

立法會
Legislative Council

LC Paper No. CB(3)717/00-01

(These minutes have been
seen by the Administration)

Ref: CB(3)/BC/1/00/2

Bills Committee on Telecommunications (Amendment) Bill 2001

Minutes of meeting
held on Wednesday, 2 May 2001 at 1:05 pm
in Conference Room A of the Legislative Council Building

- Members present** : Hon James TIEN Pei-chun, JP (Chairman)
Hon David CHU Yu-lin
Hon Eric LI Ka-cheung, JP
Hon CHAN Kwok-keung
Hon SIN Chung-kai
Hon Howard YOUNG, JP
Hon YEUNG Yiu-chung
Hon Emily LAU Wai-hing, JP
- Public Officers attending** : Ms Eva CHENG
Deputy Secretary for Information Technology and
Broadcasting
- Ms Gracie FOO
Principal Assistant Secretary for Information
Technology and Broadcasting
- Miss Linda SO
Assistant Secretary for Information Technology and
Broadcasting
- Mr M H AU
Director-General of Telecommunications (Acting)
- Mr Geoffrey FOX
Senior Assistant Law Draftsman
- Miss Shirley WONG
Government Counsel

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Clerk in attendance : Mrs Betty LEUNG
Chief Assistant Secretary (3)1

Staff in attendance : Miss Connie FUNG
Assistant Legal Adviser 3

Mr Colin CHUI
Senior Assistant Secretary (3)2

I. Meeting with the Administration

TA empowered to regard the fees arising from the auction, tender or other methods as a determining factor in issuing licences or assigning spectrum frequency

Deputy Secretary for Information Technology and Broadcasting (DSITB) and Principal Assistant Secretary for Information Technology and Broadcasting briefed members on the Administration's response to the members' concern raised at the last Bills Committee meeting, which was set out in LC Paper No.CB(3) 635/00-01(01) (the paper).

2. Members noted the Administration's legal advice (paragraph 5 of the paper refers) explaining why the suggestion to amend clause 2 of the Bill to provide that in case of auction, the Telecommunications Authority (TA) "shall" regard the fees as the determining factor while in other cases, TA "may" regard the fees as a determining factor was not appropriate. Mr SIN Chung-kai asked whether, in the light of the present wording of clause 2 which provided that TA "may" regard the fees as a determining factor, TA would be subject to legal challenge if he decided not to issue licences to winners in the auction.

3. In response, DSITB said that it would be ultra vires for TA, as a statutory body, to disregard or contravene provisions of the subsidiary legislation to be made by the Secretary for Information Technology and Broadcasting (SITB) under section 32I of the Telecommunications Ordinance (the Ordinance). There would be safeguards for the aggrieved party such as seeking judicial review on TA's exercise of power under clause 2 of the Bill. The Administration maintained that it was appropriate to set out general empowering provision applicable to all licensing exercises in primary legislation and specific provision to individual licensing exercise in subsidiary legislation.

4. Mr SIN Chung-kai asked whether paragraph 5(b) of the paper was telling members that the suggestion could lead to licences awarded to the

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highest bidders without regard to the results of the pre-qualification exercise and requirement for compliance with the auction rules. DSITB responded that the pre-qualification results and compliance requirement had to be taken into account in the award of licences. The Administration was cautious to avoid any unintended effect arising from the member's suggestion that TA must regard the fees as the determining factor in the auction, which might lead to legal challenge from unsuccessful bidders such as an un-qualified bidder or a bidder in breach of auction rules who had made the highest offer.

5. In response to Mr Howard YOUNG's question of whether the Administration had in mind any other situation that the Bills Committee was unaware of in which TA's discretionary power was required, DSITB said that the Administration was not aware of any other situations which TA's discretionary power under section 7 as revised by clause 2 sought to deal with. The answer to members' concern on whether TA would comply with the subsidiary legislation without an express requirement for him to do so in the primary legislation was positive in that there were already such provisions in the Ordinance.

6. In the case of only four or less bidders entering the spectrum auction as raised by the Chairman, DSITB said that subject to payment of the reserve price for the licence and compliance with the terms and conditions of the auction, licences would be awarded to these bidders. The reserve price of the 3G licences would be set out in the information memorandum. A period of eight weeks commencing from the date of issue of the memorandum would be given to potential bidders to decide whether to make licence applications.

7. Regarding Mr Howard YOUNG's enquiry about whether the Administration could change the method for determining the fee of a licence which had not been awarded in the auction exercise at its discretion, DSITB said that as the draft subsidiary legislation specified that the four 3G licences were to be issued by auction, a new subsidiary legislation would need to be passed for employing another method to award the remaining licence(s) and the subsidiary legislation would be subject to negative vetting by the Council.

8. Members noted that PCCW-HKT had not made further submission to pursue with its earlier suggestion to amend clauses 2 and 3 to the effect that the fees should be the only determining factor in the issue of licences and allocation of frequency bands respectively.

9. Mr SIN Chung-kai said that he was yet to be persuaded that the drafting of clauses 2 and 3 fully reflected the arrangements for the issue of 3G licences, but he would accept it if during the Second Reading debate on the Bill in the Council, the Administration would spell out clearly the legislative intent

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of the relevant provisions and give an undertaking that TA was bound by the provisions of subsidiary legislation, and in the case of 3G licensing exercise, TA must regard the fees arising from the auction exercise as the determining factor for granting the licences as provided for in the 3G-specific regulation, subject to compliance with terms and conditions of the auction. DSTIB agreed to convey the request to SITB.

Forfeiture or refund of a spectrum utilization fee that has been paid, where a licence was cancelled, withdrawn or suspended

10. Regarding Miss Emily LAU's enquiry about the meaning of public interest based on which the Chief Executive (CE) in Council might exercise the power to cancel or suspend a licence under section 34(4) of the Ordinance and the procedures to be followed in such exercise of power, DSITB said that under common law principles, the CE in Council was required to act fairly and follow the common law principles of natural justice in making his decision. If the CE in Council decided to cancel or suspend a licence, the affected licensee would be given an opportunity to make representations and the CE in Council would consider all representations made and would act impartially in the exercise of his discretion. The CE in Council's decisions to cancel or suspend a licence were subject to judicial review and the CE in Council would need to justify his decision in any legal challenge. In view of the above safeguards and the difficulty in giving an all-embracing definition of the term "public interest", the Administration considered that the existing wording of the provision was appropriate.

11. Members noted that PCCW-HKT Limited had not further pursued with its submission on amendment to section 34(5) in clause 5 of the Bill in relation to forfeiture of any spectrum utilization fee already paid in relation to a licence that had been cancelled or suspended by the CE in Council on the ground of public interest.

12. Miss Emily LAU said that while the broad ground of public interest was not defined in the Ordinance, she understood from the Administration that amendment to specify the ground was outside the scope of the Bill. Nevertheless, she asked whether the Administration would spell out in the law the circumstances under which public interest could be invoked to cancel or suspend a licence. In response, DSITB said that the proposed amendment to section 34(5) sought to provide that any spectrum utilization fee already paid would not be refunded upon licence cancellation, withdrawal or suspension. The Government might enforce the 5-year rolling bank guarantee of the guaranteed minimum royalty payment provided by a licensee in the event that a 3G licence was revoked because the licensee had either terminated its own business or breached the auction rules. As cancellation or suspension of a licence was a very serious matter and the exercise of the power by CE in Council to do so was subject to safeguards, CE in Council would be cautious

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about exercising the power. In fact the provision on licence cancellation, withdrawal or suspension had not been invoked so far.

13. Miss Emily LAU said that as the Executive Council meetings were held in camera, representations to the CE in Council on his decision to cancel or suspend a licence could only be made in written form. Moreover, judicial review was only concerned with the procedure followed by the CE in Council in making the decisions. Since amendment to specify the broad ground of public interest could not be included in the Bill, she requested that the circumstances under which public interest could be invoked to cancel or suspend a licence should be clearly spelt out in the law in the near future. She pointed out that in the course of studying the Broadcasting Bill criteria had been imposed on invoking provisions which had a broad scope of application. DSITB responded that the Broadcasting Ordinance also provided for licence cancellation or suspension on the ground of public interest and the criteria were not concerned with licence cancellation or suspension but exemptions concerning “disqualified persons”. In response to members’ request, DSITB agreed to give further consideration to members’ views regarding whether it should be clearly spelt out in the law the circumstances under which "public interest" could be invoked to cancel or suspend a licence, and to inform the Panel on Information Technology and Broadcasting of its deliberation in this respect in six-month's time.

**Adm
CAS(1)3**

Committee Stage Amendments (CSAs)

14. Noting that the Administration would revise the Chinese version of its CSAs which had been submitted to the Bills Committee earlier and provide the Bills Committee with a complete set of its proposed CSAs, members agreed that ALA3 should examine the legal and drafting aspects thereof and advise whether they were in order.

15. Members agreed that the Bills Committee would not propose CSAs to the Bill.

Report to House Committee

16. Members agreed that the Bills Committee should report to the House Committee at its meeting on 4 May 2001 recommending that:

- (a) subject to the CSAs to be moved by the Administration, the Second Reading debate on the Bill be resumed on 16 May 2001; and
- (b) a subcommittee should be formed immediately under the House Committee to study the draft subsidiary legislation and the proposed auction design and process, and to meet

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with the industry.

Information memorandum

17. In response to Miss Emily LAU, DSITB said that the Administration was drawing up the information memorandum for issue on the first day of the licence application period, which would be after completion of the legislative process for the subsidiary legislation by 11 July 2001 according to the Administration's tentative timetable. While the Administration would not provide a draft version of the memorandum for consultation, it intended to brief the Panel on Information Technology and Broadcasting on important issues therein which were of interest to members such as the auction design and means to keep the public and the media informed of the auction process. To avoid duplication of work of the Panel and the subcommittee, members considered it more appropriate for the subcommittee, rather than the Panel, to receive the Administration's briefing and to follow up on the issues relating to the memorandum.

18. There being no other business, the meeting ended at 1:56 pm.

Legislative Council Secretariat

28 May 2001

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