

立法會
Legislative Council

LC Paper No. CB(3)663/00-01

(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 Friday, 6 April 2001 at 2:30 pm
in Conference Room B of the Legislative Council Building

- Members present** : Hon James TIEN Pei-chun, JP (Chairman)
Hon Eric LI Ka-cheung, JP
Hon CHAN Kwok-keung
Hon Emily LAU Wai-hing, JP
- Members absent** : Hon David CHU Yu-lin
Hon SIN Chung-kai
Hon Howard YOUNG, JP
Hon YEUNG Yiu-chung
- 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
Senior Assistant Director (Regulatory), Office of the
Telecommunications Authority
- Mr Geoffrey FOX
Senior Assistant Law Draftsman

Miss Shirley WONG
Government Counsel

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

On the Chairman's question of the price for the four third generation mobile services (3G) licences resulted from the auction, Deputy Secretary for Information Technology and Broadcasting (DSITB) responded that the price, which was linked to a royalty percentage to be determined by the auction, would be the market price for the licences and would be applicable to all the four successful bidders. A common royalty percentage was necessary as different royalties could create distortion in the market for 3G services. The Chairman asked the Administration why the price was set at the fourth bidder's last bid before he left the spectrum auction rather than at that offered by the four remaining bidders immediately after the fifth bidder left the auction. DSITB responded that it was essential that the spectrum should be awarded at a fair market price. The Administration considered that such price was reflected by the highest common price willing to be paid by the four successful bidders.

2. The Chairman asked whether during the auction the last remaining four bidders would be aware of the fact that they were successful bidders in view of the fact that all bidders were not accommodated together and were kept at their own bidding rooms. DSITB responded that such arrangement aimed at preventing collusion which might result in potential bidders jointly lowering the licence price. Only when there were three bidders remained in the auction and when the fourth bidder had made his last offer price would the auction end. To address the concern about transparency on a closed-door auction, the Administration was considering taking the following measures: (a) inviting the Independent Commission Against Corruption to the auction as an observer; (b) 'replaying' and accounting for the whole auction process afterwards with suitable means; and (c) briefing the media on the outcome of the auction immediately thereafter.

Written submission from Hutchison Telephone Company Limited to the Bills Committee (tabled at the meeting and issued to absent members vide LC Paper No. CB(3)584/00-01)

3. Mr Eric LI said he shared the concern of Hutchison Telephone Company Limited (Hutchison) about the secret bid approach which preserved confidentiality of the identity and number of bidders. Mr LI pointed out that in its submission, Hutchison considered that such approach contradicted the principles of an auction and defeated the purpose of an open auction. It also questioned whether the secret bid approach could promote entry of bidders as open auctions could, especially in the light that land auctions which had been conducted in Hong Kong for many years and other auctions conducted by the Government did not seem to have deterred any players from participating (paragraph 5.2.2 of the submission refers). Mr LI considered that such approach with a specified number (four) of licences was unique and could be contentious. He wondered why such approach with low transparency was adopted, whether it might encourage irrational bidding and was designed to maximize the treasury benefit.

4. In response, DSITB pointed out that the Administration had not prescribed that the number of 3G licences to be issued must be four. The relevant subsidiary legislation would provide that if less than four potential bidders were qualified to enter the auction, spectrum auction would not be held and the bidders would be granted the licences at the reserve price. The Administration would ensure that the auction would be conducted in a fair manner. In deciding to adopt the method of royalty bid rather than cash bid, the Administration had taken into account bidders' difficulties in raising capital. Irrational bidding might not arise as the bidders could bring in their supporting experts to the auction in order to work out the price offered and they should not need to refer to other bids in making their own offers. The Administration was considering the detailed arrangement for the auction such as the venue and the possibility of web-casting the bids on royalty percentage.

5. Mr Eric LI was concerned that potential bidders did not have sufficient information to do the analysis and calculation work in order to work out their proposed licence prices. He considered it difficult for a bidder to adopt a rational approach in making bids without knowing about other bidders.

6. DSITB responded that potential bidders might already be working out their proposed licence prices. The risks involved in making bids in the auction would not be greater than those in a tender. In fact, the proposed ascending auction might be advantageous to the bidders as the bid value resulted therefrom might be lower than what they were prepared to pay. In a tender, bidders made their bids at the highest values they were willing to pay.

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7. Miss Emily LAU supported the use of auction to allocate 3G licences. While the detailed auction design had to be drawn up carefully, she supported the principles of setting the licence price at the highest common price willing to be paid by the fourth bidder and of the secret bid approach to prevent collusion. Nevertheless, she was concerned about the transparency in the auction and asked the Administration about the possibility of media presence therein.

8. In response, DSITB said that the Administration was considering ways to address the concern on transparency in the auction. One option was a time-lag release of the auction process, like that of the United Kingdom, and the bids were to be made by web-casting. Another option was for the auction to be conducted in a venue provided by the Administration and to arrange for media presence in the master control room.

9. In reply to the Chairman, DSITB said that the relevant subsidiary legislation would not set out the arrangement for releasing information on the bids during the auction. The principle of preserving the identity of the bidders would be adhered to in selecting the auction venue. Media presence in the auction should not lead to disclosure of bids during the auction thereby affecting the licence price. Miss Emily LAU supported the Administration in this respect. Nevertheless, she said that information relating to the bids should be released as soon as possible after the auction, and in the light that the auction would last for only a few hours, media presence during the auction was preferable to releasing information about the bids after the auction, which could be piecemeal and incomplete.

10. In reply to the Chairman, DSITB said that the terms and conditions of the auction would be set out in the information memorandum which was a notice published in the Gazette and not subsidiary legislation. While it was unlikely that the entire set of terms and conditions could be drawn up at this stage for consideration by the Bills Committee, the main concerns thereon, such as the royalty percentage bid for right to licence, cash bid for allocation of specific sets of frequency bands and sorting out connected bidders, would be addressed in the relevant subsidiary legislation, a draft of which had already been issued to the Bills Committee (LC Paper No. CB(3) 536/00-01(02)).

11. In reply to the Chairman, DSITB said that in order to preserve market competition, the proposed ownership rules provided that any arrangement with more than one 2G operator involved in a bidding consortium must be expressly approved by the Telecommunications Authority (TA) in advance.

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12. On the Chairman's question of how to allocate the four sets of frequency bands of the four 3G licences, DSITB said that in the light that the four licences were likely to have slightly differing technical capabilities which might be perceived differently by individual successful bidders, the four successful bidders would bid in a cash auction the priority to choose amongst the four sets of frequency band. For any successful bidders who did not have any preference on any specific set of frequency band they might not submit a bid and would be allocated a set of frequency by lot.

13. Members noted the Administration's tentative timetable for 3G licensing (LC Paper No. CB(3)577/00-01(01)) under which the Bills Committee would report to the House Committee on 4 May 2001 and resumption of second reading debate on and third reading of the Bill would take place on 16 May 2001.

14. In reply to Miss Emily LAU's question about when the detailed auction arrangement could be made available to the industry, DSITB said that the proposed ownership rules had been published for consultation which would end on 9 April 2001. The information memorandum, which would be voluminous, was being drawn up but was unlikely to be available by 4 May 2001 on which the Bills Committee would report to the House Committee under the tentative timetable for 3G licensing. The Administration would brief the Information Technology and Broadcasting Panel on important issues in the memorandum which were of interest to the members in May/June 2001 but information such as the reserve price for the licences would not be disclosed until the issue of the memorandum. Both Mr Eric LI and Miss Emily LAU supported the drawing up of the information memorandum in parallel with the Council's scrutiny of the Bill and the relevant subsidiary legislation. In reply to Miss Emily LAU, DSITB said that there would not be any consultation exercise on the information memorandum, which would be uploaded onto the Internet for access by the industry and the public.

15. Mr Eric LI referred to Hutchison's concern about the obligations of Mobile Virtual Network Operators (MVNOs)/NSPs in relation to the royalty payment, as raised in paragraph 5.1.2(d) of its written submission. Whilst supporting the non-disclosure of reserve price before commencement of licence application, he asked whether indication of the price range could be given beforehand. DSITB responded that the obligations would be set out in the information memorandum. As an application period of eight weeks from the issue of the information memorandum would be provided, potential bidders should have sufficient time to work out their proposed licence prices.

16. In reply to the Chairman, DSITB said that if the legislative

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process could not be completed by 11 July 2001, it could only be resumed in the beginning of the next legislative session in October this year. In such case, the licence application could only be issued by the end of this year rather than summer thereof. In fact, Japan already issued 3G licences, Australia had completed the 3G licensing exercise while Singapore would conduct the auction for the licences in April 2001.

Clause-by-clause examination of the Bill

(the Bill (issued vide LC Paper No. CB(3)395/00-01) and the summary of questions/comments and suggested amendments regarding the Bill from written submissions received by the Bills Committee together with the respective comments from Legal Service Division and the Administration (LC Paper No. CB(3)554/00-01 (the paper))

17. Members examined the Bill clause-by-clause. The salient points of discussions are summarised below.

Clause 1

18. Members raised no objection to the clause.

Clauses 2 and 3

19. ALA3 and DSITB briefed members on their respective comments on PCCW-HKT's suggestion of amending proposed sections 7(12) and 32H(6) so that licences should be issued and frequency allocated solely on the basis of success in the bid or tender process. Senior Assistant Law Draftsman (SALD) said that subject to discussion with the Information Technology and Broadcasting Bureau and within the Department of Justice the Administration might consider drafting Committee stage amendments to clauses 2 and 3 to the effect that TA should regard the relevant fees as the only determining factor, where and when it was so provided for in the relevant regulation.

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Clause 4

20. ALA3 and DSITB briefed members on their respective comments on the suggestions of the Law Society of Hong Kong and PCCW-HKT that the regulation prescribed by SITB under proposed section 32(I)2 should be subject to industry consultation. DSITB added that the regulation was subsidiary legislation subject to negative vetting by the Council and it must be passed together with TA's Order, which would be also subject to scrutiny of the Council, to designate the relevant frequency band under section 32I(1). Under this section, the TA was already subject to an express requirement for consultation. As such, it would not be necessary to set out in the proposed

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section the requirement of industry consultation. Members accepted the Administration's explanation. In response to members' request, DSITB undertook to request SITB to reiterate the Administration's position on industry consultation in the resumption of second reading debate on the Bill.

21. Members noted the PCCW-HKT's suggestion that the terms and conditions of the auction specified by TA by notice published in the Gazette under proposed section 32I(4)(b)(ii) should be subject to a requirement for consultation and the respective comments of Legal Service Division and the Administration thereon. ALA3 added that the notice which specified the terms and conditions was not subsidiary legislation under the Bill. DSITB pointed out that section 6C of the Telecommunications Ordinance (the Ordinance) already provided that before performing any function or exercising any power thereunder, TA might consult with (a) the persons who might be affected by the performance of that function or the exercise of that power, as the case might be; or (b) members of the public. To impose a general statutory obligation on TA in relation to consultation might give rise to legal challenge if he failed to do so on some of the terms and conditions, such as the reserve price for licences which should not be disclosed for consultation. Senior Assistant Director (Regulatory), Office of the Telecommunications Authority (SARD) reiterated that consultation exercises on the important points and principles in these terms and conditions, such as the ownership rules, had been conducted and the Administration had earlier on in the meeting undertaken to brief the relevant Panel (paragraph 14 of these minutes refers). Mr Eric LI said that section 6C of the Ordinance, under which TA might consult with the parties mentioned therein, did not impose an obligation on TA in relation to consultation. As the notice which specified the terms and conditions was not subsidiary legislation subject to negative vetting by the Council, it was important to spell out in the Bill that TA should conduct consultation exercises on the important points and principles thereof before adopting them. In response, DSITB reiterated that TA was already subject to an express requirement of consultation under section 32I(1). TA had already conducted a number of consultations and all important principles had been put forward for consultation. SITB might reiterate the Administration's position on industry consultation in the resumption of second reading debate on the Bill, if members so requested.

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22. Members noted CSL's proposal of requiring SITB or TA, as appropriate, to conduct industry consultation on the important issues which remained unanswered in the Administration's previous consultation papers and industry workshops. They also noted the respective comments by the Legal Service Division and the Administration.

23. Regarding the PCCW-HKT's suggestion of amending the English wording of proposed section 32I(2)(b)(i) by replacing "auction or tender or a

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combination of auction or tender” with “auction or tender or a combination of auction and tender”, SALD pointed out that the Administration had proposed a technical Committee stage amendment (CSA) to that effect, which was set out in LC Paper No. CB(3) 574/00-01(01). Members accepted that it might not be necessary to replace "auction or tender" by "auction or tender or a combination of auction and tender" in proposed sections 32I(4)(b)(i), 32I(4)(b)(ii), 32I(5), 32I(5)(a), 32I(5)(b), 32I(5)(g)(iii) and 32I(7), as proposed by PCCW-HKT.

24. ALA3 and SALD respectively explained their reasons (set out in the paper) for not accepting PCCW-HKT’s suggestion of deleting proposed section 32I(4)(a). SALD added that it was necessary to empower SITB to set the minimum fees to be paid in the form of a “reserve price” commonly used for an auction and the minimum guaranteed payments for the royalty auction, and the Administration had proposed a CSA to that effect and the provision was the same as the minimum fee in section 7 of the Telecommunications (Method for Determining Spectrum Utilization Fees) (Third Generation Mobile Services) Regulation to be made by SITB, which was set out in LC Paper No. CB(3) 574/00-01(01). Members accepted the explanation.

25. Regarding Hutchison’s concern about disallowing withdrawal from a bid or tender except with the TA’s written consent and for a reason specified in the terms and conditions under proposed section 32I(5)(e) (paragraph 4.2.2-3 of its submission refers), Members noted DSITB's response that one of reasons that would be specified under the section was withdrawal based on the reason of discontinuation to make next bid in the bidding schedule in the ascending auction.

26. Members raised no objection to the other provisions in proposed section 32I(5) and to proposed section 32I(6) to (9).

27. SALD said that the Administration had proposed a CSA to proposed section 32I(10) to enable the Government to recover any outstanding spectrum utilization fees owed by a licensee as a civil debt to the Government and to add a definition of 'event', which was set out in LC Paper No. CB(3) 574/00-01(01).

Clause 5

28. Members noted the respective comments from the Legal Service Division and the Administration on the CSL’s suggestion of amending proposed section 34(5) to the effect that successful bidders who eventually decided to terminate the 3G business before the expiry date of the licence should be liable to pay the yearly minimum guaranteed payment until the date. In explaining the Administration’s non-acceptance of the suggestion, DSITB

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said that for the 3G licensing exercise, the proposed section provided 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. Members accepted the Administration's explanation.

29. Members noted the respective comments from the Legal Service Division and the Administration on PCCW-HKT's suggestion of amending proposed section 34(5) to the effect that forfeiture of spectrum utilization fee would apply to cancellation, withdrawal or suspension of licence on grounds of breach of the Ordinance or licence conditions but not to that on grounds of public interest. Miss Emily LAU would like to know the meaning of "public interest" under section 34(4) of the Ordinance and said that according to the Administration's comments, the exercise of the power of cancellation, withdrawal or suspension of a licence by the Chief Executive (CE) in Council was subject to safeguards including representation by the licensee, and the test of reasonableness and proportionality. She asked the Administration whether such safeguards were implied or included in the Ordinance. DSITB responded that the Administration would revert to the Bills Committee on how the CE in Council would exercise the power or the procedures governing the exercise of the power.

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30. ALA3 advised that in exercising the discretionary power to cancel, withdraw or suspend a licence under section 34(4), both TA and the CE in Council must act reasonably and in good faith, and upon proper grounds. The exercise of that discretion was subject to judicial review and should be consistent with the principles of natural justice, under which persons who might be affected by a decision should be given a right to make representations which would be taken into account in making the decision and the reasons for making such decision had to be given to them. Such principles were made statutory in section 34(4B) and (4C) of the Ordinance which were applicable to the exercise of the power by TA but there were no equivalent provisions applicable to the exercise of the power by the CE in Council. Moreover, the requirement that the exercise of the power must be proportionate and reasonable as provided in section 34(4A) of the Ordinance was applicable to TA but not to the CE in Council. Miss Emily LAU was concerned that judicial review might only be applicable to the procedures followed by the CE in Council in making the decision rather than the merit of the decision. Mr Eric LI was of the view that as in some other legislation, the procedures governing the exercise of the power by the CE in Council should be provided for in the Ordinance.

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II. Dates of next meetings

31. Members agreed that the arrangements for the next two Bills Committee meetings should be as follows:

	<u>Date</u>	<u>Time</u>	<u>Purpose</u>	<u>Remarks</u>
Fifth meeting	26 April 2001 (Thursday)	4:30 pm	Meeting with the Administration	As scheduled
Sixth meeting	2 May 2001 (Wednesday)	12:45 pm to 2:15 pm	Meeting with the Administration	Lunch would be provided

32. There being no other business, the meeting ended at 4:41 pm.

Legislative Council Secretariat

10 May 2001

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