

立法會
Legislative Council

LC Paper No. CB(1)1826/99-00

(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 Friday, 14 April 2000, at 10:45 am
in Conference Room A of the Legislative Council Building

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

Ms Priscilla TO
Assistant Secretary for Information Technology and
Broadcasting

Mr Richard FOWLER, QC
Adviser to the Office of the Telecommunications
Authority

Ms Jenny CHUNG
Legal Adviser of the Office of the
Telecommunications Authority

Mr Geoffrey FOX
Senior Assistant Law Draftsman

Mr Peter H H WONG
Senior Assistant Solicitor General/Basic Law

Mr Paul TSANG
Government Counsel/Basic Law

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 the Administration

Mrs Miriam LAU sought clarification on whether the letter (issued to members after the meeting vide LC Paper No. CB(1) 1405/99-00) tabled at the meeting was a joint submission of six mobile network operators (MNOs) as purported by the signatory of the letter. The Senior Assistant Director, Office of the Telecommunications Authority (SAD/OFTA) said that Mr Kandy YUEN, the signatory of the letter, was a staff member of Cable & Wireless HKT CSL Ltd responsible for regulatory matters. SAD/OFTA said that according to his understanding, the views set out in the letter were the collective views of the six MNOs.

Clause-by-clause examination of the Bill and Committee Stage Amendments proposed by the Administration
(LC Paper No. CB(1) 1378/99-00(01))

Clause 7 - proposed section 14

Power to place and maintain telecommunications lines, etc., on land, etc

2. On whether the Telecommunications Authority (TA) should authorize access by MNOs prior to determination of the access fee by arbitration, Mrs Miriam LAU referred to a copy of an existing access agreement provided to her and pointed out that the agreement also covered a wide range of matters apart from the access fee. They included the installation and operation of ancillary equipment, the arrangements for obtaining all necessary licence approvals and permits in connection with the wayleave agreement, insurance cover, indemnity, liability etc. She therefore considered that TA should not authorize early access if, apart from the access fee, some other matters relating to access were also in dispute between the two parties concerned. On the other hand, if the access fee was the only outstanding matter in dispute, she would accept that TA might authorize early access subject to the payment of an interim fee to the land and facility owner concerned and on condition that the fee subsequently determined by the arbitrator would take retrospective effect from the date of access. Dr Philip WONG expressed concurrence with Mrs Miriam LAU's view on TA's power to authorize early access pending arbitration on the access fee.

3. The Acting Secretary for Information Technology and Broadcasting (SITB(Atg.)) said that the Administration welcomed the suggestion by members on an interim fee arrangement to enable early access as this was in line with the policy objective to facilitate early access into shielded areas by MNOs for the provision of mobile telecommunications services. The Administration would further examine the manner in which the interim fee arrangement should be put into effect, whether by way of a condition in TA's authorization or by Committee Stage Amendments (CSAs) to the relevant section.

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4. Mrs Miriam LAU opined that although proposed section 14(5A)(a) provided that the arbitrator should give regard to, inter alia, the factors relating to cost, property value and the benefits to be derived from the authorization concerned in determining the access fee, the interpretation of these factors should be elaborated in the guidelines on the charging principles referred to in proposed section 14(5A)(b). Mrs LAU recalled that the Administration had elaborated on the charging principles based on the aforesaid factors in its paper CB(1)806/99-00(01), and suggested that the guidelines on the charging principles should be drawn up along the lines set out in the paper.

5. In response, SITB(Atg.) confirmed that it was the Administration's intention to incorporate the charging principles set out in paper CB(1)806/99-

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00(01) into the guidelines referred to in proposed section 14(5A)(b). She confirmed that the Administration would give an undertaking at the Second Reading debate of the Bill that the consultation paper on the charging principles for determination of access fee (the outcome of which would form the basis of the guidelines to be issued by TA for the purpose of proposed section 14(5A)(b)) would incorporate the charging principles set out in paper CB(1) 806/99-00(01).

6. On the scope of matters that might be determined by arbitration for the purposes of proposed section 14(5)(b), SITB(Atg.) advised that having regard to views expressed by members, the Administration considered it appropriate for the arbitrator to also determine those matters that were under dispute between the licensee and the land or facility owner concerned if the determination of those matters was necessary for effecting the access authorized by TA under proposed section 14(1A). However, the technical requirements relating to the access in question which TA was empowered to specify in authorizing the access would not be subject to arbitration. Members noted that this policy intent was made explicit in proposed section 14(5B)(a).

7. Mr Eric LI pointed out that as arbitration was a mutually agreed arrangement to resolve disputes without resorting to court proceedings, the scope of arbitration must be agreed to by the two parties concerned.

8. The Chairman recalled that at the last meeting on 15 March 2000, Mr Eric LI had suggested that proposed section 14(5A)(b) should be modified to the effect that the arbitrator, in having regard to the guidelines issued by TA, should also take into consideration the public interest factor in determining the access fee. He enquired whether the proposed CSAs had taken heed of Mr Eric LI's suggestion.

9. In this regard, Mrs Miriam LAU considered that the guidelines issued by TA for the determination of access fee should have incorporated the public interest factor. As the arbitrator was obliged to give due regard to the guidelines under proposed section 14(5A)(b), she considered it unnecessary to add an express provision that the arbitrator should give regard to the public interest factor.

10. SITB(Atg.) and the Senior Assistant Law Draftsman (SALD) further advised that under proposed section 14(1B)(a), TA should not grant an access authorization unless he was satisfied that the authorization was in the public interest. Under proposed section 6A(3), TA would be obliged to provide written reasons, which should include public interest considerations, that he had taken into account in granting the authorization. Under proposed section 14(5A)(c), the arbitrator should give regard to the reasons and technical requirements concerned referred to in proposed section 14(1B)(d). Hence, in practice, the arbitrator would have taken into account the public interest factor in determining the access fee.

11. In reply to Mrs Miriam LAU's enquiry about the purpose of proposed section 14(8), SALD advised that this provision sought to put beyond doubt that where there was an inconsistency between the technical requirement(s) specified by TA in granting an authorization of access and any provision relating to public safety under any other Ordinance, the latter provision should prevail over the former one(s) to the extent of the inconsistency.

*Clause 20 - Proposed section 36AA
Sharing of use of facilities*

12. On the proposed CSAs to proposed section 36AA, SITB(Atg.) advised that the proposed deletion of "a person" and similar amendments to this section was to confine the scope of application of this section to telecommunications licensees only. This would allay the concern of tunnel companies that they might also be required by TA to share the use of tunnel facilities. SITB(Atg.) further advised that the proposed CSAs to proposed section 36AA(6) was intended to spell out explicitly the provision of fair and reasonable compensation for the shared use of facilities required by TA and the manner in which TA should determine the compensation.

13. The Bills Committee then proceeded to examine other proposed CSAs set out in paper CB(1)1378/99-00(01).

*Clause 3 - Proposed section 6A
Powers of Authority*

14. Mrs Miriam LAU queried whether the proposed CSAs to add "under this Ordinance" in proposed section 6A(3)(a) and (b) was necessary as the phrase "In exercising his powers under this Ordinance," at the beginning of section 6A(3) already served to define the scope of application of section 6A(3). She commented that as a result of the proposed CSAs, one might infer that if TA was forming an opinion or making a decision not under the Telecommunications Ordinance, then he would not be obliged to do so on reasonable grounds or to provide written reasons.

15. SALD concurred with Mrs Miriam LAU that the proposed CSAs to add the phrase "under this Ordinance" to sections 6A(3)(a) and (b) was not absolutely necessary. He however pointed out that those CSAs would clarify beyond doubt that sections 6A(3)(a) and (b) applied only to TA's decision, determination, direction and opinion made under the Telecommunications Ordinance, and not to the administrative powers or other powers that TA might have. SAD/OFTA and SITB(Atg.) further clarified that the exercise of powers by TA conferred on him under other ordinances, such as the Television Ordinance, would be subject to the statutory checks and balances stipulated in those ordinances.

Clause 23 - Proposed section 36D

Authority may obtain information

16. Mr Eric LI elaborated on the view of the Hong Kong Society of Accountants (HKSA) that the non-licensee (third party) required to produce information should be given a reasonable opportunity to make representations to the magistrate in open court to challenge the application by TA for an order to obtain information from the third party. He explained that the information required by TA under this section might be the subject of a confidentiality agreement between the non-licensee and a fourth party, as was the case of professionals and their clients. The non-licensee might be required to give prior notice to the fourth party of any proposed disclosure of the information under the confidentiality agreement. He noted the underlying intention of proposed section 36D(5) to absolve the third-party non-licensee from the civil liability imposed on him by the confidentiality agreement, but pointed out that even if this provision could afford the third party some protection, there was still the question that the fourth party who had entrusted his own information to the third party was not afforded adequate protection under the proposed section. Therefore, HKSA submitted that the application to the magistrate by TA for an order to obtain information from a non-licensee under section 36D(1) should be inter partes, as opposed to ex parte, so that the third party could be given due notice of TA's application, who in turn could give due notice to the fourth party to afford the latter a reasonable opportunity to challenge the application of TA through the third party. He therefore sought confirmation on whether the application to the magistrate by TA to obtain information from a non-licensee under section 36D(1) was an ex parte or inter partes application.

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17. In response, the Administration indicated that they would need to verify this point after the meeting. The Administration also agreed to consider the concern raised by Mr Eric LI and revert to the Bills Committee.

II Any other business

18. The next meeting of the Bills Committee was scheduled for 27 April 2000 at 10:45 am. The Chairman also requested members to forward to the Clerk any CSAs they wished to propose to the Bill for consideration at the next meeting.

19. The meeting ended at 11:45 am.

Legislative Council Secretariat

16 June 2000