

立法會
Legislative Council

LC Paper No. CB(1)2069/99-00

(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 Thursday, 18 May 2000, at 8:30 am
in the Chamber of the Legislative Council Building

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

Mr Geoffrey FOX
Senior Assistant Law Draftsman

Ms 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 Meeting with the Administration
LC Paper No. CB(1)1614/99-00

CSAs to clause 7 - proposed section 14

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

The Acting Secretary for Information Technology and Broadcasting (SITB(Atg.)) advised that to allay the concern about the determination of the final access fee vis-à-vis the interim access fee, a Committee Stage Amendment (CSA) would be proposed to add section 14(5A)(b) to make it clear that in any arbitration proceedings for the determination of the access fee, regard should not be given to the amount of the interim fee specified by the Telecommunication's Authority (TA) in authorizing mobile network operators early access to land and buildings for placement of radiocommunications equipment under proposed section 14(1D).

CSAs to clause 23 - proposed section 36D

Authority may obtain information

2. SITB(Atg.) recapitulated members' major concerns on proposed section 36D raised at the meeting on 10 May 2000 that -

- (a) before the court hearing of TA's application for an order requiring a third party to produce information, the third party should be given prior notice of TA's request for information and be given a reasonable opportunity to make representations; and

- (b) representations of the third party regarding TA's request for information should be submitted together with TA's application for an order to the magistrate, so that the magistrate would also take into account the third party's representations in deciding whether an order should be issued.

SITB(Atg.) said that the Administration considered it not necessary for the proceedings for TA's request for information to be inter partes to address the above concerns. The Administration would propose CSAs to proposed section 36D to provide that TA should first serve a notice on the third-party non-licensee requesting the latter to produce information and to allow the latter to make representations in writing if he objected to TA's request. If TA still considered the production of the information necessary and the third party refused to comply with the request, TA might then apply to a magistrate for an order, at the same time serving the third party a notice to notify him the date of his application to the magistrate. TA would also be required to submit for the magistrate's consideration the written representation(s), if any, received from the third party.

3. SITB(Atg.) further advised that under this approach, although the proceedings remained ex parte, the magistrate would have to consider the representations made by the third party to TA before deciding whether an order should be made. This would ensure that the views and position of the third party in refusing to provide information to TA would be taken into account by the magistrate. This approach of notification was also in line with the established administrative practice of TA when requesting information from non-licensees. On the other hand, for preservation of evidence, CSAs would also be proposed to prevent the requested information from being unduly processed between the time the first notice of request for information was served and the time the information was produced to TA. Failure to comply with the relevant provision (proposed section 36D(4)) would be an offence.

4. Referring to proposed section 36D(3)(b), Mrs Miriam LAU asked whether the magistrate, after considering the third party's representations, had the discretion to adjourn the hearing of TA's application for an order and summon or invite the third party to appear before him to make representations before he decided whether or not to issue an order. In response, SITB(Atg.) said that the Administration considered that as TA was required to submit the third party's representations together with his application for an order under proposed section 36D, the magistrate should be in a position to decide whether an order should be issued. The Senior Assistant Law Draftsman (SALD) advised that if the magistrate, having considered TA's application and the third party's representations, would still require clarification from the third party before making a decision, he might adjourn the proceedings and if necessary, invite the third party to appear before him to make representations. It was unlikely that TA would object to adjourning the proceedings as by doing so, the

magistrate would probably refuse to issue an order.

Admin

5. Mrs Miriam LAU commented that as the proceedings were ex parte, it appeared that the magistrate would only be in a position to either accept or reject TA's application. At her request, the Administration agreed to provide information on the basis (by virtue of existing legislation, judicial rules or common law) on which the magistrate would be entitled to adjourn proceedings of an ex parte hearing to invite the third party to make representations before him before he decided whether or not to issue an order under proposed section 36D.

(*Post-meeting note:* The Administration has confirmed vide its letter of 23 May 2000 that there are no "rules of procedures" of the magistrates. Further clarification on the ex parte proceedings was given in the letter, which was issued to members vide LC Paper No. CB(1) 1680/99-00 dated 24 May 2000.)

6. Mr Eric LI said that by and large, the Hong Kong Society of Accountants (HKSA) was agreeable to the proposed CSAs to proposed section 36D and its lawyer was examining the drafting aspects. Referring to proposed section 36D(4), (9) & (10) relating to preservation of information requested by TA, Mr LI related the concern of HKSA that as new entries and updating were often made to accounting documents in the course of normal accounting work, it was highly possible that certain necessary processing of the documents held by accountants and required to be produced to TA would have been made between the time the first notice of request for information was served by TA and the time the documents were produced to TA. HKSA was concerned that such normal processing of accounting documents might incriminate accountants under the said proposed provisions. In response, SITB(Atg.) advised that subsection 4(b) of proposed section 36D sought to provide that processing of the information requested by TA would be allowed if such processing would have been made irrespective of the service of the notice by TA. SALD supplemented that proposed section 36D(4) was modeled on similar provisions in the Personal Data (Privacy) Ordinance (Cap. 486), and as far as he understood, there had been no problem arising from these provisions.

7. The Assistant Legal Adviser 3 (ALA3) advised that in legal terms, proposed section 36D(4)(a) and (b) was a negative averment. According to the relevant provision on negative averments in the Criminal Procedure Ordinance (Cap. 221), the burden of proof was on the person relying on the negative averments provision. This would mean that if alterations had been made to the information between the time of the first notice served by TA and the time the information was produced by an accountant to TA in compliance with an order issued under proposed section 36D(3), the burden would be on the accountant to prove that the alterations were of the nature referred to under section 36D(4)(a) and (b).

8. Referring to the expression "the Authority may serve a notice in writing on the person" in proposed section 36D(1), ALA3 said that as the way(s) of serving such a notice was not specified in the Bill, disputes on the service of a notice might arise between the person being served the notice and TA. In response, SALD said that "serve a notice in writing" was a common expression in existing ordinances. Whether a person had been served a notice or not was a question of fact and the TA had the discretion as to how a notice should be served. He understood that there were provisions in the Interpretation and General Clauses Ordinance (Cap. 1) regarding the service of notices. The Chairman referred members to section 8 of the said Ordinance on "Service by post". Members took note of the provision.

9. The Senior Assistant Director, Office of the Telecommunications Authority supplemented that operationally, TA would use a reliable method to serve any notice in performing his statutory functions to ensure that the party concerned would be served the notice. For example, TA might require an acknowledgement of receipt with the signature of the party being served the notice.

II Any other business

10. The Chairman said that as the Bills Committee had completed its deliberation on the Bill, he would report to the House Committee on 19 May 2000 with the recommendation to resume the Second Reading debate of the Bill on 7 June 2000. Members agreed.

11. The Chairman thanked members and the Administration for their participation in the deliberation of the Bill over the past months.

12. The meeting ended at 9:05 am.

Legislative Council Secretariat
27 September 2000