

立法會
Legislative Council

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Paper for the House Committee meeting on 21 January 2005

**Report of the Subcommittee on
Telecommunications (Designation of Frequency Bands subject to Payment of
Spectrum Utilization Fee) (Amendment) Order 2004,
Telecommunications (Method for Determining Spectrum Utilization Fees)
(Third Generation Mobile Services) (Amendment) Regulation 2004 and
Telecommunications (Level of Spectrum Utilization Fees)
(Second Generation Mobile Services) Regulation**

Purpose

This paper reports on the deliberations of the Subcommittee on Telecommunications (Designation of Frequency Bands subject to Payment of Spectrum Utilization Fee) (Amendment) Order 2004, Telecommunications (Method for Determining Spectrum Utilization Fees) (Third Generation Mobile Services) (Amendment) Regulation 2004 and Telecommunications (Level of Spectrum Utilization Fees) (Second Generation Mobile Services) Regulation made under the Telecommunications Ordinance (Cap. 106) (TO).

Background

2. At present, second generation (2G) mobile services are licensed under the Public Radiocommunications Service (PRS) licences pursuant to the Telecommunications Regulations (Cap. 106 sub.leg. A). Of the 11 PRS licences held by six 2G mobile services operators¹, nine are for providing services based on the GSM 900 standard (GSM licences) and Personal Communications Services using the GSM 1800 standard (PCS licences). The remaining two provide services on the IS-95 CDMA standard (CDMA licence) and IS-136 TDMA standard (TDMA licence). These PRS licences will expire between July 2005 and September 2006.

¹ They are China Resources Peoples Telephone Company Limited, Hong Kong CSL Limited (CSL), Hutchison Telecommunications (Hong Kong) Limited (Hutchison), New World PCS Limited, SmarTone Telecommunications Holdings Ltd and SUNDAY Communications Limited.

3. Under section 32I of TO, the Telecommunications Authority (TA) may by Order designate the frequency bands in which the use of spectrum is subject to the payment of spectrum utilization fees (SUF) by the spectrum users. The level of, or the method for determining, the SUF will be prescribed by the Secretary for Commerce, Industry and Technology (SCIT). Section 32I(8) of TO provides that SUF paid by licensees shall be paid into the general revenue. At present, while licensees providing third generation (3G) mobile services are required to pay SUF, those providing 2G mobile services are not subject to such payment. However, having regard that radio spectrum is a scarce public resource, the Administration considers it reasonable that licensees should be required to pay for their right to use it for providing commercial services. It is the Administration's plan to require 2G licensees to pay SUF after they have been issued new licences.

4. TA has conducted two rounds of consultation, in August 2003 and March 2004, on the licensing arrangements, which include the introduction of SUF, of mobile telecommunications services on expiry of the existing 2G licences. Having considered the comments received, TA issued a Statement on 29 November 2004 setting out his views on the relevant issues, including the decision not to offer new CDMA and TDMA licences and the requirement for 2G licensees to pay SUF under their new licences. The Administration has also announced that it intends to initiate a separate spectrum policy review on the allocation and assignment of radio spectrum for telecommunications and related services.

The subsidiary legislation

5. The purpose of the proposed subsidiary legislation is to provide the legal framework for charging SUF on 2G licensees under the new licences to be issued upon expiry of their existing ones. It consists of the following proposals :

- (a) Telecommunications (Designation of Frequency Bands subject to Payment of Spectrum Utilization Fee) (Amendment) Order 2004 (the Amendment Order)

The Amendment Order, made by TA, designates additional sets of frequency bands in which the use of spectrum is subject to the payment of SUF by the spectrum users. These sets of frequency bands are currently deployed for the provision of 2G mobile services.

- (b) Telecommunications (Method for Determining Spectrum Utilization Fees) (Third Generation Mobile Services) (Amendment) Regulation 2004 (the Amendment Regulation)

The Amendment Regulation is made by SCIT to introduce consequential amendments to the principal Regulation (Cap. 106 sub. leg. X) to make it clear that the principal Regulation only applies to the four sets of frequency bands that have been designated for providing 3G mobile services.

- (c) Telecommunications (Level of Spectrum Utilization Fees) (Second Generation Mobile Services) Regulation (the 2G Regulation)

The 2G Regulation, made by SCIT, prescribes the level of SUF for the additional sets of frequency bands designated in the Amendment Order and empowers TA to take remedial action should a licensee fail to keep proper accounts for the purpose of determining SUF. The amount of SUF payable by 2G licensees is determined as follows :

- (i) For the first five years of the new mobile carrier licence, the annual SUF will be \$145 per kHz of the total radio frequencies then assigned to the licensee; and
- (ii) From the sixth licence year onwards to the expiry of the licence, the annual SUF will be 5% of the network turnover, subject to a minimum fee of \$1,450 per kHz of the total radio frequencies then assigned to the licensee.

The Subcommittee

6. At the meeting of the House Committee on 17 December 2004, members agreed that a Subcommittee should be formed to study the proposed subsidiary legislation. To allow sufficient time for the Subcommittee to study the subsidiary legislation, Members passed a resolution at the Council meeting on 5 January 2005 to extend the scrutiny period to 2 February 2005.

7. The membership list of the Subcommittee is in **Appendix I**. Under the chairmanship of Hon SIN Chung-kai, the Subcommittee has held two meetings with the Administration and considered the submissions provided by the organizations listed in **Appendix II**.

Deliberations of the Subcommittee

8. In general, members have not raised any strong view against the proposed subsidiary legislation. They have nevertheless considered a number of policy and legal issues related to the proposal to charge SUF on 2G licensees when new licences are issued upon expiry of their existing licences.

Spectrum utilization fee

SUF for 3G services

9. The concept of SUF was introduced when the Government auctioned four 3G licences in 2001. For the first to fifth licence years, a 3G licensee is required to pay SUF at a flat fee of \$50 million (i.e. unit rate of \$1,450 per kHz of assigned frequencies) per year. From the sixth year onwards, the annual SUF will be 5% of the annual network turnover of the licensee, subject to a minimum fee that rises incrementally from \$60.1 million in the sixth year to \$151.2 million in the 15th year.

10. Members note that the structure of the proposed SUF for 2G services is broadly modeled on that for 3G services. One major difference is that a 2G licensee may return unused or surplus spectrum to TA and thereby lower its SUF payment calculated at the rate of \$145 or \$1,450 per kHz of frequencies assigned. According to the Administration, this will encourage the more efficient use of spectrum. Nevertheless, there is no similar arrangement for 3G licensees to return any of the assigned frequencies to TA. Members also note that the “unit rate” for calculating the minimum SUF for 2G licensees from the sixth year onwards (i.e. \$1,450 per kHz of frequencies assigned) is not subject to any incremental rise as in the case of SUF for 3G licensees.

11. In examining the Amendment Regulation relating to SUF for 3G licensees, members have referred to the Chinese text of section 10 of the existing Regulation on which section 5 of the 2G Regulation is modeled. With a view to achieving textual consistency, the Administration has proposed certain amendments to the Chinese text in question to tie in with the improved wording in section 5 of the 2G Regulation.

Charging mechanism and level of SUF for 2G services

12. To facilitate scrutiny of the legislative proposal, the Subcommittee has considered the views of existing 2G operators. It is noted that the two operators which did not bid for 3G licences in 2001 have expressed reservation on the proposed SUF mainly on account of the additional financial burden which may eventually be passed onto consumers. The other four operators, which have been granted 3G mobile services licences, however, do not object to the proposed

SUF. Some of them consider that there should not be any disparity in the SUF payable by 2G licensees and 3G licensees, given that the 2G spectrum can be used to offer 3G-like services in the near future. They also express their concern that as the operating environment has changed considerably since the issue of the 3G licences in 2001 and the market outlook for 3G services has become less optimistic, it is opportune for the Administration to review the existing SUF charging mechanism for 3G licensees with a view to lowering the level of fee on par with that for 2G licensees.

13. On cost implications, the Administration's proposal is to set a relatively low level of SUF during the first five-year period to enable the 2G licensees to factor SUF into their cost structures, to identify additional revenue sources and to upgrade their networks for the provision of advanced mobile services. It therefore considers that the cost impact on consumers should be minimal and gradual. The Administration has also informed members that according to the consultant commissioned to advise on the setting of SUF for 2G spectrum, there should be no immediate liquidity concerns among operators directly as a result of the proposed SUF. As regards the suggestion of reviewing the SUF payable by 3G licensees, the Administration's position is that since the SUF for 3G licensees was determined as a result of the auction conducted in September 2001 and has subsequently been included as a licence condition, it would not be appropriate to consider any variation at this stage. Members note that policy issues related to SUF for 3G licensees are not within the scope of the proposed subsidiary legislation and should be considered in a separate context.

14. In examining the proposed structure of SUF for 2G licensees, some members are concerned whether 2G licensees will have an unfair advantage over 3G licensees as they will be able to offer, through network upgrading, 3G-like services but will only need to pay a much lower SUF. They have also sought the Administration's view on a suggestion that 2G licensees should only provide mobile services at a transmission rate of less than 144 kbps (such as providing only basic voice telephony service) so as not to pose unfair competition to 3G services.

15. In this connection, the Administration has advised that after the initial five years, the charging mechanism for 2G services from the sixth licence year onwards is broadly consistent with that for 3G services. The annual SUF will be 5% royalty over the network turnover of the licensee, or the minimum fee, whichever is higher. According to the Administration's assessment, 5% of the network turnover of the 2G licensees will likely exceed the minimum fee (i.e. \$1,450 per kHz of frequencies assigned) payable and as such, both 2G and 3G licensees will be subject to the same charging formula in future. The Administration has also confirmed that it will not prescribe an upper limit on the transmission speed of 2G services as this will become a disincentive for 2G licensees to enhance their capability to provide advanced services.

16. Members have also enquired about the revenue implications of the proposed SUF. The Administration has advised that the annual SUF received from each 2G licensee during the first five licence years will be about \$2.4 million or \$3.4 million, depending on the amount of radio frequencies they have been assigned. Assuming that from the sixth licence year onwards, only the minimum SUF is payable by the six operators, an additional revenue of around \$274 million per annum will be generated for the Government. However, this estimated amount may vary if the 2G licensee(s) decides to return part of its assigned spectrum to TA.

Application of the proposed SUF

17. The Subcommittee has examined whether the Amendment Order and the 2G Regulation, as currently drafted, can clearly reflect the policy intent that the provisions relating to SUF will not apply to existing 2G licences, i.e. the 2G licensees will only be required to pay SUF under the new licences issued upon the expiry of their existing ones. In this regard, the Administration has explained that the requirement to pay SUF will only apply to the period of validity of the relevant “mobile carrier licence” at the rates stipulated in section 4 of the 2G Regulation. At present, 2G mobile services are licensed under PRS licences and existing 2G licensees do not hold any “mobile carrier licences” until such licences are issued to them upon expiry of their existing PRS licences. As such, the Administration is of the view that the proposed SUF will not apply to 2G licensees before the expiry of their existing licences.

18. While the Administration maintains its view that the Amendment Order and the 2G Regulation, as currently drafted, are in order, it has agreed to introduce an amendment to the 2G Regulation to specify more explicitly the mobile carrier licences to which the Regulation will apply in order to remove any doubt which may arise.

Convergence of 2G and 3G mobile services

19. Some members have enquired whether it is the Administration's anticipation that 2G services will be replaced by 3G services in the near future, and whether the purpose of requiring 2G licensees to pay SUF is to expedite their migration to 3G services.

20. The Administration's view is that the future development of mobile services in Hong Kong is primarily market-driven. It will be up to individual licensees to make their own business decision as to whether they would upgrade their systems and service capability. However, the Administration also points out that there is a rising demand and expectation on the part of consumers for higher capacity and speed in voice and data transmission. Therefore, operators will likely upgrade their technology to meet market needs for more advanced mobile services. Members are also aware that four of the six existing 2G

operators already hold 3G licences. There are also reports that the other two operators have approached the 3G licensees in connection with leasing 3G network capacity from them.

21. On whether 2G and 3G services will converge in a few years as envisaged by the Administration, members note that one of the operators has expressed doubt about such convergence as there is so far no cogent evidence that 3G infrastructure equipment will be available for 2G spectrum. In this regard, the Administration has confirmed that during public consultation, the industry has expressed divergent views on the convergence of 2G and 3G services. While some respondents are doubtful, others believe that the differences in capability between 2G and 3G spectra are likely to converge in future due to network upgrading to 2.5G or 2.75G services. The Administration has also advised that according to some equipment vendors, the development of 3G equipment for 2G spectrum is technically feasible and the necessary hardware will be available in response to market demand. Nevertheless, members note that the two operators who do not possess 3G licences may not be able to provide the full range of services available on 3G networks due to the limited amount of 2G spectrum they have been assigned. In this regard, the Administration advises that it will soon conduct a public consultation on the assignment of additional spectrum in the EGSM band to 2G operators which may alleviate the problem of spectrum shortage.

CDMA and TDMA licences

No issue of new licences

22. The Subcommittee notes that TA has decided not to offer new CDMA and TDMA licences upon expiry of the existing ones for reason that the assigned spectrum has not been put to efficient use. The Administration will nevertheless give the existing CDMA licensee and TDMA licensee a migration period of three years upon expiry of their current licences, with one-third of the originally assigned spectrum (i.e. 2 x 2.5 MHz paired spectrum), to enable the licensees to carry out changeover plans for customer migration. During the three-year migration period, the CDMA and TDMA licensees will be required to pay SUF proportional to the assigned bandwidth at the rate stipulated in section 4 of the 2G Regulation.

23. On whether the allocation of only one-third of the originally assigned spectrum would be sufficient for the licensees to cope with the service demands of local subscribers and inbound travellers using the roaming service, the Administration has advised that at present, there are about 25,000 local subscribers for CDMA service. It believes that one-third of the assigned spectrum should be more than sufficient to carry the existing volume and cope with the service demands in the run-up to November 2008 when the three-year migration period expires.

24. Some members are concerned whether the proposed phasing out of CDMA and TDMA services would be in the best interest of consumers, given that some of them might prefer to use this more economical option having regard to their actual needs. Moreover, the increasing number of visitors from the Mainland, where the CDMA standard is used, may find it inconvenient as they can no longer make use of the roaming service of their mobile phones while in Hong Kong.

25. In this connection, the Administration has advised that the future of CDMA and TDMA services, as well as the proposed use of the spectrum vacated by the CDMA licence, will be examined in the forthcoming spectrum policy review. Operators may submit proposals on using the vacated spectrum for the deployment of advanced mobile networks for TA's consideration during the review.

26. Meanwhile, TA has also decided to re-farm the spectrum vacated by the TDMA licence for supporting EGSM services and to make it available for capacity expansion by existing licensees. Regarding an operator's suggestion that for legislative efficiency, the EGSM band should also be included in the Amendment Order, the Administration has informed the Subcommittee that TA is required under TO to conduct a public consultation on the allocation and assignment of the EGSM band. Pending such consultation, it is not appropriate to deal with the EGSM band in the current legislative exercise.

Legal basis for the proposed migration period

27. Pursuant to the Telecommunications (Carrier Licences) Regulation (Cap.106 sub.leg.V), a mobile carrier licence, unless it is an existing licence, will be issued for a period of 15 years. The Subcommittee has sought clarification on the legal basis for TA to grant a three-year migration period to the CDMA and TDMA licensees upon expiry of their existing licences and to require them to pay SUF in accordance with the 2G Regulation.

28. In this connection, the Administration has explained that at present, the operators providing CDMA and TDMA services (namely, Hutchison and CSL respectively) also hold GSM and PCS licences. The new mobile carrier licence to be issued to each operator upon expiry of the existing licences will be technology-neutral and the licensee can therefore use more than one technology under a single licence to provide services. It is TA's intention that in the new mobile carrier licence to be issued to Hutchison and to CSL, the spectrum to be assigned for the provision of CDMA/TDMA services will be specified to enable the operators to provide such services during the three-year migration period. Notwithstanding that the new mobile carrier licence will be valid for 15 years, section 32H of TO empowers TA to assign, vary or withdraw frequencies. TA may also determine the radio frequencies to be assigned, the purpose for which

and the conditions (including the period of assignment) under which the frequencies are to be used. The Administration's view is that the validity period of the new mobile carrier licence needs not be the same as the period for which the frequencies for CDMA/TDMA services are to be assigned, but the latter period has to be clearly specified in the licence. Members further note that the frequency bands that will be assigned to Hutchison and CSL for their CDMA and TDMA operations respectively have been specified in Part 2 of the Amendment Order. As such, the use of these frequencies under the respective mobile carrier licence will be subject to the payment of SUF in accordance with section 4 of the 2G Regulation.

Commencement of the subsidiary legislation

29. The Administration has specified 3 February 2005 (i.e. the day immediately after the expiry of the scrutiny period which has been extended to 2 February 2005) as the commencement date of the three pieces of subsidiary legislation. Following discussion with the Subcommittee, the Administration will amend the Amendment Regulation and the 2G Regulation by moving a motion at the Council meeting on 2 February 2005. Nevertheless, it is noted that pursuant to section 34(2) of the Interpretation and General Clauses Ordinance (Cap.1), any amendment to subsidiary legislation by resolution of this Council takes effect only from the date of gazettal of the resolution, which falls on 4 February 2005 in the present case. As such, there is a one-day gap between the commencement of the subsidiary legislation as gazetted and the subsidiary legislation as will be amended.

30. Regarding the one-day gap, the Administration has advised that this will not give rise to any practical problem because the proposed SUF will not be charged on 2G licensees until they have been granted new mobile carrier licences after expiry of their existing licences, the earliest being in July 2005. On the designation of commencement date, the Administration has explained that its intention is to commence the subsidiary legislation as soon as possible in order that TA can start discussion with existing 2G licensees on the new licensing conditions well in advance of the expiry of their current licences. To avoid similar time gaps in future, the Subcommittee has drawn the Administration's attention to the need to take into account the possibility of amendment to subsidiary legislation by this Council when specifying commencement dates.

Proposed amendments

31. The proposed amendments to be moved by the Administration are at **Appendix III**. The Subcommittee is agreeable to the proposed amendments, which are mainly for the purpose of removing doubt and improving textual consistency, and will not move any amendment in its name.

Advice sought

32. Members are invited to note the Subcommittee's deliberations.

Council Business Division 1
Legislative Council Secretariat
20 January 2005

**Subcommittee on
Telecommunications (Designation of Frequency Bands subject to Payment of
Spectrum Utilization Fee) (Amendment) Order 2004,
Telecommunications (Method for Determining Spectrum Utilization Fees)
(Third Generation Mobile Services) (Amendment) Regulation 2004 and
Telecommunications (Level of Spectrum Utilization Fees) (Second
Generation Mobile Services) Regulation**

Membership List

Chairman	Hon SIN Chung-kai, JP
Members	Dr Hon LUI Ming-wah, JP Hon Jasper TSANG Yok-sing, GBS, JP Hon Howard YOUNG, SBS, JP Hon Abraham SHEK Lai-him, JP Hon Audrey EU Yuet-mee, SC, JP (Total : 6 Members)
Clerk	Miss Polly YEUNG
Legal Adviser	Ms Connie FUNG
Date	22 December 2004

**Subcommittee on
Telecommunications (Designation of Frequency Bands subject to Payment of
Spectrum Utilization Fee) (Amendment) Order 2004,
Telecommunications (Method for Determining Spectrum Utilization Fees)
(Third Generation Mobile Services) (Amendment) Regulation 2004 and
Telecommunications (Level of Spectrum Utilization Fees) (Second
Generation Mobile Services) Regulation**

Organizations which have submitted views to the Subcommittee

1. China Resources Peoples Telephone Company Limited
2. Hong Kong CSL Limited
3. Hutchison Telecommunications (Hong Kong) Limited
4. New World PCS Limited
5. SmarTone Telecommunications Holdings Ltd
6. SUNDAY Communications Limited

INTERPRETATION AND GENERAL CLAUSES ORDINANCE

RESOLUTION OF THE LEGISLATIVE COUNCIL

TELECOMMUNICATIONS (METHOD FOR DETERMINING SPECTRUM
UTILIZATION FEES) (THIRD GENERATION MOBILE
SERVICES) (AMENDMENT) REGULATION 2004

TELECOMMUNICATIONS (LEVEL OF SPECTRUM UTILIZATION
FEES) (SECOND GENERATION MOBILE SERVICES)
REGULATION

Resolution made and passed by the Legislative Council under section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1) on 2 February 2005.

RESOLVED that -

- (a) the Telecommunications (Method for Determining Spectrum Utilization Fees) (Third Generation Mobile Services) (Amendment) Regulation 2004, published in the Gazette as Legal Notice No. 209 of 2004 and laid on the table of the Legislative Council on 15 December 2004, be amended by adding -

"3. Action that may be
taken by Authority if
licensee fails to keep
proper accounts for
purposes of determining

spectrum utilization

fees

Section 10 is amended -

- (a) by repealing “完全或局部關乎” and substituting “關乎（不論是完全關乎或局部關乎）”；
- (b) by repealing “按照”；
- (c) in paragraph (a) -
 - (i) by adding “按照” before “規”；
 - (ii) by adding “備存” after “件”；
- (d) in paragraph (b) -
 - (i) by adding “按照” before “根”；
 - (ii) by adding “該” before “持”；
 - (iii) by adding “備存” after “規”；
- (e) by repealing “備存，”；
- (f) in paragraph (c)(i) -
 - (i) by repealing “必需的方式處理該等帳目，以使它們” and substituting “為使該等帳目”；

(ii) by adding “而需用的方式，看待該等帳目” after “定)”；

(g) in paragraph (c)(ii) by repealing everything before “有關” and substituting -

“(ii) 以該等如此看待的帳目作基準，就該持牌人評核”；

(h) in paragraph (d) by repealing everything before “，而” and substituting -

“(d) 該等如此看待的帳目及經如此評核的網絡營業額須用於釐定該使用費”；

(b) the Telecommunications (Level of Spectrum Utilization Fees) (Second Generation Mobile Services) Regulation, published in the Gazette as Legal Notice No. 210 of 2004 and laid on the table of the Legislative Council on 15 December 2004, be amended in section 3 -

(i) in paragraph (a), by repealing “and” at the end;

(ii) in paragraph (b), by repealing the full stop and substituting “; and”;

(iii) by adding -

“(c) “relevant mobile carrier licence” (有關的移動傳送者牌照)

means a mobile carrier licence
which -

(i) is granted after the
commencement of this
Regulation; and

(ii) entitles its holder to
use the spectrum referred
to in section 2."

Clerk to the Legislative Council

2 February 2005

INTERPRETATION AND GENERAL CLAUSES ORDINANCE

RESOLUTION

(Under section 34(2) of the Interpretation and
General Clauses Ordinance (Cap. 1))

TELECOMMUNICATIONS (METHOD FOR DETERMINING SPECTRUM
UTILIZATION FEES) (THIRD GENERATION MOBILE
SERVICES) (AMENDMENT) REGULATION 2004

TELECOMMUNICATIONS (LEVEL OF SPECTRUM UTILIZATION
FEES) (SECOND GENERATION MOBILE SERVICES)
REGULATION

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Spectrum Utilization Fees) (Third Generation Mobile
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laid on the table of the Legislative Council on 15
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 - (iii) by adding “備存” after “規”；
- (e) by repealing “備存，”；
- (f) in paragraph (c) (i) -
 - (i) by repealing “必需的方式處理該等帳目，以使它們” and substituting “為使該等帳目”；

(ii) by adding “而需用的方式，看待該等帳目” after “定)”;

(g) in paragraph (c)(ii) by repealing everything before “有關” and substituting -

“(ii) 以該等如此看待的帳目作基準，就該持牌人評核”;

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“(d) 該等如此看待的帳目及經如此評核的網絡營業額須用於釐定該使用費”;

(b) the Telecommunications (Level of Spectrum Utilization Fees) (Second Generation Mobile Services) Regulation, published in the Gazette as Legal Notice No. 210 of 2004 and laid on the table of the Legislative Council on 15 December 2004, be amended in section 3 -

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“(c) “relevant mobile carrier licence” (有關的移動傳送者牌照)

means a mobile carrier licence
which -

- (i) is granted after the commencement of this Regulation; and
- (ii) entitles its holder to use the spectrum referred to in section 2."