

C006-E

Amend the Telecommunications Ordinance.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Telecommunications (Amendment) Ordinance 2001.

2. Issue of licences

Section 7 of the Telecommunications Ordinance (Cap. 106), as amended by the Telecommunication (Amendment) Ordinance 2000 (36 of 2000), is amended by adding--

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"(12) Where a licence which may be issued under subsection (5) relates to the use of spectrum which under section 32I is subject to the payment of spectrum utilization fee---

(a) by the user of the spectrum; and

(b) the method for determining which is prescribed under section 32I(2)(b),

then the Authority may, in determining applications for the licence, regard the fees, if any, arising or resulting from that method as a determining factor in relation to those applications."

3. Power to allocate frequency

Section 32H is amended by adding---

"(6) Where an assignment which may be made under subsection (1) relates to the use of spectrum which under section 32I is subject to the payment of spectrum utilization fee---

(a) by the user of the spectrum; and

(b) the method for determining which is prescribed under section 32I(2)(b),

then the Authority may, in determining applications for the assignment, regard the fees, if any, arising or resulting from that method as a determining factor in relation to those applications."

4. Spectrum utilization fee

Section 32I is amended---

(a) by repealing subsection (2) and substituting---

"(2) The Secretary may by regulation prescribe---

(a) the level of spectrum utilization fees; or

(b) the method for determining the spectrum utilization fees, which may be by---

(i) auction or tender or a combination of auction or tender; or

(ii) such method as the Secretary thinks fit, including any method combined with a method mentioned in subparagraph (i).";

(b) by adding---

"(4) Without prejudice to the generality of subsections (2) and (3), the power of the Secretary under subsection (2)(b) to make a regulation prescribing a method for determining spectrum utilization fee shall also include the power to make a regulation to provide for all or any of the following---

(a) empowering the Secretary to specify the minimum amount of the fee, whether by notice published in the Gazette or otherwise;

(b) empowering the Authority to---

(i) promote, hold, conduct, suspend, cancel or conclude an auction or tender to which the method relates;

(ii) 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).

(5) Without prejudice to the generality of subsection (4)(b)(ii), the terms and conditions of an auction or tender which may be specified in a notice under that subsection may include terms and conditions relating to all or any of the following---

(a) subject to paragraph (c), the criteria by which the Authority shall determine whether a person is qualified to participate in the auction or tender;

(b) subject to paragraph (c), the criteria by which the Authority shall determine whether 2 or more persons who are qualified by the criteria mentioned in paragraph

(a) to participate in the auction or tender are connected, in whatever manner specified in the first-mentioned criteria, for the purposes of the auction or tender;

(c) the criteria by which, or the procedure to be followed by which, the Authority shall determine which of the persons connected as mentioned in paragraph (b) is qualified to participate in the auction or tender;

(d) a bidder or tenderer (including a prospective bidder or tenderer, or a person acting on behalf of a bidder or tenderer or prospective bidder or tenderer) shall lodge with, or otherwise provide to, the Authority security of such type and value as the Authority specifies, whether by notice published in the Gazette or otherwise (which value may be calculated by reference to a percentage of the minimum amount mentioned in subsection (4)(a));

(e) that a bid or tender may not be withdrawn by the bidder or tenderer except with the consent in writing of the Authority and for a reason specified in the notice;

(f) that the Authority may disqualify a bid or tender, or a bidder or tenderer, for a reason specified in the notice;

(g) that the Authority---

(i) may forfeit to the Government, or otherwise enforce, a security mentioned in paragraph (d) (including any interest earned thereon), whether in whole or in part, for a reason specified in the notice;

(ii) subject to subsection (6), may cancel, withdraw or suspend a licence---  
(A) where section 7(12) applied to the issue of the licence or section 32H(6) applied to the assignment under section 32H(1) of the spectrum to which the licence relates; and

(B) for a reason specified in the notice;

(iii) may specify requirements which have the purpose or effect of promoting or ensuring that the auction or tender is conducted in a fair, efficient and orderly manner.

(6) Without prejudice to the generality of any other ground on which the Authority may exercise the power mentioned in subsection (5)(g)(ii), the Authority shall not exercise that power pursuant to a complaint alleging that there is a ground for the exercise of the power except such a complaint made---

(a) by a bidder or tenderer at the auction or tender to which the complaint relates; and

(b) to the Authority not later than 3 months after the date on which the outcome of that auction or tender was publicly declared.

(7) Notwithstanding any other provision of this Ordinance, the Authority shall have all necessary powers to enforce the terms and conditions of an auction or tender which may be specified in a notice under subsection (4)(b)(ii).

(8) Any spectrum utilization fee paid pursuant to this section shall be paid into the general revenue.

(9) It is declared that---

(a) a spectrum utilization fee payable pursuant to this section is a fee payable in addition to any fee prescribed under section 7(2) or 37(1)(g);

(b) a complaint which would fall within subsection (6) but for the fact that it is made before the issue of the licence concerned, or before the assignment of the spectrum concerned, shall not of itself prevent the Authority from issuing the licence under section 7(5), or assigning the spectrum under section 32H(1), to the bidder or tenderer against which the complaint is made;

(c) a notice mentioned in subsection (4)(a) or (b)(ii) or (5)(d) is not subsidiary legislation.

(10) In this section (including subsection (3))---

"spectrum utilization fee" (頻譜使用費) includes a fixed fee, a fee calculated by a formula or a fee ascertained by another method, or any combination thereof."

5. General provisions as to licences, etc.

Section 34 is amended---

(a) by adding---

"(4D) Where Chief Executive in Council or the Authority proposes to exercise

a power under subsection (4), he shall not consider---

(a) any fee (including any spectrum utilization fee under section 32I) or other sum paid in respect of or under or in relation to any licence, permit, permission or consent granted under this Ordinance;

(b) any representations mentioned in subsection (4B) to the extent to which they fall within paragraph (a);

(c) the operation of subsection (5) if that power is exercised, and subsection (4A) shall be construed accordingly.";

(b) in subsection (5), by adding ", including any spectrum utilization fee paid pursuant to section 32I" after "refunded".

#### Explanatory Memorandum

The object of this Bill is to amend the Telecommunications Ordinance (Cap. 106), as amended by the Telecommunication (Amendment) Ordinance 2000 (36 of 2000), to--

(a) empower the Telecommunications Authority to regard the fees arising from a method prescribed under section 32I(2)(b) to determine a spectrum utilization fee as a determining factor in determining applications for a licence under section 7(5) which relates to the use of spectrum which is subject to the payment of that spectrum utilization fee (clause 2);

(b) empower the Telecommunications Authority to regard the fees arising from a method prescribed under section 32I(2)(b) to determine a spectrum utilization fee as a determining factor in determining applications for the assignment under section 32H(1) of the use of spectrum which is subject to the payment of that spectrum utilization fee (clause 3);

(c) make it clear that the method of calculating a spectrum utilization fee may be by auction or tender or such other method as the Secretary (within the meaning of section 2(1)) thinks fit (clause 4(a));

(d) enable the Secretary to make a regulation empowering the Telecommunications Authority to specify the terms and conditions of an auction or tender mentioned in new section 32I(2) at clause 4(a) (clause 4(b));

(e) make it clear the ambit of the Telecommunications Authority's power to specify and enforce such terms and conditions (new section 32I(5), (6) and (7) at clause 4(b));

(f) make it clear that the Telecommunications Authority shall, inter alia, not take into consideration any fee or other sum paid when deciding whether or not to exercise his power under section 34(4) to cancel, withdraw or suspend a licence, permit, permission or consent granted under the Ordinance (new section 34(4D) at clause 5(a)); and

(g) provide that a spectrum utilization fee paid to the Government is not refundable

if the licence to which the fee relates is cancelled, withdrawn or suspended (clause 5(b)).