

Heung, James KP

From: Heung, James KP
Sent: Wednesday, March 21, 2001 4:22 PM
To: 'bleung@legco.gov.hk'
Subject: Re: Telecommunications (Amendment) Bill 2001

Dear Sir,

In response to the invitation for written submissions by Legislative Council Bills Committee on Telecommunications (Amendment) Bill 2001 posted on the website of Legislative Council, I am pleased to submit comments of PCCW-HKT Limited on the Bill in the attached file for your reference and advise that we shall not appear before the Bills Committee to make oral representations on 26 March 2001.

Regards,
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Introduction:

PCCW-HKT welcomes the opportunity provided by the Legislative Council Bills Committee to comment on the Telecommunications (Amendment) Bill 2001 published in the Gazette on 9 February 2001. This submission is made on behalf of companies in the PCCW-HKT Limited group ("PCCW-HKT").

1. Licence Issuance and Frequency Allocation

Draft provisions:

Proposed subsections 7(12) and 32H(6) would authorise the Telecommunications Authority ("TA") to regard spectrum utilisation fees as "a determining factor" in determining applications for licence issuance or frequency allocation.

PCCW-HKT Comments:

PCCW-HKT submits that frequency should be allocated and licences should be issued solely on the basis of success in the bid or tender process. All participants in the bid and/or tender will have already gone through a pre-qualification process conducted by the TA, thus they have fulfilled all the requirements set out by the TA, with only spectrum utilization and licence fees remaining to be determined for the licence. In PCCW-HKT's submission, the TA should not have the right to deny allocating the frequency and issuing the licence to the successful bidder or tenderer.

A fundamental policy rationale for utilising auction or tender processes in the allocation of radio frequency spectrum is to ensure the efficient allocation of that scarce resource. The market mechanism (i.e. auction or tender) ensures that the spectrum is allocated to the user who values it most. The pre-qualification measures protect against allocation of spectrum to an unsuitable user. This logic would be undermined if the TA were allowed to take into account factors other than the spectrum utilisation fee in determining applications for licences or assignment of spectrum.

Suggested Amendments:

PCCW-HKT therefore submits that the concluding words of the proposed subsections should be revised as follows:

Subsection 7(12):

"(12) [...] then the Authority shall determine applications for the licence with regard solely to the level of fees arising or resulting from that method."

Subsection 32H(6):

"(6) [...] then the Authority shall determine applications for the assignment with regard solely to the level of fees arising or resulting from that method."

2. Combined Auction and Tender

Draft Provisions:

Proposed paragraph 32I(2)(b) expressly contemplates the Secretary prescribing by regulation a method for determining spectrum utilisation fees which involves "a combination of auction or tender".

PCCW-HKT Comments:

PCCW-HKT assumes that this is a typographical error, "auction or tender" being intended to read "auction and tender".

Elsewhere in the proposed provisions reference is made to the TA's powers in respect of an "auction or tender", whereas the TA should enjoy the same powers if the Secretary prescribes by regulation a method for determining spectrum utilisation fees which involves "a combination of auction and tender".

Suggested Amendments:

The phrase "auction or tender or a combination of auction or tender" in section 32I(2)(b)(I) should be amended as: "auction or tender or a combination of auction and tender".

The expression "auction or tender" appearing in draft paragraphs 32I(4)(b)(i), 32I(4)(b)(ii), 32I(5), 32I(5)(a), 32I(5)(b), 32I(5)(g)(iii) and 32I(7) should be amended to read as "auction or tender or a combination of auction and tender".

3. Minimum Spectrum Utilization Fees

Draft Provisions:

Draft paragraph 32I(4)(a) would provide that the Secretary has "...the power to make a regulation to provide for..." "...empowering the Secretary to specify the minimum amount of the fee...".

PCCW-HKT Comments:

PCCW-HKT submits that paragraph 32I(4)(a) is unnecessary, given that draft subsection 32I(2)(a) would empower the Secretary to prescribe by regulation the level of spectrum

utilization fees. If the Secretary is authorised by the Ordinance to prescribe the fees, there is no need for the Secretary to have the power to make a regulation empowering the Secretary to specify a minimum fee.

Suggested Amendments:

PCCW-HKT submits that draft paragraph 32I(4)(a) should be deleted.

4. Consultation by Secretary:

Draft Provisions:

Draft subsection 32I(2) would empower the Secretary to prescribe by regulation the level of, or method for determining, spectrum utilization fees, without a consultation obligation.

PCCW-HKT Comments:

Before the Secretary may exercise the power under the proposed subsection 32I(2), PCCW-HKT submits that the Secretary should be obliged to consult with the telecommunications industry and such other persons as may be directly affected by the proposed exercise of the power to determine the level of fees or the method for determining the spectrum utilization.

Suggested Amendments:

PCCW-HKT submits that draft subsection 32I(2) should be amended as follows:

"(2) Subject to the consultation requirement under subsection (11), the Secretary may by regulation prescribe--..."

PCCW-HKT submits that a further subsection 32I(11) should be inserted as follows:

"(11) Before exercising his powers under subsection (2), the Secretary shall carry out such consultation with —
(a) the telecommunications industry; and
(b) such other persons who may be directly affected by the exercise of such powers,
as is reasonable in all the circumstances of the case."

5. Consultation by TA

Draft Provisions:

Draft paragraph 32I(4)(b)(ii) would authorise the Secretary to make a regulation empowering the TA to specify the terms and conditions of an auction or tender.

PCCW-HKT Comments:

PCCW-HKT submits that the TA's power to specify the terms and conditions on which an auction or tender (or combined auction and tender) will be conducted should be subject to an obligation to consult with persons affected by the exercise of that power.

Suggested Amendment:

PCCW-HKT submits that proposed paragraph 32I(4)(b)(ii) should be amended to read as follows:

"(ii) subject to the consultation requirement under section 32G(2), specify the terms and conditions of an auction or tender to which the method relates by notice published in the Gazette (including terms and conditions relating to the payment of the fee)."

PCCW-HKT also submits that subsection 32G(2) should be amended to read as follows:

"(2) Without prejudice to the generality of section 6C, before exercising his powers under sections 32H(2)(a) and (b) and 32I(1) and (4)(b)(ii), the Authority should carry out such consultation with---..."

6. Forfeiture of Spectrum Utilization Fees

Draft Provisions:

Proposed subsection 34(5) would involve the forfeiture of the whole of any spectrum utilization fee that has been paid, where a licence is cancelled, withdrawn or suspended.

PCCW-HKT Comments:

In PCCW-HKT's submission, the proposed amendment to section 34(5) could work substantial injustice to a licensee whose licence is cancelled, withdrawn or suspended. This is particularly the case where a licence may be cancelled on the broad ground of "public interest".

Licensees will certainly be required to pay a substantial fixed licence fee for their 3G licence and the allocated frequency, while the 3G licence may be cancelled, withdrawn or suspended under section 34(4) by the Chief Executive in Council "if he considers that the public interest so requires", without the need to take into account the spectrum utilization fee paid for that licence (proposed section 34(4D)).

PCCW-HKT submits that clarification is required of the grounds on which the spectrum utilization fee may be forfeited under section 34(5), so that forfeiture only occurs in cases in which the licensee or person to whom the permit, permission or consent is granted has contravened the Ordinance or a condition of the licence, permit, permission or consent.

Suggested Amendment:

PCCW-HKT submits that subsection 34(5) should be amended to read as follows:

"(5) Where any licence, permit, permission or consent granted under this Ordinance is cancelled, withdrawn or suspended, no part of any fee or other sum paid in respect thereof or thereunder shall be refunded save that this subsection shall have no effect in relation to any licence, permit, permission or consent that is cancelled, withdrawn or suspended by reason only that the public interest so requires."

Conclusion:

PCCW-HKT would be pleased to elaborate on any particular point discussed in this submission.