, for clarification, direct losses exclude consequential losses and loss of profits) reasonably incurred by in respect of that capacity or equipment as a result of that termination (excluding costs of capital and interest costs, and also excluding any costs arising as a consequence of the negligence or default of);

((a), (b) and (c) being collectively "the Loss"), less any amount by which has mitigated or reasonably ought to mitigate those costs and losses in accordance with this Agreement. must comply with the obligations set out in this Agreement in relation to seeking to mitigate the extent of the Provisioning Costs or the Loss for which is liable, but is not required otherwise to attempt to mitigate the Provisioning Costs or the Loss for which is liable.

4.2A Within the period of two months following the date of termination, agrees to make reasonable endeavours to mitigate the Provisioning Costs or the Loss by:

- (a) invoking any reasonably available provision in its terms and conditions with its supplier to cancel or limit any order for the relevant capacity or equipment;
- (b) reasonably determining (having regard to all relevant matters) whether the Interconnect Exchange Capacity and Additional Equipment can reasonably be re-used wholly or partly (including, in the case of E1 capacity and ancillary Additional Equipment by converting to T1 use, and having regard to any reasonable request for capacity or equipment, whether or not from a related company of , if that request is in accordance with the terms and conditions which are made available by to similarly placed companies at that time) within a period of 30 months from the date of termination, and if so, by committing the Interconnect Exchange Capacity and Additional Equipment to re-use (in which case the amount of the Provisioning Cost for which is liable will be reduced by the amount of the Provisioning Cost attributable to that capacity or equipment);
- (c) offering the Interconnect Exchange Capacity and the Additional Equipment for sale on arms length terms to related companies of (whether in Hong Kong or elsewhere) and, if not accepted by those companies, to ; and
- (d) offering the Interconnect Exchange Capacity and the Additional Equipment for re-sale on arms length terms to the relevant equipment supplier.

4.2B must not offer any equipment or capacity which is subject to this Agreement for sale to any related company, supplier or other person other than for a separate cash consideration ("Price") and without first offering that equipment or capacity for sale to as a set off against the Provisioning Costs for the Price and on terms and conditions no less favourable than those offered to the third party.

4.2C must use its reasonable endeavours to achieve the best possible price on any sale of Interconnect Exchange Capacity or Additional Equipment.

- 4.2D Nothing in this Agreement obliges to offer for sale any capacity or equipment once physically installed in its network, and the parties acknowledge that the only relevant mitigation requirements for physically installed capacity or equipment relate to reuse of that capacity or equipment within network. agrees that, if it receives written notice of termination from prior to installing any Interconnect Exchange Capacity or Additional Equipment, it will not proceed to physically install that Interconnect Exchange Capacity or Additional Equipment until it has fully complied with its obligations under this Agreement to mitigate the Provisioning Cost or the Loss.
- 4.2E agrees to use its reasonable endeavours to secure from its suppliers terms and conditions (including as to price, force majeure and cancellation rights) no less favourable than those which would reasonably be expected to negotiate for its own equipment from time to time. agrees that, in performing this Agreement, it will allocate relevant labour and other relevant resources as it would for reasonably similar activities for its own purposes in reasonably comparable circumstances.
- 4.2F agrees that it will repay to a proportionate part of the Provisioning Cost paid by in respect of any Interconnect Exchange Capacity or Additional Equipment, if commits that equipment or capacity to reuse within a period of thirty months from the date of termination of this Agreement. The amount to be repaid to is calculated as the value to of the relevant capacity or equipment at the time of its reuse less any reasonable cost incurred in holding that capacity or equipment until the time of reuse, although that amount must not in any case exceed the amount paid to by in respect of that capacity or equipment less any amount previously paid by to in respect of that capacity or equipment. The value of the relevant capacity or equipment is to be determined as the Provisioning Cost paid by in respect of that capacity or equipment, depreciated on a straight line basis at the rate of 16% per annum from the time of acceptance by of the relevant capacity or equipment.
- 4.2G Within thirty days of receipt of a written request from on or before 1 July in each year during the currency of this Agreement and for a period of three years following its termination in respect of the last of the Interconnect Exchange Capacity or Additional Equipment, must certify in writing to the extent of reuse of any capacity or equipment in accordance with the previous clause and must pay the value of that capacity or equipment calculated as described in that clause. If any amount remains outstanding after becoming due under this sub-clause, must pay interest on the outstanding balance each month at the rate of 2 per cent per month calculated from the due date.
- 4.3 has advised that it determined the estimates of the Provisioning Costs in good faith as at the date of this Agreement, but that the Provisioning Costs may exceed or be less than these amounts. However, agrees that the Provisioning Costs may not exceed the estimated Provisioning Costs increased by the amount (if any) set out in the Schedule in respect of those costs, unless otherwise agreed by the parties. If anticipates that the Provisioning Costs will, or are likely to, exceed the estimated amounts:
- (a) must provide with a variation notice which explains the relevant circumstances which considers warrants an increase in the cost, and the amount of the increase; and
 - (b) if required by , must promptly consult with in good faith on the amount by which the cost should be increased and

will give its reasonable consideration to any alternative technical or other solution proposed by which would reduce or eliminate the anticipated cost increase; and

- (c) until resolution of the amount of the increase in costs, may request that temporarily halt work in respect of the relevant Interconnect Exchange Capacity or Additional Equipment.

5. INSTALLATION TESTING

5.1 will perform testing on the Interconnect Exchange Capacity and the Additional Equipment at each Interconnect Gateway Exchange in accordance with the Technical Specifications and standard installation procedures, unless the parties have agreed that the equipment will be provisioned with different functionality or configuration in accordance with this Agreement (in which case the testing will be performed in the agreed manner).

5.2 must give 30 days' written notice of the times and the arrangements for the testing of Interconnect Exchange Capacity and Additional Equipment.

5.3 Nothing in this Agreement is intended to apply to the testing required for commissioning of the Interconnect Exchange Capacity and Additional Equipment, establishment of points of interconnection, or provision of services over those points of interconnection, which must separately be agreed between the parties.

6. TITLE

acknowledges that retains all right, title and interest to and in the Interconnect Exchange Capacity and the Additional Equipment at each Interconnect Gateway Exchange.

7. PAYMENT

7.1 On termination of this Agreement (whether in whole or in respect of any identified Interconnect Exchange Capacity or Additional Equipment), other than due to execution by the parties of the Interconnect Agreement or default by , will render an invoice for the Provisioning Cost and the Loss in respect of the relevant Interconnect Exchange Capacity or Additional Equipment to , less any amount by which has mitigated or reasonably ought to mitigate those costs and losses in accordance with this Agreement. may only issue an invoice under this clause following its compliance with its obligation to mitigate the Provisioning Costs or the Loss under this Agreement.

7.2 must pay any valid invoice issued by under clause 7.1 within 30 days of the date of the invoice. If any amount remains outstanding after that period, must pay interest on the outstanding balance each month at the rate of 2 per cent per month calculated from the invoice date.

7.3 must pay any Hong Kong or foreign taxes, duties, impost, levies or government charges in relation to or in connection with this Agreement and services and goods provided, supplied or made available by to under this Agreement (other than any taxes payable with respect to profits or income).

8. INDEMNITY AND LIMITATION OF LIABILITY

8.1 indemnifies and holds harmless , its employees, agents and sub-contractors from any claims, demands, proceedings or liability which may be brought against or any of them in respect of any loss, injury or damage (whether personal or to property) arising directly or indirectly out of or in connection with any breach of this Agreement by . However, subject to any other contrary provision in the Interconnect Agreement, the maximum aggregate liability of to under this Agreement is limited to the amount of the Provisioning Cost and the Loss payable by to under this Agreement.

8.2 The liability, if any, of in respect of this Agreement will be determined in accordance with the Interconnect Agreement. Until such liability is agreed, and other than in respect of amounts expressly payable by under this Agreement, excludes all liability to and to third parties which may arise out of or in connection with this Agreement including, but not limited to, loss incurred by or by third parties claimed against , loss of profits or savings actual or anticipated or any costs relating to an interruption of or a third party's business.

9. TERM AND TERMINATION

9.1 Unless otherwise agreed by the parties, this Agreement terminates on the earlier of 31 December 1995, or execution by the parties of the Interconnect Agreement.

9.2 may terminate this Agreement (whether in whole or in respect of any identified Interconnect Exchange Capacity or Additional Equipment) immediately by giving notice in writing if:

(a) materially breaches a material provision of this Agreement and that breach is not remedied within 14 days after written receiving notice to do so; or

(b) becomes subject to any form of insolvency administration or winding-up, unless there is a bona fide dispute between and the person or persons seeking to subject to that insolvency, administration or winding up; or

(c) notifies in writing that wishes to discontinue the negotiation of the Interconnect Agreement because no longer proposes to interconnect its network to the network of ; or

(d) OFTA determines and notifies in writing that it will not issue a Licence to or revokes Licence, or refuses or has not taken up its Licence, at the conclusion of the period given by OFTA for it to do so (including any extensions allowed by OFTA to that period).

9.3 may terminate this Agreement (whether in whole or in respect of any identified Interconnect Exchange Capacity or Additional Equipment) immediately by giving notice in writing if:

(a) breaches a material provision of this Agreement and that breach is not remedied within 14 days after receiving written notice to do so; or

- (b) wishes to withdraw its request for provisioning of any identified Interconnect Exchange Capacity or Additional Equipment.

9.4 On termination of this Agreement (whether in whole or in part) each party remains liable to the other in respect of all amounts validly invoiced or to be invoiced in accordance with this Agreement in respect of actions up to the date of termination. The terms and conditions of this Agreement continue to operate until has been compensated in accordance with this Agreement for any Interconnect Exchange Capacity or Additional Equipment requested by prior to termination.

10. CONFIDENTIAL INFORMATION

Any Confidential Information supplied under this Agreement is subject to the Confidentiality Agreement executed between the parties.

11. FORCE MAJEURE

11.1 A party does not breach this Agreement and is not liable to any other party for a delay or failure to perform an obligation (except an obligation to pay money) resulting from events or circumstances beyond the party's reasonable control. The party affected by the event or circumstance will be granted a reasonable extension of time to perform the obligation, if:

- (a) it notifies the other parties as soon as reasonably practicable of the event or circumstance and of the period for which it expects performance of its obligations to be delayed or prevented; and
- (b) it takes all reasonable steps to avoid or limit the effects of the event or circumstance.

11.2 If a delay or failure to perform a party's obligations due to an event or circumstance beyond that party's reasonable control exceeds 30 days, the other party may immediately terminate this Agreement on notice to the first party, but only if it has otherwise complied with the terms of this Agreement.

11.3 An event or circumstance beyond a party's control includes acts of God, war, flood, fire, explosion, civil disobedience, legislation not in force at the date of this Agreement, labour disputes, or delays of third parties, including suppliers, over which the party has no control.

12. ASSIGNMENT

Neither party may assign its rights under this Agreement without the prior written consent of the other.

13. NOTICES

13.1 A notice, consent, request or any other communication under this Agreement must be in writing and must be left at the address of the addressee, or sent by prepaid post (airmail if posted to or from a place outside Hong Kong) to the address of the addressee or sent by facsimile to the facsimile number of the addressee specified below or any other address or facsimile number the addressee requests.

- 13.2 A notice, consent, request or any other communication is deemed to be received:
- (i) if by delivery, when it is delivered;
 - (ii) if a letter, three days after posting (seven, if posted to or from a place outside Hong Kong); and
 - (iii) if a facsimile, at the time of dispatch if the sender receives a transmission report which confirms that the facsimile was sent in its entirety to the facsimile number of the recipient.

14. GENERAL

14.1 Cumulative rights

The rights, powers and remedies of a party under this Agreement are cumulative with the rights, powers or remedies provided by law independently of this Agreement.

14.2 Exercise of rights

A party may exercise a right, power or remedy at its discretion, and separately or concurrently with another right, power or remedy. A single or partial exercise of a right, power or remedy by a party does not prevent a further exercise of that or of any other right, power or remedy.

14.3 Waiver and variation

A provision or a right under this Agreement may not be waived except in writing signed by the party granting the waiver, or varied except in writing signed by the parties.

14.4 Approvals and consents

A party may give or withhold its approval or consent conditionally or unconditionally in its discretion unless this Agreement states otherwise.

14.5 Indemnities

Each indemnity in this Agreement is a continuing indemnity, separate and independent from the other obligations of the parties and survives termination and completion of this Agreement. A party need not incur expense or make payment before enforcing an indemnity under this Agreement.

14.6 Further assurances

Each party must, at its own expense, do everything reasonably necessary to give full effect to this Agreement.

15. GOVERNING LAW AND JURISDICTION

15.1 This Agreement is governed by the laws of Hong Kong.

15.2 Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Hong Kong.

16. DISPUTE RESOLUTION

16.1 If either party disputes in good faith an invoice prepared by the other or the calculation of any amount owing under this Agreement, that party must notify the other party within 14 days of receipt of that invoice or notice of calculation of the amount owing, specifying:

(i) the reasons why the party disputes the invoice or calculation of the amount owing; and

(ii) the amount in dispute.

16.2 Both parties must use their best efforts to promptly resolve any dispute notified under this clause and, if they are unable to do so within 30 days from receipt of the invoice by _____, the dispute must be referred to, if the TA agrees to that referral, the TA, and if it does not agree, a person agreed between the parties or, failing agreement, nominated by the TA. That person may then request reasonable information from either party (which may be given on the basis that it is not released to the other party, although the giving party must reasonably itemise for the other party the general nature and description of the matters in that submission), and determine an appropriate resolution to the dispute. The nominated expert may also appoint any other experts required to assist in the resolution of the dispute as the nominated expert sees fit (including telecommunications and legal experts), to assist in the resolution of the dispute.

16.2A Each party agrees to support the application for appointment of the TA in accordance with this clause.

16.3 Any amount found to be due or requiring refund following resolution of a dispute by the parties, together with interest on that amount at the rate of 2 per cent per month from the invoice due date, must be paid or refunded, as the case may be, within three business days of the resolution.

16.4 If, following resolution of the dispute, the party which raised the dispute has the amount payable varied in its favour by less than 5%, that party must pay the costs of the dispute resolution, otherwise the party against whom the dispute was raised must pay the costs of the dispute resolution, and those costs are to be the reasonable costs of the dispute resolution as determined by the person resolving the dispute.

16.5 Each party acknowledges that this Agreement will not prevent the Telecommunications Authority exercising its powers under the *Telecommunication Ordinance* or its rights under the _____ held by _____, or the licence under the *Telecommunication Ordinance* held by _____, or other lawful rights or powers from time to time.

EXECUTED as an Agreement.

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SCHEDULE

Interconnect Exchanges, Capacity and Provisioning Dates

List of Interconnect Gateway Exchanges and Interconnect Exchange Capacity to be provided at each exchange, and Provisioning Dates by which the parties agree the capacity is to be provided.

The Interconnect Exchange Capacity and Additional Equipment is to be installed at each of the Interconnect Gateway Exchanges

in equal quantities (unless otherwise agreed by the parties).

Total number of E1 Ports to be provisioned: 40.

Total number of T1 Ports to be provisioned: Nil.

The Provisioning Date is: 1 June 1995.

Estimated Provisioning Costs

estimate of the Provisioning Cost per E1 port payable by in respect of the capacity in this Schedule (after the first 40 ports) is:

HK\$77,955.00.

of the Provisioning Cost per E1 port payable by in respect of the capacity in this Schedule (for the first 40 ports) is:

HK\$Nil.

This cost includes all labour, equipment and other costs and charges, including capital, billing, transmission, installation and switch related costs for each switch port capacity. agrees that it will be able to mitigate in respect of at least 40 E1 ports, and so does not require any cover from in respect of those ports.

agrees that the Provisioning Cost per port may not be increased in accordance with this Agreement so as to exceed the above estimates by more than 20%.

Technical Specifications

E1 switch port capacity: As defined in sections 5 and 6 of *Network Connection Reference CR15*.

T1 switch port capacity: As defined in sections 5 and 6 of *Network Connection Reference CR14*.

This Letter of Intent dated 28th March 1995 sets out the interim agreement between

in relation to the sharing of ducts to be located at the North Lantau Expressway ("Duct Run") pending the conclusion of a detailed agreement between the parties on the future terms and conditions for sharing of and access to those ducts.

and each of (each a "Party" and collectively the "Parties")
agree as follows :

1. Provisioning

1.1 In consideration of each of the agreeing to pay the amounts identified in this Letter, agrees to plan, order and install the Duct Run in accordance with the Duct Run Plan already made available to the new by

1.2 The Parties agree to negotiate in good faith to conclude a detailed agreement ("Agreement") which will replace the provisions of this Letter to regulate the relationship between the Parties in respect of new duct works including those relating to the Duct Run. The Parties will agree the extent to which the Agreement will govern duct works other than those relating to the Duct Run, and the provisions in this Letter are entirely without prejudice to the negotiations and agreement in connection with the Agreement.

1.3 This Letter will continue to be binding on the Parties until it is replaced by the Agreement or otherwise terminated in accordance with the provisions of this Letter.

1.4 The Parties agree that, before the Agreement is concluded or unless this Letter is terminated, no change to Ducting Technical Specifications already made available to the new FTNS Operators by

2. Construction Fee and Payment

2.1 estimate of the total construction costs of the Duct Run is set out in Appendix 1 to this Letter. The proportionate share of the construction cost of the Duct Run payable by each in respect of this Letter ("Construction Fee") is attached as Appendix 2 to this Letter.

2.2 Each will pay 50% of its Construction Fee within fourteen calendar days from the date of this Letter to , and the balance within fourteen calendar days upon receipt of an invoice from which invoice will not issue until it has been billed by its contractor.

3. Ownership of Duct

3.1 The Parties will finalise the issue of ownership of the Duct Run in the Agreement, and agree to adopt one of the two alternative models described below.

- 3.2 The first alternative is that _____ retains ownership of the Duct Run and grants an indefeasible right of use licence to _____ :
- (a) to locate the cable of _____ in the allocated duct space in the Duct Run;
 - (b) to locate in the designated duct access points any ancillary cable equipment; and
 - (c) to physically access the designated duct access points for the purpose of installing, testing, maintaining, repairing, removing and replacing the ancillary cable equipment and cable of _____
- 3.3 The other alternative is for the Parties to agree to own the Duct Run as tenants-in-common in the same proportion used for calculating Construction Fee in Appendix 2 of this Letter.
- 3.4 Any title or interest to or in the Duct Run that _____ may have pursuant to this Letter will automatically cease if that _____ informs the other Parties of its intention to terminate this Letter.
4. Termination by
- 4.1 _____ may, at any time prior to 21 April 1995, inform the other Parties of its intention to terminate this Letter subject to its payment liability described in this Letter.
- 4.2 If _____ informs the other Parties that it intends to terminate this Letter, the remaining Parties may choose to take over the cancelled capacity.
- 4.3 _____ may, with the consent of _____ which consent will not be unreasonably withheld, assign its capacity to and its rights and obligations under this Letter to its associated company which is authorised by law to install ducts in Hong Kong and holds a licence issued under the Telecommunication Ordinance.
- 4.4 If the cancelled capacity is committed to reuse and new arrangements for payment in respect of that capacity are made to the reasonable satisfaction of _____, _____ will repay the terminating _____ a proportionate part of the Construction Fee in respect of the capacity reused, less any reasonable cost incurred by _____ in holding that capacity until the time of reuse.
- 4.5 The terminating _____ must pay and indemnify _____ against the costs reasonably incurred by _____ as a consequence of that termination (which may include an advance payment in respect of the increase in overall unit costs of the project in respect of the remaining construction, costs of variation to the Duct Run Plan, and costs of continuing construction until it is reasonably feasible to cease the presently planned construction) if those amounts have not already been paid by the terminating _____ as part of the Construction Fee. _____ will give credit to the terminating _____ for the amount that _____ can recover from the reuse of the cancelled capacity.

- 4.6 Unless the remaining _____ agree to pay and indemnify _____, the terminating _____ must pay and indemnify _____ against all the costs described in clause 4.5 including :
- (a) the costs of variation of the remaining project (redrawing plans, notifying engineers, rescheduling work etc);
 - (b) the costs of construction of the Duct Run to the next natural break point which the Parties have agreed as likely to be the next duct access point in accordance with the Duct Run Plan; _____ agrees to make its best efforts to contain these costs to the extent reasonably possible under its agreement with the contractors;
 - (c) the costs that may be incurred by _____ or the remaining _____ to make variation to the Duct Run Plan to take into account the diminished need, and a variation which requires 'excess capacity' to be installed to meet an engineering 'multiple' of ducts (eg a reduction from a 12 way to a 10 way will either require a consequential reduction to a 9 way, or installation of the original 12 way).
- 4.7 If a Party disputes in good faith an invoice prepared by _____ or the calculation of any amount owing under this Letter, that disputing Party must notify within seven calendar days of receipt of that invoice or notice of calculation of the amount owing, specifying the amount in dispute and the reasons for dispute. _____ and the disputing Party must use their best efforts to promptly resolve any dispute notified under this clause and, if they are unable to do so within fourteen calendar days from receipt of the invoice by the disputing Party, the dispute may be referred to, if the Telecommunications Authority ("TA") agrees to the referral, the TA, and if it does not agree, a person agreed between _____ and the disputing Party or, failing agreement, nominated by the TA. That person may then request reasonable information from _____ or the disputing Party (which may be given on the basis that it is not released to the other Party in dispute, although the giving Party must reasonably itemise for the other Party the general nature and description of the matters in that submission), and determine an appropriate resolution to the dispute. The nominated expert may also appoint any other experts required to assist in the resolution of the dispute as the nominated expert sees fit (including telecommunications and legal experts), to assist in the resolution of the dispute.
5. **Deadlock**
- 5.1 If the Parties are unable to conclude the terms and conditions of the Agreement by 14 April 1995, any Party may invite the TA to facilitate discussion among the Parties to conclude the Agreement. The Parties agree that this clause does not in any manner prejudice the Parties' rights under the Telecommunication Ordinance nor vary the power which the TA has under law. The Parties also agree that inviting facilitation by the TA under this clause does not amount to a request for determination by the TA, and does not set a precedent for any future dealings between the Parties.
- 5.2 If the Parties are unable to conclude the Agreement fourteen calendar days after commencement of facilitation by the TA, the Parties must enter into good faith negotiations to share _____ liability in connection with the Duct Run which has

not been provided for under this Letter. If the Parties are still unable to reach an agreement within another fourteen calendar days on how to share liability, any Party may immediately terminate this Letter subject to its payment liability described in this Letter.

5.3 Nothing in this Letter will prejudice the Parties' rights to refer a matter for determination by the TA pursuant to the Telecommunication Ordinance.

6. Liability

6.1 Each Party indemnifies and holds harmless the other Parties, their employees, agents and sub-contractors from any claims, demands, proceedings or liability which may be brought against any of them in respect of any loss, injury or damage (whether personal or to property) arising directly or indirectly out of or in connection with the negligence or wilful default of the first Party, its employees, agents or sub-contractors.

6.2 The total liability of each Party to the other Parties in contract, tort or otherwise including any liability for negligence however arising in connection with this Letter is limited to its corresponding amount set out in Appendix 2 of this Letter.

6.3 No Party will be liable for any consequential damage or loss suffered or incurred by any other Party arising directly or indirectly out of or in connection with the sharing arrangement of the Duct Run under this Letter, including, but not limited to, loss incurred by a Party or by third parties claimed against that Party, loss of profits or savings actual or anticipated or any costs relating to an interruption of the Party's or a third party's business.

7. Force Majeure

7.1 A Party does not breach the agreement under this Letter and is not liable to any other Parties for a delay or failure to perform an obligation (except an obligation to pay money) resulting from events or circumstances beyond the Party's reasonable control. The Party affected by the event or circumstance will be granted a reasonable extension of time to perform the obligation, if:

(a) it notifies the other Parties as soon as reasonably practicable of the event or circumstance and of the period for which it expects performance of its obligations to be delayed or prevented; and

(b) it takes all reasonable steps to avoid or limit the effects of the event or circumstance.

7.2 If a delay or failure to perform a Party's obligations due to an event or circumstance beyond that Party's reasonable control exceeds 21 days, any other Party may immediately inform the other Parties of its intention to terminate this Letter, subject to its liability to reimburse for any direct costs it has incurred in performing its duties under this Letter prior to the force majeure.

7.3 An event or circumstance beyond a Party's control includes acts of God, war, flood, fire, explosion, civil disobedience, legislation not in force at the date of this Letter, labour disputes, or delays of third parties, including suppliers, over which the Party

has no control. However, the Parties acknowledge that the failure of any Party to be granted _____, or the revocation or termination of that licence, is not considered to be an event of force majeure for the purposes of this Letter.

Signed for and on behalf of)

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Signed for and on behalf of)

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Signed for and on behalf of)

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Signed for and on behalf of)

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ESTIMATED QUARTERLY PAYMENT K\$

YEAR 1 (94/95)

SECTION	2nd Qtr/94 (4-6/94)	3rd Qtr/94 (7-9/94)	4th Qtr/94 (10-12/94)	1st Qtr/95 (1-3/95)	TOTAL K\$
	0	0	0	296	296
	0	0	85	391	476
	0	0	0	0	0
	0	0	0	0	0
Total K\$	0	0	85	687	772

YEAR 2 (95/96)

SECTION	2nd Qtr/95 (4-6/95)	3rd Qtr/95 (7-9/95)	4th Qtr/95 (10-12/95)	1st Qtr/96 (1-3/96)	TOTAL K\$
	2,151	2,194	2,194	1,466	8,005
	3,132	4,220	4,650	872	12,875
	1,457	992	1,973	2,020	6,441
	34	508	254	635	1,432
Total K\$	6,774	7,914	9,071	4,993	28,753

YEAR 3 (96/97)

SECTION	2nd Qtr/96 (4-6/96)	3rd Qtr/96 (7-9/96)	4th Qtr/96 (10-12/96)	1st Qtr/97 (1-3/97)	TOTAL K\$
	0	0	0	0	0
	0	0	0	0	0
	2,754	0	0	0	2,754
	1,142	0	0	0	1,142
Total K\$	3,897	0	0	0	3,897

Grand Total =

33,422 (Year 1+2+3)

- Note : 1. For ease of comparison, the management fee is a 9% mark-up on the contractor and material costs. (approximately HK\$ 2.8 million)
 2. The figures in this Appendix 1 are based on a 12 way duct run. will provide cost estimates for a 9 way duct run to within one week after quotes are received by from its contractors.

APPENDIX 2

Duct requirements for Main Duct Route of each Party :

	2
	2
	2
	3
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TOTAL	9

Costs to each Party for the Main Duct Route will be calculated on a pro-rata basis in proportion to the above total.

Estimated construction and material costs of a 12 way duct run for the period covered by this Letter of Intent are HK\$1,888,000. Within one week after quotes for a 9 way duct run are received by _____ from its contractors, _____ will provide _____ with estimated costs for a 9 way duct run and the Construction Fee payable by each Party. In the meantime, _____ will make payments under clause 2.2 of the Letter of Intent based on the following figures :

HK\$
419,555
419,555
419,555
629,333

A Party's liability cap in respect of each of the other Parties is HK\$600,000.