

LN115e

Telecommunications (Method for Determining Spectrum Utilization Fees) (Third Generation

Mobile Services) Regulation

(Made under section 32I of the Telecommunications Ordinance (Cap. 106))

1. Commencement

This Regulation shall come into operation on 4 July 2001.

2. Interpretation

(1) In this Regulation, unless the context otherwise requires---  
"auction" (拍賣) includes a tender and a combination of auction and tender;

"bid" (出價) includes---

(a) a tender;

(b) an intention to bid specified in an application in writing given to the Authority;

"bidder" (競投人) includes---

(a) a tenderer;

(b) a person who has expressed an intention to bid by application in writing given to the Authority;

"highest common royalty percentage" (最高共同專營權費百分率), in relation to an auction, means the highest royalty percentage bids offered by all the successful bidders at the auction;

"network turnover" (網絡營業額), in relation to calculating a spectrum utilization fee, means the revenue arising from or attributable to the provision of any telecommunications services over any telecommunications network using the frequency bands to which that fee relates;

"relevant minimum fee" (有關最低費用), in relation to a spectrum utilization fee mentioned in a provision of this Regulation, means the minimum fee specified under section 8;

"relevant terms" (有關條款) means the terms and conditions specified in the notice mentioned in section 9(b).

(2) For the avoidance of doubt, it is hereby declared that the fact that an auction mentioned in this Regulation is not held shall not in any way prejudice the operation of a provision of this Regulation (including the definition of "highest common royalty percentage").

3. Application

The method for determining the spectrum utilization fees to be paid by the users of the spectrum which falls within the 4 sets of frequency bands designated in the

Telecommunications (Designation of Frequency Bands subject to Payment of Spectrum Utilization Fee) Order (L.N. 116 of 2001) shall be as specified in sections 4, 5, 6 and 7.

4. Auction to determine annual spectrum utilization fee payable

Subject to sections 5, 6, 7 and 8 and compliance with the relevant terms, where there are more than 4 bidders, an auction shall be held in which---

(a) the bidders whose bids will produce the highest common royalty percentage, as determined in accordance with this Regulation and the relevant terms, shall be the successful bidders;

(b) the spectrum utilization fee to which the auction relates shall be---

(i) an annual fee for each of the first 5 years of the period of validity of the relevant licence mentioned in section 7(12) of the Ordinance consisting of the relevant minimum fee applicable to the highest common royalty percentage;

(ii) for each year of the period of validity of the relevant licence remaining after the expiration of the first 5 years, an annual fee consisting of---

(A) a royalty determined by reference to the network turnover in relation to the licensee multiplied by the highest common royalty percentage; or

(B) the relevant minimum fee based on the highest common royalty percentage, whichever is the highest for the year concerned.

5. Spectrum utilization fee payable where auction not held due to insufficient bidders

Subject to sections 6, 7 and 8 and compliance with the relevant terms, where there are not more than 4 bidders---

(a) in relation to the auction mentioned in section 4 and before the start of the auction; and

(b) immediately upon the expiration of the period, as specified in the relevant terms, after which the Authority will not accept bids,

then---

(c) the auction shall not be held;

(d) each of the bidders shall be a successful bidder; and

(e) the spectrum utilization fee shall be the relevant minimum fee.

6. Auction to remove connected bidders

Subject to section 8 and compliance with the relevant terms, where 2 or more of the successful bidders mentioned in section 4 or 5 are connected as mentioned in the relevant terms, then an auction shall be held, as required by the relevant terms, for those successful bidders so connected (or, if there is more than one set of those successful bidders so connected, an auction for each set shall be held) in which---

(a) the bidder whose bid produces the highest spectrum utilization fee mentioned in paragraph (b) shall be the remaining successful bidder whilst the other bidder or bidders shall cease to be a successful bidder or the successful bidders, as the case may be;

(b) the spectrum utilization fee to which the auction relates shall be a cash amount payable by the successful bidder immediately upon demand by the Authority.

7. Auction to determine respective priority rights of successful bidders in allocation of sets of frequency bands

Subject to section 8 and compliance with the relevant terms, after sections 4, 5 and 6 have been complied with, an auction shall be held---

(a) to determine the respective priority rights---

(i) of the successful bidders remaining after the operation of those sections; and

(ii) in relation to the allocation of the sets of frequency bands mentioned in section 3; and

(b) in which---

(i) the priority rights shall be assigned in descending order from the bidder whose bid produces the highest spectrum utilization fee mentioned in subparagraph (ii);

(ii) the spectrum utilization fee to which the auction relates shall be a cash amount payable by each of the successful bidders immediately upon demand by the Authority.

8. Secretary may specify minimum fee of spectrum utilization fee

The Secretary may specify the minimum fee of any spectrum utilization fee mentioned in a provision of this Regulation---

(a) by notice published in the Gazette or otherwise; and

(b) by means of---

(i) a minimum fixed fee;

(ii) a minimum fee determined by reference to a formula or percentage or the occurrence of an event or series of events;

(iii) a series of 2 or more minimum fees in relation to the same spectrum utilization fee where the relevant minimum fee is determined by reference to the occurrence of an event or series of events;

(iv) a minimum fee the determination of which varies upon the occurrence of an event or series of events;

(v) a minimum fee determined by reference to another minimum fee, or by reference

to the means of determining another minimum fee, whether or not the other minimum fee is or will become payable;

(vi) a minimum fee the determination of which varies, or is calculated by reference to, the period of validity of a licence or any part thereof; or

(vii) any combination of 2 or more of any of the means specified in subparagraph (i), (ii), (iii), (iv), (v) or (vi), whether in whole or in part.

9. Authority may promote, etc. an auction to which method referred to in section 3 relates

The Authority may---

(a) promote, hold, conduct, suspend, cancel or conclude an auction to which the method referred to in section 3 relates;

(b) specify the terms and conditions of an auction to which that method relates by notice published in the Gazette (including terms and conditions relating to the payment of the spectrum utilization fees).

10. Action that may be taken by Authority if licensee fails to keep proper accounts for purposes of determining spectrum utilization fees

Where the determination of a spectrum utilization fee (including a relevant minimum fee) relates, whether in whole or in part, to the accounts of a licensee and the accounts have not, in the opinion of the Authority, been kept in accordance with---

(a) the conditions to which the licence is subject; or

(b) any accounting practices specified under section 7H of the Ordinance and applicable to the licensee,

then---

(c) the Authority may---

(i) treat the accounts in such manner as he considers necessary to bring them into conformity with those conditions or accounting practices, as the case may be; and

(ii) assess the network turnover in relation to the licensee on the basis of the accounts as so treated; and

(d) the accounts as so treated and the network turnover as so assessed shall be used for the purposes of determining that fee, and the other provisions of this Regulation shall be construed accordingly.

Mrs. Carrie YAU

Secretary for Information Technology and Broadcasting

29 May 2001

Explanatory Note

This Regulation---

(a) specifies the method for determining the spectrum utilization fees to be paid

for the frequency bands designated in the Telecommunications (Designation of Frequency Bands subject to Payment of Spectrum Utilization Fee) Order (L.N. 116 of 2001) (sections 3 to 7);

(b) empowers the Secretary for Information Technology and Broadcasting to specify the minimum fee to be paid in relation to any spectrum utilization fee specified in a provision of the Regulation (section 8);

(c) empowers the Telecommunications Authority to, inter alia, hold the auction or tender (see the definition of "auction" in section 2) to which the method relates and specify the terms and conditions of the auction or tender (section 9); and

(d) empowers the Telecommunications Authority to take remedial action should a licensee fail to keep proper accounts for the purposes of determining spectrum utilization fees (section 10).