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16 December 2004

Legislative Council Secretariat
Legal Service Division
Legislative Council Building
8 Jackson Road
Central
Hong Kong

(Attn: Ms Connie Fung, Assistant Legal Adviser)

Dear Ms Fung,

**Subsidiary Legislation made under the
Telecommunications Ordinance (Cap.106)
(L.N. 208 to L.N. 210 of 2004)**

I refer to your letter dated 15 December 2004 to our Janet Wong relating to the captioned subsidiary legislation. I would like to clarify the matters raised by you as follows:-

Application of the Provisions Relating to Spectrum Utilization Fees to 2G Licensees

2. We noted your observation that public radiocommunications service (PRS) licences may be construed as mobile carrier licences by virtue of section 6(1) of the Carrier Licences Regulation. We are of the view that it is not necessary to prescribe an explicit provision that the subsidiary legislation does not apply to the existing licences.



3. On the lack of definition for “relevant mobile carrier licence”, we have defined “mobile carrier licence” in section 3 of L.N. 210 and that “relevant” “mobile carrier licence” is used in other sections of L.N. 210 to refer to the individual mobile carrier licences held by different licensees, which will have different dates of issue and expiry and hence the applicability of L.N. 210 to them.

4. We explained that the Telecommunications (Carrier Licences) Regulation was made for the purpose of introducing new types of “carrier licences”. Section 6(1) of the Telecommunications (Carrier Licences) Regulation stipulated that a reference **in an existing licence** to, say, PRS licence shall include a reference to mobile carrier licence and the licensee shall comply with the provisions of **the existing licence** in accordance with that reference as so construed. Our understanding is that this section is related to how one should construe the terms and conditions of a licence and is restricted to such purpose only. The type of licences will not be changed. If the intention were that all PRS licences are to be regarded as mobile carrier licences in all respects, an express provision to such effect would have been included in the Telecommunications (Carrier Licences) Regulation.

5. On section 70 of the Telecommunications Ordinance, this section only gives legitimacy to the remaining period of existing licences for which the empowering provisions have been repealed, so that such licence would be “deemed to be a licence granted under this Ordinance”. There is no suggestion in section 70 of the Telecommunications Ordinance that those existing licences would be re-classified into the prevailing types of licences.

6. We understand that, as a general rule, statutory provisions, in particular those which impose charges or are penal in nature, will not have retrospective effect. Therefore, the subsidiary regulation and order when enacted will not apply to existing licences unless it is otherwise stated in the legislation. In fact, the PRS licences do not contain any conditions which impose an obligation on the licensee to pay fees or charges as may be payable under any Hong Kong laws. As such, we consider that a provision to exclude application of the provisions to an existing licence is not necessary.

CDMA and TDMA Licences

7. Apart from holding a PRS licence for their CDMA and TDMA operations, Hutchison and CSL also hold two more PRS licences for their

GSM and PCS services respectively. The licence conditions of the PRS licences for GSM, PCS, CDMA and TDMA are substantially similar. The mobile carrier licences to be issued in future will remain technology-neutral. There will not be any requirement imposed by the mobile carrier licences as to what technology should be employed. A licensee may use more than one technology under a single mobile carrier licence.

8. Therefore, to implement the 3-year migration period for CDMA and TDMA operations, we intend to incorporate the spectrum to be assigned to Hutchison / CSL for such operations in the new mobile carrier licences to be issued upon the expiry of PRS licences for GSM services for the migration period upon the expiry of their PRS licences for CDMA and TDMA operations. Hutchison and CSL would then be able to provide public telecommunications service using CDMA and TDMA standards under those licences during the migration period.

9. The frequencies that will be assigned to Hutchison / CSL for the 3-year migration period for CDMA / TDMA operations are:

831.59 – 834.09 MHz	and	876.59 – 879.09 MHz	(for Hutchison)
835 – 837.5 MHz	and	880 – 882.5 MHz	(for CSL)

They have been specified in section 3 of L.N. 208.

10. Under section 4 of L.N. 210, spectrum utilization fee is payable during the validity of the mobile carrier licence. As the above frequencies for CDMA and TDMA operations would be incorporated in the mobile carrier licences, Spectrum Utilization Fee would be payable for those frequencies for CDMA and TDMA operations.

Yours sincerely,



(Li Yeuk Yue, Tony)

for Secretary for Commerce, Industry and Technology