

**Responses to Assistant Legal Adviser's
Comments Raised in the letter of
19 April and the fax of 23 April[@]**

([@] Note by Clerk to Bills Committee: ALA's letter of 19 April and the fax of 23 April (Chinese version of the aforesaid letter) are attached at Appendix 1)

Introduction

On 19 April 2001, the Assistant Legal Adviser gave us comments on the draft subsidiary legislation to be made under the Telecommunications Ordinance (Cap 106), as amended by the Telecommunications (Amendment) Bill 2001. She has also made some further comments on the Telecommunications (Amendment) Bill 2001. The following sets out our responses to the comments .

Telecommunications (Method for Determining Spectrum Utilization Fees) (Third Generation Mobile Services) Regulation

(1) Definition of "spectrum utilization fee"

As the references to "spectrum utilization fee" in proposed sections 3, 4, 5 and 6 of the draft Regulation appear to mean different sums of money in the context of those provisions, will the administration consider defining the term in the draft Regulation for the sake of clarity"? Although "spectrum utilization fee" is defined in the Bill, it seems that the definition of the term only applies in the context of section 32I of the principal Ordinance and it is not entirely clear as to whether the definition is equally applicable to the draft Regulation.

Response

As the Regulation is made under section 32I, the definition of the "spectrum utilization fee" in the principal Ordinance is equally applicable to the Regulation. The definition of the term is flexible enough to allow the spectrum utilization fee to be calculated or arrived at pursuant to the different manner or ways as may be specified in sections 3, 4, 5 and 6 of the draft Regulation. It is therefore not necessary to define the term in the draft Regulation.

(2) Proposed section 3

- (a) In paragraph (b)(i), what is “the relevant minimum fee applicable to the highest common royalty percentage”? Is it the same as “the relevant minimum fee based on the highest royalty percentage” referred to in paragraph (ii)(B)?**

Response

As we explained in paragraph 4 of the paper “Committee Stage Amendments (CSAs) proposed by the Administration to the Telecommunications (Amendment) Bill 2001 issued to the Bills Committee meeting on 6 April, the minimum spectrum utilization fee that the Secretary for Information Technology and Broadcasting will set for the 3G licensing exercise will contain the following:-

- (1) the minimum royalty percentage, and the spectrum utilization fee payable over the 15-year licence period based on that minimum royalty percentage – they, as a whole, constitute what is commonly known as the “reserve price”; and
- (2) the series of minimum payments of spectrum utilization fee over the 15-year licence period based on the highest common royalty percentage set by the fourth winner.

The “relevant minimum fee applicable to the highest common royalty percent” mentioned in paragraph (b)(i) and the “relevant minimum based on the highest royalty percentage” mentioned in paragraph (ii)B both refer to (2) above. The former refers to the annual payment for each of the first 5 years of the period of validity of the licence, while the latter refers to the minimum annual payment for each of the years during the period of validity of the licence remaining after expiration of the first 5 years.

- (b) Is the “relevant minimum fee” mentioned in paragraph (b)(i) and (ii)(B) supposed to be specified under proposed section 7? If so, is it necessary to make it clear in proposed section 7 that “percentage” as mentioned in paragraph (b)(ii) thereof includes “the highest common royalty percentage”?**

Response

The “relevant minimum fee” mentioned in paragraph (b)(i) and

(ii)(B) are supposed to be specified under proposed section 7. The proposed section 7(b)(ii) envisages the determination of the relevant minimum fee by reference to a percentage, which is a generic term and is wide enough to cover the “highest common royalty percentage”. It is therefore not necessary to amend section 7 to expressly provide for this.

(3) Proposed section 7

- (a) **Will the Administration consider adding the definition of “event” in the draft Regulation in line with the proposed Committee Stage amendments to the Bill?**

Response

As the Regulation is made under section 32I, the definition of “event” in the principal Ordinance is equally applicable to the Regulation. It is not necessary to separately define the term in the Regulation.

- (b) **The term “relevant minimum fee” is defined in proposed section 1 of the draft Regulation. However, in paragraph (b)(iii), it would appear that “the relevant minimum fee” can be construed as a descriptive term for the minimum fee in the context of “a series of 2 or more minimum fees”. Does this reflect the Administration’s intention? Should the drafting of the paragraph be improved to achieve clarity?**

Response

The meaning of proposed section 7(b)(iii) is not contingent on the defined term “relevant minimum fee”. The meaning of the defined term “relevant minimum fee” is contingent on proposed section 7(b)(iii) and the other provisions of section 7. Given section 7(2) of Cap. 1, the term “fee” in the defined term “relevant minimum fee” includes “fees”. Further, under proposed section 7(b)(iii), there is only one relevant minimum fee payable at any one time, because the “series of 2 or more minimum fees” as tied to “the occurrence of an event or series of events”. Accordingly, the present drafting of the defined term “relevant minimum fee” and of proposed section 7(b)(iii) accurately represents the Administration’s intention.

- (c) **In paragraph (b)(v), what is “another minimum fee”? Under what circumstances will “another minimum fee” come into existence?**

Response

The reference to “another minimum fee” is a means to permit the determination of a minimum fee for one period of time to be calculated by reference to whatever formulation has been used for calculation of another minimum fee. Or, alternatively, a means to permit the determination of a minimum fee to be calculated by reference to whatever formulation has been used for the calculation of a minimum fee which is not payable because its payment has not been triggered by the occurrence of a relevant event. Proposed section 7(b)(v) does not, of course, mean that 2 minimum fees are payable at the same time.

(4) Proposed section 9

- (a) **How will the determination of a spectrum utilization fee relate to the accounts of a licensee? Is it intended that this provision would apply where the determination of a spectrum utilization fee is made by reference to the accounts of a licensee? If so, should this be reflected more clearly in the provision?**
- (b) **In proposed section 9(d), is it the case that the accounts shall be used by the Secretary for Information Technology and Broadcasting for the purposes of determining the spectrum utilization fee? If so, should this be reflected clearly in the provision to avoid the possible construction that using the accounts for the purpose of determining the fee is an action that the Telecommunications Authority may take under the provision when in fact the accounts will be used by the Secretary?**

Response to (a)&(b)

The proposed section 3(b)(ii)(A) mentions that the spectrum utilization fee may consist of a “royalty” determined by reference to the network turnover of the licensee multiplied by the highest common royalty percentage. The “network turnover”, as defined,

refers to the “revenue” of the licensee which will be reflected in its accounts. To compute and determine the *actual amount* of the royalty to be paid during the licence period, it is necessary to make reference to the accounts of a licensee. Under section 7H of the Telecommunications Ordinance, the Telecommunications Authority is empowered to specify accounting principles for the licensees to adopt. The proposed section 9 in the draft Regulation therefore requires the licensee to keep the accounts in accordance with any accounting practices specified under section 7H of the Telecommunications Ordinance. It is intended that the Telecommunications Authority (not the Secretary for Information Technology and Broadcasting) will examine the accounts of the licensees for the said purposes. The current section 9 of the draft regulation accurately reflects the policy intention.

The Bill

(1) Clause 2

Given that new section 7 as introduced by the Telecommunication (Amendment) Ordinance 2000 (36 of 2000) has already come into operation on 1 April 2001, should the reference to the Amendment Ordinance in clause 2 be deleted?

Response

Noted. The reference can be deleted by CSAs. However, even if this were not done, it would not effect the efficacy of clause 2, because the reference to “, as amended by the Telecommunication (Amendment) Ordinance 2000 (36 of 2000),” is merely redundant.

(2) Chinese text

Response

We are discussing with the Chinese Law Draftsman on the suggestion and will let Members have a revised set of CSA’s, if any.

Letterhead of Hong Kong Special Administrative Region of the People's Republic of
China LEGISLATIVE COUNCIL SECRETARIAT LEGAL SERVICE DIVISION

Appendix 1

YOUR REF. : ITBB CR 7/23/10(01)
OUR REF. : LS/B/22/00-01
TELEPHONE : 2869 9209
FACSMILE : 2877 5029

Secretary for Information Technology and Broadcasting
(Attention: Ms Gracie FOO,
Principal Assistant Secretary (E))
Information Technology and Broadcasting Bureau
2/F Murray Building
Garden Road
Hong Kong

19 April 2001

BY FAX

Fax No.: 2511 1458

Total no. of pages : (6)

Dear Ms Foo,

Telecommunications (Amendment) Bill 2001

I am scrutinising the draft subsidiary legislation to be made under the Telecommunications Ordinance (Cap. 106), as amended by the above Bill. My comments on the draft subsidiary legislation are as follows:

Telecommunications (Method for Determining Spectrum Utilization Fees) (Third Generation Mobile Services) Regulation

(1) *Definition of "spectrum utilization fee"*

As the references to "spectrum utilization fee" in proposed sections 3, 4, 5 and 6 of the draft Regulation appear to mean different sums of money in the context of those provisions, will the Administration consider defining the term in the draft Regulation for the sake of clarity? Although "spectrum utilization fee" is defined in the Bill, it seems that the definition of the term only applies in the context of section 32I of the principal Ordinance and it is not entirely clear as to whether the definition is equally applicable to the draft Regulation.

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(2) Proposed section 3

- (a) In paragraph (b)(i), what is "the relevant minimum fee applicable to the highest common royalty percentage"? Is it the same as "the relevant minimum fee based on the highest common royalty percentage" referred to in paragraph (ii)(B)?
- (b) Is the "relevant minimum fee" mentioned in paragraph (b)(i) and (ii)(B) supposed to be specified under proposed section 7? If so, is it necessary to make it clear in proposed section 7 that "percentage" as mentioned in paragraph (b)(ii) thereof includes "the highest common royalty percentage"?

(3) Proposed section 7

- (a) Will the Administration consider adding the definition of "event" in the draft Regulation in line with the proposed Committee Stage amendments to the Bill?
- (b) The term "relevant minimum fee" is defined in proposed section 1 of the draft Regulation. However, in paragraph (b)(iii), it would appear that "the relevant minimum fee" can be construed as a descriptive term for the minimum fee in the context of "a series of 2 or more minimum fees". Does this reflect the Administration's intention? Should the drafting of the paragraph be improved to achieve clarity?
- (c) In paragraph (b)(v), what is "another minimum fee"? Under what circumstances will "another minimum fee" come into existence?

(4) Proposed section 9

- (a) How will the determination of a spectrum utilization fee relate to the accounts of a licensee? Is it intended that this provision would apply where the determination of a spectrum utilization fee is made by reference to the accounts of a licensee? If so, should this be reflected more clearly in the provision?

- (b) In proposed section 9(d), is it the case that the accounts shall be used by the Secretary for Information Technology and Broadcasting for the purposes of determining the spectrum utilization fee? If so, should this be reflected clearly in the provision to avoid the possible construction that using the accounts for the purposes of determining the fee is an action that the Telecommunications Authority may take under the provision when in fact the accounts will be used by the Secretary?

Telecommunications (Designation of Frequency Bands subject to Payment of Spectrum Utilization Fee) Order

The legal and drafting aspects of the Order are in order.

Further comments on the Bill

(1) Clause 2

Given that new section 7 as introduced by the Telecommunication (Amendment) Ordinance 2000 (36 of 2000) has already come into operation on 1 April 2001, should the reference to the Amendment Ordinance in clause 2 be deleted?

(2) Chinese text

My comments on the Chinese text have been marked up on the relevant pages attached for your easy reference.

I look forward to hearing from you soon.

Yours sincerely,

(Connie Fung)
Assistant Legal Adviser

Encl.

c.c.: LA