

**立法會**  
**Legislative Council**

LC Paper No. CB(1)2067/99-00  
(These minutes have been seen  
by the Administration and  
cleared by the Chairman)

Ref : CB1/BC/18/98/2

**Legislative Council**  
**Bills Committee on Telecommunication (Amendment) Bill 1999**

**Minutes of meeting**  
**held on Wednesday, 15 March 2000, at 10:45 am**  
**in Conference Room A of the Legislative Council Building**

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

Mr Geoffrey FOX  
Senior Assistant Law Draftsman

**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

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## **I Meeting with the Administration**

The Bills Committee continued to examine the Committee Stage Amendments (CSAs) proposed by the Administration to the Bill vide paper "Committee Stage Amendments" (CB(1)1138/99-00(01) issued on 8 March 2000).

*CSAs to Clause 7 - Proposed section 14  
Power to place and maintain telecommunications lines, etc., on land, etc.*

2. On proposed section 14(1B)(d)(ii), Mrs Miriam LAU referred to paragraph 9 of the aforesaid paper and pointed out that the technical requirements contained in the Telecommunications Authority (TA)'s authorization might affect the operation of the facility concerned and therefore have an impact on public safety. She queried why TA was conferred unrestricted power to specify technical requirements in relation to the access authorized under proposed section 14(1B), bearing in mind that TA might not possess the necessary expertise on the operation and safety of non-telecommunications facilities such as railways and tunnels. She was particularly concerned that while the land or facility owner concerned was ultimately responsible for public safety within his premises, he would be unable to ensure public safety as proposed section 14(1B)(d)(ii) would in effect deprive him of his control over the telecommunications installations within his premises.

3. In response, the Deputy Secretary for Information Technology and Broadcasting (DS/ITB) re-affirmed that the technical requirements to be specified by TA under proposed section 14(1B)(d)(ii) would be concerned with the telecommunications installations of mobile network operators (MNO) only. As the relevant legislation already stipulated that the railway corporations, tunnel operators and other statutory bodies were the sole authority on matters relating to the safety of the facilities under their purview, there should be no

question that TA could act against the law by specifying technical requirements which would contravene the safety requirements laid down by these statutory bodies.

4. DS/ITB further advised that in response to the railway corporations' concerns about MNOs' access to railway premises under proposed section 14, TA would issue operational guidelines setting out the manner in which MNOs should exercise access to railway premises authorized by TA. The draft guidelines had been provided to the Bills Committee earlier on (vide paper CB(1)806/99-00(02) issued on 17 January 2000.) It would be unequivocally stated in the guidelines that the railway corporations should be the sole authority in determining the technical specifications or standards relevant to the safety of railway operation in relation to the radiocommunications systems for installation on the premises. MNOs would be required to obtain the approval of the corporations for their installation plan prior to any installation work. Details on the design, technical standards and the location etc. of the proposed installations should also be included in the installation plan to be submitted to the railway corporations. She stressed that these arrangements would ensure that the MNOs' equipment and installation works would be in compliance with the safety requirements of the railway corporations.

5. To address Mrs LAU's concerns, the Senior Assistant Director, Office of the Telecommunication Authority (SAD/OFTA) elaborated that to ensure public safety and to prevent harmful interference, it was necessary to empower TA to specify technical requirements in respect of telecommunications installations when authorizing access by MNOs. TA would be required to give the land or facility owner concerned a reasonable opportunity to make representations under proposed section 14(1B)(c) before he decided whether to grant an access authorization. Operationally, TA would attach a condition to his authorization stipulating that the licensee, in exercising the right of access, would have to observe the relevant guidelines issued by TA. It would also be stipulated in the relevant guidelines that the licensee was required to observe all the rules and instructions of the relevant railway corporation governing the installation and operation of any equipment within the railway premises.

6. Dr Philip WONG commented that as far as public safety was concerned, an authority which did not possess the necessary expertise in respect of a public facility's operation and safety should not be empowered to specify technical requirements that might affect the facility's operation and safety. He thus shared the concern about the possible jeopardy posed to public safety and enquired about the bases on which TA would specify technical requirements in authorizing access into shielded areas.

7. In response, DS/ITB reiterated that under the draft guidelines for MNOs' access to railway premises, no installation of telecommunications equipment should be made until and unless the installation plan with all necessary details as required by the relevant railway corporation had been approved by the

corporation. SAD/OFTA said that apart from safety requirements, the technical requirements to be specified by TA under proposed section 14(1B)(d)(ii) would also cover other necessary technical requirements such as the prevention of harmful interference caused to other services. These technical requirements would be made with reference to widely recognized international/national technical standards in respect of telecommunications.

8. Taking note of the Administration's explanation, Mrs Miriam LAU considered that the technical requirements to be specified by TA should not cover the safety aspect and the land or facility owner concerned should be vested with the control over this aspect. She referred to proposed section 14(1A) which provided that TA's powers to authorize access was not subject to any other law, and the draft guidelines on MNOs' access to railway premises which contained a provision that "TA may amend these guidelines from time to time after consultation with the interested parties". In view of these provisions, Mrs LAU came to the view that neither the proposed provisions on TA's power to specify technical requirements nor the future guidelines on MNO's exercise of access right would provide adequate safeguard on public safety within railway premises and in other shielded public places.

9. The Chairman agreed that TA should be responsible for specifying technical requirements for telecommunications installations but appreciated that those requirements might affect the safety of the public facility concerned. He thus sought clarification on whether according to the Bill, TA was obliged to abide by other legislation when specifying technical requirements under proposed section 14(1B)(d).

10. In reply, the Senior Assistant Law Draftsman (SALD) acknowledged that as proposed section 14(1A) regarding TA's powers to authorize access contained the expression "notwithstanding any other law", the position as to whether TA was obliged to abide by other legislation relating to safety in specifying technical requirements might not be absolutely clear. He suggested that to remove doubt, a CSA be introduced to provide that the technical requirements to be specified by TA must not contravene the provisions in any other legislation in relation to safety. DS/ITB said that as explained earlier on, the Bill would not empower TA to specify technical requirements that could prevail over the safety requirements of other statutory authorities. However, in view of members' concern, the Administration would consider modifying proposed section 14(1B)(d) along the lines suggested by SALD.

*(Post-meeting note: The Administration has proposed further CSA to qualify TA's power to specify technical requirements under proposed section 14(1B)(d) vide paper CB(1)1378/99-00(01) issued on 13 April 2000.)*

11. Noting that the physical damage referred to in proposed section 14(2)(b)(i) would not cover any intangible loss directly resulted from the physical damage caused by the exercise of access right authorized by TA, Mrs Miriam LAU and Dr Philip WONG queried the rationale for not providing compensation for such intangible loss. In response, SALD said that intangible loss directly resulted from the exercise of access right should be taken into account in the determination of the access fee, for which proposed section 14(5A)(a) provided that "the fee to be paid should be fair and reasonable in all circumstances of the case, including but not limited to, factors relating to cost, property-value and the benefits to be derived from the authorization granted under proposed section 14(1A)". DS/ITB affirmed that the policy intention underlying proposed section 14(2)(b)(i) was that full compensation should be paid to the land or facility owner concerned for any physical damage resulted from the exercise of access right granted under section 14(1) or (1A). DS/ITB also referred to the cost-related charging principle delineated in the paper CB(1)806/99-00(01) issued on 17 January 2000, based on which the three factors quoted in proposed section 14(5A)(a) were drawn up, and confirmed that it was the Administration's policy intention to take into account, among others, any intangible loss directly resulted from the exercise of access right in determining access fees.

12. Mrs Miriam LAU enquired about the proper test for the principle "fair and reasonable in all the circumstances of the case" in the context of proposed section 14(2)(ii)(A). In reply, SALD said that only when the two parties concerned could not agree between themselves on the fee to be paid for access and when the fee had to be determined by arbitration, would the interpretation of the principle be material. Hence, this principle, as well as the factors to be taken into account during the arbitration proceedings, were stipulated under proposed section 14(5A).

13. Mrs Miriam LAU asked whether the expression "fair and reasonable" should be replaced by "fair and equitable" in the context of the determination of access fees as the latter term carried a stronger connotation that the two parties concerned should be treated equitably. In response, SALD said that he would consider the expressions "fair and equitable" and "fair and reasonable" basically the same. DS/ITB said that "fair and reasonable" was widely used in existing ordinances and stressed that the very purpose of the proposed arbitration mechanism was to ensure that the determination of access fees would be and would be seen to be carried out impartially.

14. Mrs Miriam LAU sought clarification on whether TA was empowered to authorize access by MNOs prior to determination of the access fee by arbitration. She said that if the answer was affirmative, there should be further provisions governing the interim access arrangements. In reply, DS/ITB advised that the Administration did not have a strong view and was prepared to accept that MNOs should be granted access only after the completion of the arbitration on the access fee.

15. On proposed section 14(5A)(b) which stipulated that in any arbitration proceedings for the determination of access fees, regard should be given to the guidelines issued by TA under proposed section 6D(2)(b), Mrs Miriam LAU considered the provision unacceptable, as this requirement would defeat the objective of ensuring the impartiality of the arbitration mechanism. Instead, she considered that the criteria and bases for the determination of access fees should be clearly spelt out in the legislation so that by referring to statutory provisions, the parties concerned could reasonably estimate the level of fee to be determined by arbitration. In this connection, she suggested that the explanation on the charging principles set out in the paper CB(1)806/99-00(01) should be suitably incorporated into the provisions on determination of access fees.

16. In response, DS/ITB clarified that the guidelines for determination of access fees would not prescribe any formula to be applied to particular scenarios of determination. Instead, the guidelines would include a series of applicable charging principles and it would be up to the independent arbitrator to decide which principle or combination of principles should be applied in a particular case of determination. As regards the suggestion of providing further elaboration of the three factors quoted in proposed section 14(5A)(a) in the Bill along the lines of the principles detailed in paper CB(1)806/99-00(01), DS/ITB said that the paper only sought to provide an initial framework for the future consultation on the guidelines for the determination of access fees. The charging principles set out in the paper were not meant to be exhaustive and any interested party would be welcome to comment on the principles and make further suggestions. It was thus not appropriate to pre-empt the consultation results by incorporating the charging principles set out in the paper into the Bill. She assured members that the entire process of drawing up the guidelines for determination of access fees would be open and transparent.

17. Dr Philip WONG on the other hand questioned the appropriateness of prescribing in the legislation the principles or guidelines that the arbitrators should have regard to, given that arbitrators were independent and suitably qualified persons to make fair and reasonable determination. In this connection, DS/ITB said that where an arbitration mechanism was provided in law, it was not uncommon that some broad guiding principles relating to the subject matter concerned were also prescribed to facilitate reference. SALD added that instead of imposing a stringent requirement on the arbitrator to make determination in accordance with a pre-determined set of criteria, proposed section 14(5A) only required the arbitrator to give regard to certain principles and guidelines in determining the access fee and there was nothing in the proposed section to restrict the discretion of the arbitrator.

18. Mr Eric LI commented that an arbitrator could not rely solely on conditions laid down in legislation to make his determination as legislation would mainly spell out the general principles. He also considered it inappropriate to subject the decision making process in the arbitration

proceedings to very detailed statutory provisions which would undermine the independent judgement of arbitrators. He further said that in practice, an arbitrator would first hear the representations of the parties concerned and seek the agreement of both parties to the principles to be applied to his determination before proceeding to make the determination. Whilst he shared Mrs Miriam LAU's concern that the requirement on the arbitrator to give regard to the guidelines issued by TA in determining the access fee might place TA in an advantageous position in relation to the determination, he suggested that proposed section 14(5A)(b) be modified to the effect that the arbitration proceedings should take into consideration the public interest factor having regard to the guidelines issued by TA. This would in effect make "public interest" a factor of paramount importance.

19. Dr Philip WONG concurred with Mr Eric LI. Mr David CHU opined that public interest in this context should be restricted to mobile phone coverage, i.e. users being able to make and receive mobile phone calls in shielded areas.

20. Mrs Miriam LAU re-stated her view that the arbitrator should not be bound to give regard to the guidelines issued by TA. Instead, the principles and factors that the arbitrator should take into account in determining the access fee should be spelt out clearly in the legislation.

21. The Administration took note of members' views and suggestions for consideration.

*(Post-meeting note: The Bills Committee had further discussion on proposed section 14(5A) at the meeting on 14 April 2000 starting at 10:45 am.)*

22. On proposed section 14(5B), Mrs Miriam LAU enquired about the bases on which the arbitrator should determine the matters relating to access other than the access fee. In reply, SALD said that while TA was at liberty to issue guidelines in respect of the matters that might be subject to determination under proposed section 14(5B), there was no provision in the Bill to spell out the bases for the determination. If such a provision was considered necessary, he would suggest that the same overriding principle of "fair and reasonable in all the circumstances of the case" should apply. Mrs Miriam LAU considered that the arbitrator should be provided with some guidance for his determination under proposed section 14(5B). DS/ITB agreed to consider whether CSAs should be introduced to spell out the bases on which the arbitrator should make determination on issues relating to access other than the access fee, having regard to the relevant provisions of the Arbitration Ordinance and the prevailing practices of arbitration proceedings.

*(Post-meeting note: The Administration has proposed CSA to proposed section 14(5B) vide paper CB(1)1378/99-00 issued on 13 April 2000.)*

23. In reply to Mrs Miriam LAU's enquiry, SALD advised that any subsequent dispute arising from the arbitration results should be referred to the court as in the case of disputes over contracts, unless during the arbitration, the parties concerned had agreed to resort to the same arbitrator for resolving any subsequent dispute arising from the arbitration results.

*CSA to Clause 16 - Proposed section 32D  
Standards*

24. Dr Philip WONG asked whether under the currently proposed section 32D(2), TA's consultation with the telecommunications industry would be discretionary rather than mandatory prior to his prescribing the standards and specifications under proposed section 32D(1). In reply, SALD confirmed that the consultation would still be mandatory under the currently proposed section 32D(2). The CSA to substitute "consult with the telecommunications industry" with "carry out such consultation with the telecommunications industry as is reasonable in all circumstances of the case" only sought to provide flexibility on the extent of consultation required under different circumstances.

*CSAs to Clause 19 - Proposed section 36A  
Authority may determine terms of interconnection*

25. Referring to proposed section 36A(10)(a), Mrs Miriam LAU asked whether the Administration would publish its policy objectives for the telecommunications industry for public information on a regular basis. She was concerned that the Administration might seek to change arbitrarily the criteria and bases for determination of interconnection charges simply by issuing new policy statements for the purpose.

26. In response, DS/ITB advised that the Administration made known its policy statements in respect of the telecommunications industry in the annual Policy Address publications. Besides, the Administration also issued Legislative Council Briefs from time to time setting any new policy objectives and the planned measures to achieve the objectives. In fact, most of the current policy objectives in respect of the telecommunications industry were enshrined in the Bill. DS/ITB remarked that at present, TA already had the power to mandate interconnection of telecommunications systems or networks between licensees. The Bill only sought to clarify the powers of TA on interconnection, in particular the power to determine interconnection at any technically feasible point. The policy objective in this regard was that interconnection should be made at any technically feasible point on fair and reasonable terms if the interconnection was necessary to enable users of different networks to communicate with one another unobstructed.

27. The Chairman commented that as a matter of principle, TA should be obliged to act pursuant to the Government's policy objectives for the

telecommunications industry. He thus considered proposed section 36A(10)(a) acceptable.

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

28. DS/ITB highlighted that having regard to the concern raised by some members and deputations, the Administration would propose CSAs to Clause 20 to confine the application of proposed section 36AA to telecommunications licensees. Members agreed that the examination of the CSAs to Clause 20 be deferred pending the Bills Committee's further deliberation on the legal and constitutional issues arising from the Bill at the next two meetings.

*CSAs to clauses 22 to 26*

29. Members did not raise any query on the proposed CSAs to Clauses 22 to 26.

**II Any other business**

30. The Chairman reminded members that at the request of the Administration, the next two meetings would not be held on 5 April 2000 as originally scheduled. He had asked the Clerk to issue notice to consult members on their availability on alternative dates and would confirm the date for the next two meetings thereafter.

31. The meeting ended at 12:30 pm.

Legislative Council Secretariat  
25 September 2000