LC Paper No. CB(1)390/99-00
(These minutes have been
seen by the Administration)

Ref : CB1/BC/18/98/2

Legislative Council
Bills Committee on Telecommunication (Amendment) Bill 1999

Minutes of meeting
held on Wednesday, 6 October 1999, at 8:30 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 Eric LI Ka-cheung, JP Hon MA Fung-kwok Dr Hon Philip WONG Yu-hong Hon Howard YOUNG, JP Hon YEUNG Yiu-chung Hon Mrs Miriam LAU Kin-yee, JP
Member attending	**:**	Hon Ronald ARCULLI, JP
Members absent	**:**	Hon Fred LI Wah-ming, JP Hon CHOY So-yuk
Public officers Attending	**:**	For Item II Ms Eva CHENG, JP Deputy Secretary for Information Technology and Broadcasting Mr M H AU Senior Assistant Director (Regulatory), Office of the Telecommunications Authority

Ms Gracie FOO
Principal Assistant Secretary for Information Technology and Broadcasting

Miss Priscilla TO
Assistant Secretary for Information Technology and Broadcasting

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 Confirmation of minutes of meeting

(LC Paper No. CB(1)1905/98-99)

The minutes of the meeting held on 21 July 1999 were confirmed without amendments.

II Meeting with the Administration

Right of access (section 14)

2. The Principal Assistant Secretary for Information Technology and Broadcasting briefed members on the paper - "Review on the access fees charged by Government for installation of radiocommunications equipment at Government tunnels" (CB(1)46/99-00(02)).

3. In reply to Mr YEUNG Yiu-chung's enquiry about the difference in the approaches for setting the old fees and the new fees (which took effect from 1 October 1999 for any new agreement) charged on mobile phone operators (MPOs) for access to Government tunnels, the Deputy Secretary for Information Technology and Broadcasting (DS/ITB) explained that the old fees included a portion set on the full market rental basis while the new access fees only sought to recover the costs incurred by the Government which were mainly the staff costs for processing the applications from MPOs for equipment installation and management of the installation process. She also confirmed

that the new fees would not include an element of return on the capital investment by the Government.

4. In this connection, Mr Howard YOUNG enquired whether private tunnels were expected to use the same cost-recovery approach in setting the access fees charged on MPOs. DS/ITB advised that the objective of revising the access fees for Government tunnels was to facilitate ubiquitous coverage of mobile telecommunication services in Hong Kong. It was not the Administration's intention that operators of private tunnels and other shielded public places should adopt the same charging approach. Instead, in setting the charging principles for access fees to private tunnels and other shielded public places, the Telecommunications Authority (TA) would consult all relevant parties on the charging models to be adopted, including those options listed in a previous paper submitted to the Bills Committee (CB(1)1860/98-99(01)).

5. Referring to the paper on "Cost implication of the access fees charged by tunnel operators on mobile network operators" (CB(1)46/99-00(03)), Mr HO Sai-chu commented that as the fees for access into tunnels for the year 1998-99 to be borne by each mobile phone subscriber only amounted to about $15, the proposal to empower TA to intervene into the commercial negotiation between MPOs and tunnel operators and to determine the level of fees was not warranted. While such intervention might reduce the access fees which had to be borne by each subscriber by just a few dollars, it would seriously undermine investors' confidence in the Government's commitment in upholding the free market principle.

6. In response, DS/ITB pointed out that access fees into tunnels only formed a portion of the fees payable by MPOs for access into shielded areas. She stressed that the primary purpose of the proposed amendments to section 14 was to provide a mechanism to achieve ubiquitous coverage of mobile telecommunication services, the lack of which would significantly hinder the development of telecommunications services in Hong Kong.

7. Mr HO Sai-chu queried the need for radiocommunications installation in shielded places in order to provide network coverage given the rapid development of mobile telecommunications technology. In reply, the Senior Assistant Director (Regulatory), Office of Telecommunications Authority (SAD/OFTA) advised that future generations of mobile phone services would continue to require radio waves for transmission. To provide mobile network coverage in confined and shielded areas, where there was obstruction in the transmission of radio waves, installation of radiocommunications equipment inside confined and shielded areas would still be necessary.

8. In reply to the Chairman's enquiry, SAD/OFTA confirmed that radiocommunications installation was also required in order to receive radio broadcasting in shielded areas. At present, radio broadcasting equipment was

installed in tunnels at the initiative and expense of tunnel operators.

9. Dr Philip WONG asked whether the proposed access provisions would affect existing commercial agreements on access between MPOs and landlords/tunnel operators. In reply, DS/ITB confirmed that existing agreements would not be affected and would remain in force.

10. Mrs Miriam LAU commented that all along, access by MPOs to "build-operate-transfer" (BOT) tunnels had not been a problem. The proposed access provisions would in effect enhance MPOs' bargaining power and consequently disadvantage tunnel operators in future negotiation on terms and conditions of access. In the light of the review by the Government on access fees into Government tunnels which resulted in a substantial fees reduction, Mrs LAU said that the Administration was giving an impression that it would like to see a lower level of access fees payable by MPOs to private tunnels in future as well.

11. In response, DS/ITB reiterated that the Administration had no intention to override existing commercial agreements by legislative amendments. Based on the information available to the Administration, the negotiation between MPOs and landlords/tunnel operators often took more than a year on average to reach an agreement and in some cases, the negotiation process lasted for over seven years. In view of the genuine demand for mobile telecommunication services in the community and the rapid development of mobile telecommunications technologies, the Administration considered it necessary to provide a mechanism to facilitate ubiquitous coverage of mobile telecommunication services. She stressed that pending TA's consultation on the charging models, the Administration had not formed an opinion on whether the existing access fees for BOT tunnels were on the high or low side.

12. Mrs Miriam LAU enquired about the circumstances under which TA's intervention into the negotiation between MPOs and tunnel operators would be triggered off, as well as the basis for determining a reasonable and fair access fee apart from using the cost-based approach. She was particularly concerned about how the intangible benefits derived from the radiocommunications installation of MPOs in tunnel areas would be factored into the fees determination models. Dr Philip WONG cautioned that a substantial reduction in the access fees into BOT tunnels might have a significant impact on the income of tunnel operators. He asked whether the Administration would consider adopting an incremental approach in reducing the access fees into private tunnels.

13. In reply, DS/ITB said that in line with existing practice, TA would only mediate in negotiation for access upon request by a concerned party, and it would be up to the concerned party to substantiate his/her request. As regards the charging models, DS/ITB stressed that the Administration was prepared to consider various charging models and the cost-based model was only one of the

options for consideration. She further pointed out that an access fee might comprise different components each of which might be calculated on different bases. She considered that "intangible benefits" derived from radiocommunications installations referred to by Mrs Miriam LAU might be reflected in the revenue-sharing model as suggested in paper CB(1)46/99-00(03) and be regarded as a percentage of the revenue of MPOs derived from the usage of mobile phone services in tunnel areas.

14. Referring to the submissions from BOT tunnel operators and a piece of written advice provided by the legal advisers to the tunnel operators, the Chairman requested and the Administration agreed to provide a consolidated written response to the issues and views raised therein for discussion at the next meeting on 21 October 1999.

(*Post-meeting note :* The Administration's response to the aforesaid submissions vide Paper CB(1)141/99-00(01) was discussed at the meeting on 21 October 1999.)

15. Mrs Miriam LAU expressed concern about the progress in drawing up the guidelines on determination of access fees by TA and on ensuring the safety of radiocommunications installation in railway premises. In response, DS/ITB informed members that the Administration would consult the two railway corporations in drawing up relevant operational guidelines governing the safety of access by MPOs and would report to the Bills Committee. As regards the guidelines for determining access fees into shielded areas, DS/ITB undertook to provide the Bills Committee with an outline of the draft consultation paper on the subject in due course.

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16. Mr MA Fung-kwok pointed out that there were other bodies such as the Airport Authority which might also be concerned with the safety aspects of granting a right of access to MPOs. He suggested and the Administration agreed to also consult these bodies.

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Request for information (sections 35A and 36D) and section 7H

17. SAD/OFTA took members through the paper - "The Administration's response to submission by the Hong Kong Society of Accountants" (CB(1)46/99-00(01)).

18. Noting from the Administration's response that licensees were required to adopt the accounting practices specified in the Accounting Manual issued by TA, Mr Eric LI said that the Hong Kong Society of Accountants (HKSA) had not expected such an extent of regulation over the accounting practices of licensees by TA. He considered that if the proposed arrangement was a detailed codification of the existing licence conditions and clearly understood by licensees in the telecommunications sector as claimed by the Administration,

there might not be a serious problem. However, Mr LI pointed out that it might be preferable to refer to "accounting principles" or "accounting principles and practices" in lieu of "accounting practices" in the second line of proposed section 7H. DS/ITB remarked that the adoption of standard accounting practices by licensees was necessary to facilitate TA to perform some of its regulatory functions and for the compilation of statistics for the sector.

19. Mr Eric LI considered that the powers of TA to obtain and disclose information should be suitably circumscribed by specifying the circumstances under which a licensee or non-licensee would be required to produce certain documents or information. This was particularly important as persons who were ordinarily outside the scope of TA's regulation might also be required to produce information. He also opined that an avenue for appeal against TA's directions to obtain or disclose information should be provided in the legislation.

20. The Chairman commented that the powers conferred on TA under proposed sections 35A and 36D were relatively broad. He pointed out that the market in general was very sensitive to any action taken by a regulatory authority on a listed company. To ensure that the legal privilege of licensees and persons concerned would be duly protected, it was important to build in adequate checks and balances in the legislation on the powers of TA to obtain information.

21. Dr Philip WONG enquired whether there were provisions to restrict the use of the information obtained by TA and to preserve the confidentiality of such information. He was also concerned whether the information obtained by TA could be used as evidence before the court. He considered that in principle, any information obtained by TA should not be disclosed or divulged to any other parties.

22. In response, SAD/OFTA confirmed that all along, TA had observed strict confidentiality in handling information provided by licensees and other persons. Under proposed section 7I of the Bill, a licensee/person providing the information would be given a reasonable opportunity to make representations on a proposed disclosure by TA of such information. TA would be required to take into account the representations and the public interest in deciding whether the information should be disclosed. SAD/OFTA assured members that as the regulator of the industry, TA was fully aware that his credibility was of paramount importance. Any inappropriate disclosure of information would significantly undermine TA's credibility.

23. Mr Eric LI considered that whilst he would not doubt the Administration's commitment to observe confidentiality and act prudently, it was still necessary under the rule of law to provide statutory safeguards in the

relevant legislation to circumscribe TA's powers. He considered that provisions should be introduced to hold the authorized officer concerned responsible for inappropriate divulgence/disclosure of information and to provide remedy for the aggrieved licensee or non-licensee concerned. He also referred to provisions in the Inland Revenue Ordinance under which an authorized official was personally liable for breach of the confidentiality provisions in the Ordinance.

24. On proposed section 36D which required TA to obtain an order from a magistrate to seek information about anti-competitive practices from non-licensees, Mr Eric LI shared HKSA's concern that as under proposed subsection(1), the magistrate needed only be satisfied that the information sought by TA was relevant to its functions, the proposed section could be subject to very broad interpretation and would not afford much protection to third parties. He suggested that reference be made to the draft composite Securities and Futures Bill in which a comprehensive procedural and institutional set-up was proposed to provide the necessary checks and balances on the powers of the Securities and Futures Commission, including an appeal tribunal comprising independent members. Mr HO Sai-chu shared Mr Eric LI's view.

25. To conclude, the Chairman said that while members would not object in principle to empowering TA to obtain and disclose information necessary for the exercise of its functions, members considered it necessary to stipulate, inter alia, the following in the legislation -

(a) the circumstances under which TA could obtain a particular type of information from a licensee or non-licensee;

(b) procedures for preservation of confidentiality of the information obtained and penalties for breach of the procedures; and

(c) an appeal avenue and remedies for aggrieved licensees and non-licensees.

He requested the Administration to consider members' views and examine comparable provisions in other Ordinances, including relevant legislation in the United Kingdom, to see whether additional checks and balances should be included in the Bill to limit/circumscribe the powers of TA and the manner in which such powers were to be exercised.

26. While agreeing to consider members' views, DS/ITB stressed that the legislative intent of the proposed amendments was to codify the existing licence conditions under which TA was entitled to obtain certain necessary information. She added that TA, as a public officer, was bound by administrative law to act lawfully and not to exercise his powers arbitrarily.

(*Post-meeting note :* The Administration's response on the subject vide Paper CB(1)141/99-00(03) was discussed at the meeting on 21 October 1999.)

Numbering Plan (Section 32F)

27. SAD/OFTA advised that telephone numbers were public resources and their allocation would affect fair market competition. Proposed section 32F was to provide a fair and transparent mechanism for the allocation of special numbers. Management of the telecommunications numbering plan for Hong Kong was a function of TA under the existing Telephone Ordinance. Pursuant to proposed section 32F(5), the Secretary for Information Technology and Broadcasting (SITB) would be empowered to make regulation to allow TA to auction off "special numbers" and to set up a fund for holding of the proceeds for charities or for activities connected with telecommunications. The fund would be managed by TA while SITB would by regulation impose requirements in relation to the establishment and management of the fund.

28. In reply to Mrs Miriam LAU's enquiry on whether the proposed amendments would affect existing telephone numbers already allocated, DS/ITB confirmed that these numbers would not be taken back for re-allocation.

29. Noting the existing arrangement whereby proceeds from auctions of special numbers such as vehicle licence numbers were transferred to the Lotteries Fund for general charitable purposes, some members queried whether the proposed management/use of proceeds from sales of special telephone numbers was a deviation from the existing policy and practices. In response, DS/ITB pointed out that the proposal would not constitute a change to the existing policy. The situation of TA was different as the Office of the Telecommunications Authority operated as a trading fund.

30. Mr Eric LI pointed out that levies and charges by Government agencies were usually used to fund public schemes of a compensation or insurance nature. All along, the Government had not allowed Government agencies to use such proceeds to fund their own activities to avoid possible conflict of interests. He cautioned that the proposed management arrangements for the proceeds from the numbering plan might set an undesirable precedent.

31. Mrs Miriam LAU considered that the proposed use of the proceeds from the numbering plan was a fundamental policy issue involving the Government's principles in public finance management. The Administration should clarify whether a precedent deviating from the existing practice would be set, and its implications on the existing arrangements whereby a Government agency usually could not use the revenue raised by it to fund its own activities.

32. The Administration agreed to consider members' views and provide a response.

(The Administration's response on the subject vide Paper CB(1)167/99-00(02) was discussed at the meeting on 21 October 1999.)

33. In reply to the Chairman's enquiry about the management arrangements for the fund holding the proceeds from the sale of telephone numbers, DS/ITB advised that the regulation to prescribe the management arrangements had not been formulated at this stage. However, it was the Administration's intention to set up a committee including individual members of the public to advise on the utilization of the proceeds according to the prescribed uses laid down in proposed section 32F(5)(b)(i).

34. The Chairman said that he had no objection to the proposed use of the proceeds for the promotion of telecommunications-related activities in the community as presently proposed in the Bill. However, he was concerned whether it was appropriate for TA to manage the fund. He further commented that if the Administration intended to set up a committee to manage the fund, it might be more appropriate to specify such arrangements in the legislation. DS/ITB agreed to consider the suggestion.

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Spectrum utilization fee (Section 32I)

35. SAD/OFTA advised that under proposed section 32I, TA might charge a spectrum utilization fee for the use of designated frequency bands. SITB might by regulation prescribe the level, or the method for determining the level, of spectrum utilization fees. The purpose of charging these fees was two-fold: to ensure efficiency in the use of the radio spectrum and to allocate this public resource in an open and fair manner. He further advised that the existing practice was for a public telecommunications service (PTS) provider to apply for allocation of frequency bands and the decision was made by TA based on its assessments on the benefits of the proposed service to the community. Upon enactment of proposed section 32I, TA might allocate certain frequency bands through open tender/auctioning of the spectrum. He pointed out that there was a trend in overseas countries with a liberalized telecommunications regime for spectrum to be allocated through open tenders/auctions.

36. DS/ITB supplemented that the existing spectrum utilization fees were charged on a cost-recovery basis. The proposed provision was an enabling provision to allow TA to charge a fee in excess of costs where the circumstances so warranted. Referring to recent speculations in the telecommunications sector that the Administration planned to grant licences for the third generation mobile phone services through auctioning, DS/ITB clarified that the Administration had not made a decision at this stage and

would weigh carefully the pros and cons involved. One major consideration about auctioning was the possible effect on consumers, especially whether the higher costs incurred on PTS providers might ultimately be translated into higher subscription fees on consumers.

37. In reply to the Chairman's enquiry about the legislative procedure for the regulation under proposed section 32I(2), DS/ITB confirmed that the regulation would be subsidiary legislation subject to the scrutiny of the Legislative Council through the negative vetting process.

38. Mr Eric LI said that enacting the proposed enabling provision without spelling out the principles for fees determination in the legislation would cause uncertainties to PTS providers. He pointed out that it was the usual practice for the Administration to conduct consultation and formulate the guidelines/principles for charges/fees determination before introducing enabling provisions to levy charges or fees. Although the Administration had undertaken to consult the industry before setting the spectrum utilization fees, the ultimate authority on fees determination vested with the Administration. He opined that the Administration should also provide the Bills Committee with the draft subsidiary legislation setting out the mechanism for determining spectrum utilization fees to facilitate members' consideration of the proposed enabling provision. Both he and the Chairman also expressed concern that the negative vetting procedure might not allow a reasonable opportunity and time for the affected parties to peruse and consolidate their views on the draft subsidiary legislation upon gazettal. The Chairman and Mr HO Sai-chu shared the view that the proposed provisions on spectrum utilization fees and the draft subsidiary legislation setting out the detailed arrangements for the spectrum pricing mechanism should be submitted to this Council in one package. DS/ITB agreed to consider members' views.

(*Post-meeting note:* The Administration's response vide Paper CB(1)141/99-00(02) was discussed at the meeting on 21 October 1999.)

Interconnection and sharing of facilities (Section 36A and 36AA)

39. On the legislative intent of the proposed amendments, DS/ITB stressed that interconnection was essential to fair competition as consumers using different networks should be able to communicate with one other. SAD/OFTA supplemented that when making a determination on the sharing of facilities, TA would consider whether the facilities were essential and/or bottleneck facilities. However, the concept of "bottleneck" facility was not relevant to interconnection between networks. He explained that it was necessary for interconnection to be made to a fixed network so that users connected to that network might gain access to users connected to other networks. However, the former fixed network was not necessarily a bottleneck facility as the users connected to it might be accessed through other

networks.

40. Members did not raise any query on this issue.

Increase in penalty (Section 36C)

41. DS/ITB reported that during the consultation on the proposed amendments, the industry shared the majority view that the existing maximum penalty which TA could impose was grossly inadequate to reflect the size of operation of the telecommunications sector. Under proposed section 36C(3B)(a), the Court of First Instance could, on application by TA, impose a higher amount of financial penalty than the maximum amount that TA could impose under proposed section 36C(3), i.e. HK$200,000 on the first occasion, HK$500,000 on the second occasion and HK$1,000,000 on any subsequent occasion. DS/ITB also clarified that there would not be any double penalty first imposed by TA under proposed section 36C(3) and then by the Court under proposed section 36C(3B)(b) on the same breach.

42. In reply to the Chairman's enquiry about the maximum penalty under proposed section 36C(3B)(b), SAD/OFTA advised that the maximum financial penalty was a sum not exceeding 10% of the turnover of the licensee who had committed the breach in the relevant telecommunications market during the period of the breach, or $10,000,000, whichever was the higher.

Civil Remedy (Section 39A)

43. SAD/OFTA advised that the legislative intent of proposed section 39A was to provide a statutory right for an aggrieved party to claim remedies for the loss or damage as a result of breaches of proposed sections 7K, 7L,7M or 7N on competition safeguards. In reply to the Chairman's enquiry about the procedure for bringing an action, SAD/OFTA said that an aggrieved party would need to substantiate his/her claim that he/she had suffered loss or damage as a result of a breach by a PTS licensee.

Appeal body

44. DS/ITB said that views expressed during the consultation on the legislative proposals were generally supportive of maintaining the existing practice whereby appeals against TA's decisions were by means of judicial review. The Administration also considered that the existing appeal system had worked well. She nevertheless noted that some deputations received by the Bills Committee had called for the establishment of an appeal mechanism. She and SAD/OFTA further advised that as the telecommunications sector was undergoing rapid development and was highly competitive, TA was often required to take regulatory action expeditiously on anti-competitive practices such as predatory pricing. If an appeal procedure other than judicial review

was available, it might be abused by a delinquent licensee to delay implementation of a well-justified determination of TA. This delay might have enabled the licensee in question to have obtained a significant market share, which would be detrimental to fair competition and consumers' interest.

45. In this connection, Mrs Miriam LAU was concerned that judicial review, on the contrary, might be even more vulnerable to abuse as the procedure involved was more lengthy and complicated, thus causing further delay. She also pointed out that judicial review was a restrictive remedy which could only be proceeded with the Court's leave. Mrs LAU suggested that the Administration should also consider other options such as the Administrative Appeal Board system.

46. At the invitation of the Chairman, the Assistant Legal Adviser 3 advised that strictly speaking, judicial review was not an appeal channel as the Court would not substitute its own decision in place of the decision of TA while an appeal body was usually empowered to review and where necessary, vary the decision under appeal. Judicial review was primarily concerned with the fairness and lawfulness of the decision-making process, rather than with the merits of the decision. She added that a person applying for judicial review must first prove, inter alia, that he/she had sufficient interest in the matter to which the application related in order to obtain leave from the Court.

47. The Chairman commented that the cost and administrative burden required of an aggrieved party in judicial review might in effect deter small companies from making an "appeal" against TA's decisions even in deserving cases. On the other hand, large companies with strong financial backing could afford to make use of judicial review to delay the implementation of TA's decision.

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48. Recapitulating members' concern that relying solely on judicial review might not provide an adequate and effective avenue for appeal against TA's decisions, the Chairman requested and the Administration agreed to re-consider the subject and to make reference to the appeal provisions in other pieces of legislation, such as those proposed in the proposed composite Securities and Futures Bill, and to examine the feasibility of using other appeal channels such as the Administrative Appeal Boards.

III Any other business

49. The Chairman advised that at the next meeting to be held on 21 October 1999 at 8:30 am, the Bills Committee would continue to examine the outstanding issues arising from this and previous meetings.

50. There being no other business, the meeting ended at 10:35 am.

Action

Legislative Council Secretariat
28 November 1999