

LC Paper No. CB(1)110/99-00
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seen by the Administration)

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Bills Committee on Telecommunication (Amendment) Bill 1999

**Minutes of meeting
held on Monday, 6 September 1999, at 10:45 am
in the Chamber of the Legislative Council Building**

- Members present** : Hon SIN Chung-kai (Chairman)
Hon David CHU Yu-lin
Hon HO Sai-chu, SBS, JP
Hon Fred LI Wah-ming, JP
Hon MA Fung-kwok
Dr Hon Philip WONG Yu-hong
Hon Howard YOUNG, JP
Hon YEUNG Yiu-chung
Hon Mrs Miriam LAU Kin-ye, JP
Hon CHOY So-yuk
- Member attending** : Hon Martin LEE Chu-ming, SC, JP
- Member absent** : Hon Eric LI Ka-cheung, JP
- Public officers attending** : For Item I
Ms Eva CHENG, JP
Acting Secretary for Information Technology and
Broadcasting
Mr M H AU
Acting Director-General of Telecommunications
Ms Gracie FOO
Principal Assistant Secretary for Information
Technology and Broadcasting

Miss Priscilla TO
Assistant Secretary for Information Technology
and Broadcasting

**Attendance by
invitation**

: For Item I

Hong Kong External Telecommunication Service
Association

Mr Kin WONG
Chairman

Mr Henry G LAM
Vice Chairman

Hong Kong Internet Service Providers Association

Mr Charles MOK
Chairman

Mr LEE Kheng Joo
Vice Chairman

Hong Kong Telecommunications Users Group

Mr Simon CHAN
Chairman

Kowloon-Canton Railway Corporation

Miss Heaster CHEUNG
Senior Manager, Station Commercial

Mr Paul ANDERSON
General Manager, Railway Systems

Mass Transit Railway Corporation

Ms Sara CHEUNG
Marketing Manager

Ms Teresa CHEUNG
Legal Manager General

Representatives of the BOT tunnels

New Hong Kong Tunnel Co Ltd

Mrs Susan LO
Human Resources and Administration Manager

Ms Miranda YIP
Deputy General Manager

Cross Harbour Tunnel Co Ltd

Mr Frankie YICK
General Manager Representative

Tate's Cairn Tunnel Co Ltd

Ms Josephine LAM
Corporate Affairs Manager

Western Harbour Tunnel Co Ltd

Mr Kenneth PANG
General Manager

Mr Patrick HO
Finance & Materials Manager

Route 3 (CPS) Co Ltd

Mr Gary LUK
General Manager

Ms Christine CHIE
Corporate Communications Manager

Lovell White & Durrant

Mr Peter TSE
Legal Adviser to the BOT tunnel operators

Cheung-Macpherson & Co Ltd

Ms Ophelia CHEUNG
Strategic Consultant to the BOT tunnel operators

The Real Estate Developers Association of Hong Kong

Mr Robert WONG
Representative

Ms Dora LEUNG
Representative

Clerk in attendance : Miss Polly YEUNG
Chief Assistant Secretary (1)3

Staff in attendance : Miss Connie FUNG
Assistant Legal Adviser 3

Ms Anita SIT
Senior Assistant Secretary (1)8

I Meeting with industry groups, tunnel operators and the Administration

The Chairman welcomed deputations of industry groups and tunnel operators to the meeting. He said that the purpose of this meeting was for the Bills Committee to exchange views with industry groups and tunnel operators on the Telecommunication (Amendment) Bill 1999 (the Bill), and for the Administration to take note of the deputations' views and to provide supplementary information where necessary. He then reminded the deputations that when addressing the Bills Committee, they were not covered by the protection and immunity provided under the Legislative Council (Powers and Privileges) Ordinance (Cap. 382). Their written submissions were also not covered by the said Ordinance. He then invited the deputations to present their views.

Presentation by deputations of industry groups and tunnel operators

Hong Kong External Telecommunication Service Association (HKETSA)
CB(1)1842/98-99(05) and CB(1)1845/98-99(02)

2. Mr Kin WONG highlighted the following views of the Association -
 - (a) the rates of the Local Access Charge and Universal Service Charge for external telecommunications services (ETS) should be reviewed;

- (b) the rental of local telephone lines should be off-hook with the IDD revenue of Cable & Wireless HKT Limited (CWHKT);
- (c) cabling access to buildings should be open to all FTNS operators; and
- (d) the legislative provisions on competition safeguards should cover predatory pricing by dominant or large ETS operators.

Hong Kong Internet Service Providers Association (HKISPA)

3. Mr Charles MOK said that HKISPA represented some 70 Internet service providers, which had a total market share of over 90% in Hong Kong. He presented major views of the Association as follows-

- (a) HKISPA supported proposed amendments seeking to strengthen competition safeguards in the telecommunications market. HKISPA was particularly concerned that the existing connection charge for Public Non-exclusive Telecommunications Services (PNETS) collected by Internet service providers on behalf of CWHKT might significantly hinder the growth of Internet services in Hong Kong;
- (b) Currently, comprehensive information on the mechanism and process for determining the connection charges for PNETS and broadband services was only available to CWHKT's affiliated companies. HKISPA hoped that the proposed legislative amendments would improve the transparency in this regard; and
- (c) HKISPA supported the proposed provisions seeking to enhance the access to land and buildings by MPOs.

Hong Kong Telecommunications Users Group (HKTUG)

CB(1)1826/98-99(01)

4. Mr Simon CHAN said that members of HKTUG were mainly corporate users of telecommunications services. He then highlighted the views of HKTUG as follows-

- (a) HKTUG strongly supported the proposed legislative amendments on competition safeguards, the new licensing regime, interconnection and the right of residents and occupiers to access to public telecommunications services of their choice;
- (b) HKTUG however had the following concerns :

- (i) the proposed new section 19B was too limited in scope as it applied only to lease agreements, deeds of mutual covenant and commercial contracts;
- (ii) an objective formula for determining the charges for facility sharing was not specified in the Bill;
- (iii) objective criteria were not specified in the Bill on how TA should form an opinion on whether a licensee's conduct was anti-competitive; and
- (iv) the proposed amendment to Section 8 requiring any person who, in the course of business offer a telecommunications service, to acquire a licence would unduly complicate the licensing system and increase the administrative costs of telecommunications service providers.

Kowloon-Canton Railway Corporation (KCRC)

CB(1)1815/98-99(02) and CB(1)1826/98-99(02) and CB(1)1877/98-99(03)

Mass Transit Railway Corporation (MTRC)

CB(1)1826/98-99(03) and CB(1)1832/98-99 and CB(1)1877/98-99(03)

5. Mr Paul ANDERSON of KCRC and Ms Sara CHEUNG of MTRC made a joint presentation on the views of the two railway corporations as per the speaking note (CB(1)1877/98-99(03)) tabled at the meeting. In essence, the two corporations objected to the proposed amendments seeking to empower TA to authorize MPOs access to any land and buildings to install and maintain network facilities, and to determine relevant agreement terms between MPOs and property owners.

6. Mr ANDERSON and Ms CHEUNG highlighted the following concerns of the two corporations in relation to the aforesaid proposed amendments-

- (a) Public safety was the foremost concern of the two corporations. To ensure that the safety requirements of the railway systems were met, MTRC and KCRC should continue to have the right to grant access to MPOs and the right to determine the most suitable technical solutions for installing and maintaining MPOs' network facilities in railway premises. Under the proposed amendments to Section 14, TA would be given unfettered powers to authorize MPOs to install and maintain network facilities in the railways' premises, and thus MTRC and KCRC might be compelled to accept terms which did not fully satisfy the safety requirements of the railway systems.

- (b) TA might not be equipped with the necessary expertise to make professional assessment of the technical solutions for telecommunications installations in railway systems, as well as the commercial considerations and decisions of the railway corporations on their dealings with telecommunications operators.
- (c) MTRC and KCRC operated on commercial principles. The commercial interest of MTRC and KCRC should be respected by reasonable return on investments made in telecommunication systems. The proposed amendments would jeopardize the corporations' position in future negotiation with MPOs.
- (d) TA, being a Government agency, should not be involved in mediating/arbitrating disputes between commercial parties. Such intervention contravened the free market policy all along upheld by the Government. Besides, there might be doubts about the impartiality of TA's determinations which might be made in favour of the commercial interests of telecommunications operators.

Operators of build-operate-transfer (BOT) tunnels
CB(1)1815/98-99(01)

7. On behalf of BOT tunnel operators, Mr Kenneth PANG presented their views on the proposed provisions on access to land and buildings (Clause 7 of the Bill). He stressed that the operators objected to providing MPOs with a statutory right of access to existing BOT tunnels and opined that the relevant proposed provisions should not apply to these tunnels. He then highlighted the justifications for their position as follows :

- (a) BOT tunnel companies were currently entitled under the respective Ordinances and BOT agreements with the Government to negotiate wayleave fees for installation of mobile network facilities in tunnels on a commercial basis. It was unfair and possibly unlawful for the Government to change unilaterally the terms already agreed with the tunnel companies by way of the proposed amendments.
- (b) No MPOs had been denied access to BOT tunnels. Commercial agreements between MPOs and BOT tunnel companies were in place and had worked well so far.
- (c) Empowering TA to intervene into negotiation between commercial parties and to determine terms would contravene the free market principle and weaken investors' confidence in the

Government's commitment in upholding the principle.

- (d) There might be a conflict of interest for TA to mediate/arbitrate between MPOs and tunnel operators on wayleave fees, as TA might have a vested interest in safeguarding the interests of telecommunications operators at the expense of operators in other industries.
- (e) The proposed amendment was out of step with countries having a liberalized telecommunications regime, such as the United Kingdom and Australia, where agreements on access to tunnels were negotiated commercially between MPOs and tunnel operators, and such negotiation was not subject to government intervention.

The Real Estate Developers Association of Hong Kong (REDA)
(CB(1)1864/98-99)

8. Mr Robert WONG stated that in principle, REDA supported the legislative intent of achieving ubiquitous coverage for mobile telecommunications services and fair competition in the telecommunications market. REDA however considered that any infringement of private property rights in the course of meeting these objectives was unjustified, unless there were very strong grounds. In order to balance the interests of various parties and to uphold the free market principle, REDA would accept in principle the granting of an access right to MPOs subject to strict regulation of such right by the relevant authority.

9. Referring to REDA's submission, Mr Robert WONG highlighted concerns related to the granting of a statutory access right for MPOs, including the mechanism and criteria for determining access fees and other contractual terms, the technical issues related to installation of mobile network facilities, and safeguards for property owners and occupiers against any abuse of the access right by MPOs. He said that REDA had the following key recommendations -

- (a) Any difference in treatment of MPOs by landlords should be well justified and fair. TA should not intervene so long as landlords treated all MPOs fairly and equitably in negotiation.
- (b) An independent panel/body comprising members who had no vested interest in or affiliation with the industries concerned should be formed to formulate criteria for TA's intervention and guidelines for determining terms and conditions for MPOs' access.

- (c) Any fee to be charged for telecommunications installations should reflect the true commercial/market value, rather than just the cost, of the premises being used for such installations.

Discussion with deputations of industry groups and tunnel operators

10. Mr Howard YOUNG sought deputations' views on the suggestion of some MPOs that MPOs should be granted a statutory right of access to future buildings and facilities while an arbitration mechanism be established to deal with unsuccessful negotiations for access to existing buildings and facilities.

11. On behalf of REDA, Mr Robert WONG considered that if the proposed provisions on access to land and buildings were enacted, they should be applied equitably to both existing and new buildings, but existing access agreements should remain in force and binding on the contract parties. However, given the rapid development of mobile telecommunication services and the growing number of licensed MPOs, it might not be feasible to require property owners to accommodate the network facilities of all existing and future licensed MPOs in future buildings.

12. Mr Frankie YICK of Cross Harbour Tunnel Company Limited (CHT) said that the company in principle agreed that the proposed access provisions should apply only to future buildings and infrastructure facilities. He stressed that pursuant to their respective agreement with the Government and the relevant Ordinances governing their operation, BOT tunnel operators were granted the right to charge telecommunications operators for facilities installations in tunnel areas. The existing BOT tunnels should therefore be exempted from the proposed access provisions in the Bill. However, CHT would consider it acceptable to include relevant conditions in future BOT agreements to require the tunnel operators concerned to provide access for MPOs, as prospective tunnel operators could then take these conditions into account in making their investment decisions.

13. On Mr Howard YOUNG's enquiry about the feasibility of appointing an independent private arbitrator, instead of the TA, for determination in case MPOs and landlords/tunnel operators failed to reach an agreement on access, Mr Frankie YICK of CHT pointed out that in any event, it was not appropriate for TA to arbitrate on the negotiation between two commercial bodies. As TA was a Government body set up to regulate the telecommunications industry, there might be a conflict of interest and the TA might be inclined to protect the interests of the telecommunications operators at the expense of the tunnel companies. He further remarked that BOT tunnel operators doubted whether TA was in a position to understand the needs and operations of BOT tunnels.

14. On the issue of access to land and buildings by MPOs, Mr Martin LEE opined that public interest should be the primary consideration. As there were over 3.5 million subscribers of mobile phone services in Hong Kong and the number was growing, it would be in the interest of the public for MPOs to provide ubiquitous coverage of their services. From this perspective, he considered the proposed access provisions in the Bill acceptable whilst safety and space requirements etc. were essentially technical issues which could eventually be resolved.

15. In response, Ms Sara CHEUNG of MTRC reiterated that public safety and the principle of free commercial negotiation were the two basic concerns of MTRC. Railway corporations should have the control over all telecommunications installations to ensure public safety. As the two railway corporations were operated on commercial principles, their negotiation with other commercial organizations, including MPOs, should not be subject to Government intervention. Over the past few years, MTRC had signed a number of agreements with MPOs providing coverage in MTRC premises. She stressed that these access agreements between MTRC and MPOs were working well and fair to both parties and could ensure that all telecommunications installations were up to MTRC's safety requirements.

16. Mr Gary LUK of Route 3 (CPS) Company Ltd. (Route 3) said that when entering into the BOT agreement with the Government, the company was aware of the development of mobile telecommunication services and thus had taken into account the prospective revenue from access fees charged on MPOs. He stressed that there were clear provisions in the BOT agreement and in the Tai Lam Tunnel and Yuen Long Approach Road Ordinance (Route 3) that the company could levy charges on telecommunications installations on a commercial basis. The company considered that any subsequent legislation should not deprive the company of this right. He also pointed out that the charges on telecommunications installations would be counted towards the operating revenue of BOT tunnels and thus would be taken into account by the Government in considering tunnel operators' applications for toll increase. The proposed access provisions, if enacted and applied to BOT tunnels, would reduce the revenue for tunnels and increase the pressure on tunnel operators to raise tolls.

17. Mr Charles MOK of HKISPA said that the Association supported the user-pays principle. HKISPA considered that the access provisions in the Bill would help rectify the present situation whereby mobile phone users might be subsidizing tunnel users to a certain extent. Direct negotiation on access fees and terms between tunnel operators and MPOs might not result in fair agreements as the former possessed a monopolistic right to tunnel areas and the intervention of TA could help bring about fairness and might help resolve some technical problems. Based on past experience in dealing with TA, Mr MOK

commented that TA would not necessarily make his decisions in favour of telecommunications services operators.

18. Mr Robert WONG of REDA agreed that access charges on MPOs should be fair and reasonable. However, REDA did not consider that there was a serious problem of exorbitant access charges at present and believed that any short-term anomalous or unfair situation could be rectified by market forces in the longer term. He reiterated REDA's view that the Government must adopt a very cautious approach on any act which might infringe on private property rights and/or contravene the free market principle.

19. Mr Frankie YICK of CHT said that CHT always gave primary consideration to servicing the general public. Since the launching of mobile phone services in early 1990s, no MPOs had ever been denied access to the CHT. With regard to the alleged difficulty in gaining access by one MPO to CHT, he clarified that the MPO concerned, which was offering a double-band (GSM and PCS) mobile phone service, did not wish to pay additional access charges for the new network facilities on the grounds that these facilities could be incorporated into the existing installation for GSM service of the company.

20. Mr LI Wah-ming sought clarification from the deputations on some MPOs' earlier comments that tunnel operators had rejected their request for collective negotiation for access and installation of common facilities. In this regard, Mr Frankie YICK of CHT commented that collective negotiation by MPOs would resemble a cartel. In fact, the Western Harbour Tunnel Company Limited had proposed to install a common network facility for the licensed MPOs and charged them collectively instead of individually. The MPOs however had failed to reach an agreement on how to share the rental among themselves. Mr Gary LUK of Route 3 said that the company welcomed MPOs to install common facilities, which would facilitate tunnel management and economize space. He confirmed that there was a common antenna for some MPOs in Tai Lam Tunnel at present.

21. Mr LI Wah-ming and Mr Martin LEE recapitulated some MPOs' allegation that some landlords/operators were biased against non-affiliated MPOs in providing access to their premises. Mr Robert WONG of REDA said that while there might have been isolated incidents of discriminatory treatment in the past, REDA had recently reviewed the situation and had adopted a common position that all MPOs should be treated fairly and equally. He however pointed out that the problem should not have been serious as under the pressure of market competition, the availability of mobile telecommunication service coverage would help attract more users/customers to the buildings/shopping malls in question.

22. Mr YEUNG Yiu-chung and Mrs Miriam LAU enquired whether there were any objective criteria or standard formula being adopted by tunnel

operators to ensure fair and reasonable charges on MPOs. In reply, Mr Gary LUK of Route 3 said that it was clearly stipulated in the Tai Lam Tunnel and Yuen Long Approach Road Ordinance that the tunnel should treat all applications for installation of utilities fairly and in a similar manner. Since the commissioning of Tai Lam Tunnel, the access agreements concluded between the tunnel and MPOs contained similar terms and the agreements were offered to all MPOs at nearly the same time.

23. Mr Frankie YICK of CHT confirmed that all along, access fees charged by tunnel operators were determined through commercial negotiation with MPOs. In the course of negotiation, tunnel operators would take into account the operating circumstances of their own tunnels and the MPOs concerned. In reply to Mrs Miriam LAU, Mr YICK said that as far as he understood, tunnel operators adopted similar criteria in determining the access fees. These criteria mainly included the volume of traffic, the estimated number of passengers using the tunnel and the number of subscribers of the service provided by the MPO concerned. In some cases, provisions were included in the access agreements to allow future adjustment of access fees based on certain variables. He added that the access fees charged by Government tunnels were also not standardized.

24. In this connection, Mr Frankie YICK of CHT referred to remarks by a MPO at the earlier meeting that CHT charged a monthly access fee as high as \$600,000. He clarified that the amount represented a quarterly, rather than a monthly, wayleave and advertising fee. Referring to the allegation that MPOs were compelled to rent advertising space at tunnels in order to obtain access, Mr YICK pointed out that the allegation was misleading as the letting of advertising space formed part of the package deal with MPOs on the provision of access for network facilities.

25. Miss CHOY So-yuk sought confirmation on whether MPOs were required under their licences to provide network coverage in tunnels. The Acting Director-General of Telecommunications advised that the GSM licences granted since 1992 and the PCS licences granted in 1996 included obligatory conditions on network coverage. If a licensee failed to provide the prescribed scope of coverage, the TA would require the payment of the bonded sum in accordance with the performance bond submitted by the licensee. Mr Peter TSE of Lovell White & Durrant however remarked that PCS licensees were not required to provide coverage in Tai Lam Tunnel, and there was no specific deadline set in PCS licences for gaining access to other BOT tunnels. For other GSM licences issued before the PCS licences, he said that as far as he knew, some did not include any condition on network coverage in tunnels. The Chairman requested and Mr TSE agreed to confirm in writing his advice on the service coverage requirement in MPO licences for further consideration by the Bills Committee and the Administration.

(*Post-meeting note* : The note provided by Lovell White & Durrant on the obligation of licensed MPOs to provide coverage in BOT tunnels was circulated to members vide LC Paper No. CB(1)1947/98-99 dated 22 September 1999 (English version) and LC Paper No. 1964/98-99 dated 27 September 1999 (Chinese version).)

26. On Miss CHOY So-yuk's concern on whether there was any international standard and/or established criteria to determine the charges on MPOs for access to tunnels, Mr Frankie YICK of CHT said that according to the information available to his company, the governments of most open market economies were not empowered to determine the charges on MPOs for access to private tunnels. He added that the BOT tunnel operators in Hong Kong might not be fully aware of the coverage requirement, if any, under the MPO licences when negotiating the access agreements with MPOs. Ms Sara CHEUNG of MTRC said that based on the company's information, the Mass Transit Railway in Hong Kong might be the first railway system of its kind in the world providing network coverage for mobile telecommunication services. Therefore, the access arrangements agreed between MTRC and MPOs were often used as benchmark reference by overseas railway systems.

27. Mr MA Fung-kwok sought elaboration on why the two railway corporations considered that the proposed amendments in the Bill were incompatible with their safety requirements. Mr Paul ANDERSON of KCRC said that by giving individual MPOs the right to appeal to TA on access, and providing TA with the powers to intervene and make determinations, KCRC would be deprived of the control over the timing and manner of MPOs' installation of their network facilities in KCRC's premises and tunnels. In the past, KCRC usually discussed with MPOs jointly and designed a common network system to be shared by various MPOs. Ms Sara CHEUNG of MTRC explained that MPOs might be inclined to use cheaper equipment and simpler methods of installation which might fall short of MTRC's safety requirements. MTRC was very concerned that if MPOs could appeal to TA for making determinations on access fees and terms, MTRC might be compelled to accept terms that were not compatible with MTRC's safety requirements. MTRC therefore considered it necessary to retain its control over the terms of access agreements, particularly those concerning the design and method of installation of network facilities.

28. Mr MA Fung-kwok further enquired whether MTRC and KCRC would suggest some amendments to the Bill to ensure that their concerns were addressed, instead of objecting to the Bill in its present form. In reply, Ms Teresa CHEUNG of MTRC referred to the proposed amendments to Sections 14 and 36A and pointed out that although the factors that should be taken into account by TA in determining the access terms and fees were specified in the proposed amendments, the final authority would rest with TA and there was no mechanism provided under the Bill for further appeal against TA's

determinations. MTRC was particularly concerned that under the proposed new Section 36A(3C)(b), TA's determinations could override relevant provisions in existing agreements.

29. There being no further questions from members, the Chairman thanked the deputations for their presentations and exchange of views with the Bills Committee. He added that if the deputations had further views to submit, they were welcome to do so in writing.

Any other business

Admin.

30. At the request of the Chairman, the Administration agreed to provide a written response to the views of the deputations attending this meeting and the previous meeting held at 8:30 am.

31. Members agreed that the next meeting of the Bills Committee would be held on Tuesday, 28 September 1999 at 8:30 am. (Post-meeting note: The meeting was subsequently rescheduled to 10:45 am of the same day due to full booking of available meeting venues and two other meetings being scheduled for the 8:30 am time slot.)

32. The meeting ended at 12:35 pm.

Legislative Council Secretariat
28 October 1999