

LC Paper No. CB(1)218/99-00

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seen by the Administration)

Ref : CB1/BC/18/98/2

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

**Minutes of meeting  
held on Tuesday, 28 September 1999, at 10:45 am  
in the Chamber of the Legislative Council Building**

- Members present** : Hon SIN Chung-kai (Chairman)  
Hon HO Sai-chu, SBS, JP  
Hon Eric LI Ka-cheung, JP  
Hon Fred LI Wah-ming, JP  
Hon MA Fung-kwok  
Hon Howard YOUNG, JP  
Hon YEUNG Yiu-chung  
Hon Mrs Miriam LAU Kin-ye, JP
- Members absent** : Hon David CHU Yu-lin  
Dr Hon Philip WONG Yu-hong  
Hon CHOY So-yuk
- Public officers** : For Item I  
**Attending**
- 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** : Mr Stephen LAM  
Assistant Legal Adviser 4

Ms Anita SIT  
Senior Assistant Secretary (1)8

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## **I Meeting with the Administration**

Mr Eric LI declared interest that he was a non-executive director of SmarTone Mobile Communications Limited, which had forwarded a written submission and addressed the Bills Committee at the meeting on 6 September 1999 at 8:30 am.

2. The Chairman suggested that to facilitate systematic discussion of the wide range of policy issues related to the Bill, the Bills Committee would examine one by one the major issues as detailed and listed in Annex C to the paper on "The Administration's response to the views by the deputations" (LC Paper No. CB(1)1960/98-99). In the course of deliberation, members might draw reference as appropriate to other papers or submissions on the Bill. Members agreed to the suggested approach.

3. At the invitation of the Chairman, the Deputy Secretary for Information Technology and Broadcasting (DS/ITB) briefed members on the Administration's response to the views of deputations as detailed in the aforesaid paper. She highlighted the following major considerations underlying the Bill -

- (a) the high penetration of and growing demand for telecommunications services in the community;
- (b) the present market condition of the telecommunications industry that the former monopoly remained to be the dominant provider in various segments of the telecommunications market; and
- (c) the need to balance the interests of different providers and sectors having due regard to public interest at large.

Powers of the Telecommunications Authority

4. On some members' concern about the justification for empowering the Telecommunications Authority (TA) to draw up as well as to enforce guidelines for regulation of the telecommunications industry, the Senior Assistant Director (Regulatory), Office of the Telecommunication Authority (SAD/OFTA) said that as issues of the telecommunications industry were highly technical and often required timely action, it was appropriate for TA, which was familiar with the operation and development of the industry, to take charge of both the functions of formulation and enforcement of industry standards. He added that telecommunications regulators in most overseas jurisdictions were also entrusted with similar functions. Nevertheless, he assured members that TA would consult all relevant industry groups and operators before drawing up guidelines and making significant decisions.

5. Mr Howard YOUNG expressed doubt on whether it was appropriate to empower TA to arbitrate/mediate disputes on access between mobile phone operators (MPOs) and landlords/operators. He pointed out that it was a common practice in the commercial sector for the parties in dispute to resort to private arbitration, instead of applying to the regulatory authority of the industry concerned for mediation. In response, SAD/OFTA advised that generally speaking, arbitration would only be resorted to when the two parties concerned had already entered into a commercial contract and decisions of the arbitrator would be made on the basis of the contract conditions. As regards the proposed provisions to empower the TA to make determinations on access and interconnection, TA's function was not to arbitrate between the parties concerned based on existing contracts but to enforce the relevant legislative provisions according to the guidelines issued. He added that in most jurisdictions with a liberalized telecommunications regime, this type of determination was entrusted to the relevant regulatory authority. DS/ITB supplemented that it might not be appropriate to entrust a body outside the telecommunications industry to make determinations on access and interconnection as the issues involved were often technical and industry-specific. Besides, while decisions in commercial arbitration were based mainly on commercial fairness, determinations on access and interconnection must be made having due regard to the public interest and the relevant Government policies.

6. Mrs Miriam LAU was gravely concerned that TA, in making determinations on access, might overlook the interests and concerns of affected parties outside the telecommunications industry, such as railway corporations and road tunnel operators. In response, DS/ITB advised that under the proposed provisions, in granting an authorization of access or interconnection, TA must be satisfied that the authorization was in the public interest, which should be interpreted in the broad sense to cover the interests of all affected parties.

7. In this connection, Mr HO Sai-chu commented that the Government had taken a dangerous move in assuming that it had the best knowledge of what was in the public interest and thus would be in the best position to mediate between commercial parties whenever public interest was involved. He pointed out that the concept of public interest was relative to different circumstances, and he did not subscribe to the view that the policy objective of providing ubiquitous coverage for mobile telecommunication services should override the free market principle and warrant Government intervention in normal commercial dealings.

8. Mr MA Fung-kwok and Mrs Miriam LAU queried whether the proposed provisions to empower TA to authorize access by MPOs to build-operate-transfer (BOT) tunnels would contravene the existing legislation governing BOT tunnels and the BOT agreements between the Government and the tunnel companies, and if so, whether the Administration would apply the same approach to other sectors in order to meet certain policy objectives. In reply, DS/ITB said that given the policy objective of providing ubiquitous coverage for mobile telecommunications services, the Administration considered it appropriate to legislate for a mechanism to enable access by MPOs in case an access agreement could not be reached through normal commercial negotiation. She remarked that under the proposed provisions, access by MPOs would not be unconditional but would be subject to the payment of a fair and reasonable fee, which would be determined by TA according to a set of guidelines drawn up after consultation with all affected parties.

9. On Mr YEUNG Yiu-chung's concern about whether the intervention by TA into the disputes on access between commercial parties would constitute a breach of the free market principle, DS/ITB explained that given the public policies on telecommunications and the growing demand for the service by the general public, it would be in the public interest for TA to intervene where mobile telecommunications services could not be made available to consumers due to the failure on the part of MPOs and landlords/operators to reach an access agreement. She reiterated that TA's intervention, if any, must satisfy the public interest test and meet all the requirements as stipulated in the Bill such as whether there would be any alternative location for installation.

10. As regards the channel for appeal against TA's decisions, SAD/OFTA advised that an aggrieved party could appeal against TA's decisions by way of judicial review. Although in some countries, a special appeal mechanism was provided for within the executive government, judicial proceedings were the usual channels in most jurisdictions with an open market economy such as the United States and the United Kingdom to appeal against administrative decisions.

Tariffs and price control (Sections 7F and 7G)

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

Request for information (Section 7I)

12. At the invitation of the Chairman, SAD/OFTA explained that the provisions to empower TA to obtain and disclose information from licensees were adapted from the relevant conditions in existing public telecommunications service licences. He stressed that this power was a restrictive power necessary for TA to exercise his functions, and many overseas telecommunications regulators were also provided with similar powers.

13. Mr Eric LI considered that generally speaking, instead of resorting every now and then to judicial review as a remedy, the primary concern about legislative provisions empowering regulatory authorities to obtain and disclose information was whether there were adequate checks and balances on such powers. When parties other than the public telecommunications service licensees might also be required by the regulatory authority to provide information as proposed in the Bill, there should be proper procedures to safeguard against abuse by the authority, such as the requirement for a court warrant and giving reasonable opportunity for the third party concerned to make representation.

14. The Chairman referred to a submission which had just been received from the Hong Kong Society of Accountants on this issue. As members had not yet perused the submission, the Chairman suggested that discussion on this issue be deferred to the next meeting. Members agreed.

*(Post-meeting note : The submission from the Hong Kong Society of Accountants CB(1)1976/98-99 and the Administration's response CB(1)46/99-00(01) were discussed at the meeting on 6 October 1999.)*

Competition Safeguards (Sections 7K to 7N)

15. Mr HO Sai-chu said that he supported the principle of fair competition. However, he considered that there was inconsistency between the proposed provisions on competition safeguards and those on granting a right of access to MPOs, as the latter provided for Government intervention instead of free market competition. He considered that so long as the franchise for operating road tunnels were awarded through open tenders, there should be no question of abuse of the monopolistic wayleave right to tunnel areas on the part of franchised tunnel companies.

New licence requirements (Section 8)

16. DS/ITB advised that under the new class licence system, there would be no need for a person intending to supply specific services such as telephone card service to apply for separate licences, provided that the operator complied with the conditions of the class licence. It therefore would not impose unnecessary administrative burden on the industry. On the other hand, putting operators under the regulatory regime of class licences would provide consumers better protection.

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

Right of access (Section 14)

18. On the issue of access right of MPOs, DS/ITB affirmed that as mobile telecommunications had become an essential public service to consumers and there was community support that Hong Kong should serve as the pre-eminent communications hub in the region, the Administration considered it appropriate to legislate for a mechanism to enable access of MPOs to shielded areas. She stressed that TA's authorization of MPOs to enter land and buildings for radiocommunications installation upon failure to reach a commercial agreement must be subject to the public interest test being satisfied, the payment of a fair and reasonable access fee, and other considerations under proposed Section 14(1B)(b).

19. Mr LI Wah-ming and Mr MA Fung-kwok sought the Administration's response to some MPOs' view that MPOs should be given the same treatment as fixed telecommunications network services (FTNS) operators with regard to the right of access to land and buildings for network facilities installation. Mr MA Fung-kwok also queried whether the differential treatment for MPOs and FTNS operators, even upon enactment of the Bill, represented a biased policy in favour of FTNS.

20. In reply, SAD/OFTA said that under the existing Section 14, access to land and buildings by FTNS operators also required the authorization of TA. The basic criterion for the authorization was the necessity of the installation for provision of FTNS to customers within the land or buildings concerned. The access by FTNS operators authorized by TA was usually not subject to the payment of a fee. The Administration considered that at this stage, it was not appropriate to extend the same right to MPOs. Apart from strong objections expected from landlords and facility operators, it might be unfair in some circumstances to compel landlords and facility operators to provide unconditional access. SAD/OFTA further advised that unlike FTNS the provision of which required direct connection of cable lines to customers' places, there were often alternative sites available for radiocommunications installation to provide mobile network coverage, in which case the parties

concerned could negotiate for a fair and reasonable access fee.

21. In reply to Mr MA Fung-kwok's enquiry about the present access arrangement of FTNS operators to road tunnels for cable installation, SAD/OFTA said that as far as he understood, some FTNS operators had installed cables in road tunnels but the installation was made through private arrangements between FTNS operators and tunnel operators. So far, TA had not received any application from FTNS for authorization of access to road tunnels for cable installation. If any such application was received, TA would consider the application on its merits having regard to the aforesaid criterion.

22. Referring to Annex C1 to the Administration's paper CB(1)1960/98-90(1) regarding the annual fees paid by MPOs for access to Government tunnels for radiocommunications installation, Mr LI Wah-ming questioned the reasons for the differentials in the level of fees. The Principal Assistant Secretary for Information Technology and Broadcasting (PAS/ITB) explained that the existing access fees being charged on MPOs comprised two portions. The cable portion was calculated having regard to the length and diameter of cables laid within the tunnel area while the equipment portion was set on full market rental basis.

23. In reply to Mr LI Wah-ming's enquiry about the review of the fees for access to Government tunnels, PAS/ITB advised that the Administration planned to set the new access fees on the cost-based approach, in which case the staff costs for processing the applications for access by MPOs would constitute a major portion of the cost incurred to the Government. It was envisaged that if the cost-based approach was implemented, the new access fees would be substantially lower than the existing access fees. Mr LI Wah-ming urged the Administration to expedite the review and inform the Bills Committee of the review results as soon as possible.

*(Post-meeting note: The review results were set out in the Administration's paper CB(1)46/99-00(02) and discussed at the meeting on 6 October 1999.)*

24. Addressing Mr HO Sai-chu's concern about the implications of the charging method on BOT tunnels, DS/ITB clarified that the Administration did not intend to impose the same approach of fees determination for Government tunnels on BOT tunnels. Instead, the Administration recognized that a profit element should be taken into account in determining the fees for access to BOT tunnels.

25. In reply to the Chairman's enquiry about the access by MPOs to other Government properties, DS/ITB advised that the Administration was reviewing this subject in connection with the access by MPOs to Government tunnels. The Administration's intention was to set future access fees also on

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the cost basis to facilitate efficient provision of network coverage. She undertook to report to the Bills Committee the outcome of the review.

26. Mrs Miriam LAU queried whether the Administration considered the existing access fees charged by BOT tunnels on MPOs were on the high side, and if so, how the Administration would determine a reasonable fee for access to BOT tunnels in future. In response, DS/ITB reiterated that at present, the Administration was not in a position to comment on the reasonableness or otherwise of the existing access fees as the charging principles were yet to be drawn up. The Administration however considered that a reasonable fee should include, apart from the recovery of costs, a reasonable return on the investment made by the landlord or operator concerned. Possible charging models for determining access fees might include the incremental cost-based model, the revenue-sharing model, property rights valuation model, or combinations of these models, as suggested in the Administration's earlier paper (CB(1)1860/98-99(01)). She also remarked that a reasonable fee should as far as possible avoid any cross-subsidy between mobile phone users and the users of the facility of the landlord/operator concerned.

27. In reply to Mrs Miriam LAU's further query on the reasons for not incorporating the charging principles/guidelines into the legislation, DS/ITB explained that all along, TA had issued and would continue to issue guidelines on subjects of concern. These guidelines needed to be reviewed or revised from time to time having regard to changing circumstances. As legislative amendments was a lengthy process, it might not be possible to provide a timely course of action. Similarly, the charging principles which required periodical reviews and updating should be suitably laid down as guidelines instead of legislative provisions. However, in line with established practice, TA would draw up the charging principles in consultation with all relevant parties.

28. As to how TA would conduct the public consultation exercise on the guidelines for determining access fees, SAD/OFTA confirmed that a public consultation document would be issued, followed by a consultation report which would set out all the views received and the Administration's response with analyses and conclusions. He added that if TA had not given due regard to the views of any affected party, this could constitute valid grounds for judicial review of TA's decisions.

29. Mrs Miriam LAU expressed concern on whether the surveyors and valuers to be engaged by TA to advise on the appropriate charging models would have the necessary expertise to make valuation on the wayleave right of tunnel operators, DS/ITB said that TA was prepared to obtain professional views for the exercise. She remarked that apart from tunnels, the guidelines would also apply to other shielded areas of public places such as shopping malls and railway premises.



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30. Mr HO Sai-chu opined that the level of access fees charged by tunnel operators on MPOs per mobile phone subscriber was an important reference in determining whether Government intervention into the negotiation between MPOs and tunnel operators for access was warranted. At Mr HO's request, DS/ITB agreed to provide any further relevant cost information to facilitate members' deliberations. She added that the average cost of each minute of a mobile phone call made in tunnels was about \$4.3 at present, and there were many shielded public places in Hong Kong apart from road tunnels. She reiterated that the legislative intent was to enable efficient provision of mobile telecommunications services in these shielded areas at reasonable costs.

*(Post-meeting note: The information requested by Mr HO Sai-chu has been provided in the Administration's paper CB(1)46/99-00(03) and discussed at the meeting on 6 October 1999.)*

31. In this connection, the Chairman referred members to the information on "the access fee as a percentage of MPOs' costs" (Annex B to CB(1)1860/98-99(01)) and the "proportion of the tunnel operators' revenue attributable to the access fees received from MPOs" (Annex C to CB(1)1860/98-99(01)) provided by the Administration in response to members' requests made earlier on.

32. In reply to Mrs Miriam LAU's enquiry on how the Administration could ensure that any reduction in future access fees charged on MPOs by tunnel operators would benefit mobile phone subscribers, DS/ITB said that the mobile telecommunications market was highly competitive at present. If any MPO, upon a reduction in the access fees paid by it, would not correspondingly lower the charges on its customers, its competitiveness would inevitably be weakened. Hence, the Administration was confident that the highly competitive market structure of mobile telecommunications could work effectively to the benefit of consumers.

33. Mrs Miriam LAU pointed out that installation of radiocommunications equipment in railway premises involved complicated technical and safety issues. She opined that as the safety of the public and railway staff within the railway premises was the ultimate responsibility of the railway corporations, the corporations should be allowed to retain their existing right to grant access to MPOs. She further stressed that public safety was of paramount importance and appropriate arrangements must be worked out to ensure that public safety was not compromised for attaining ubiquitous coverage for mobile telecommunications services.

34. In response, DS/ITB affirmed that TA must give primary consideration to public safety in applying the public interest test. Hence, there should be no conflict between TA's power to grant access right to MPOs and the safety requirements of public facilities such as railways. DS/ITB also informed members that the Administration was working with the two railway

corporations to draw up operational guidelines which would help ensure that unless the railway corporation concerned was satisfied with the safety of the proposed radiocommunications installation, TA would not authorize the access of the MPO concerned to railway premises.

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35. Mrs Miriam LAU urged the Administration to provide the Bills Committee with the proposed guidelines on fees determination and safety procedures on MPOs' installations in railway premises, which she considered were critical for the Bills Committee's deliberation on the Bill. She also suggested that the Administration should commence consultation with the relevant parties on the guidelines immediately. DS/ITB agreed to consider Mrs LAU's suggestion. On the appeal channels against the future guidelines issued by TA, DS/ITB advised that similar to other administrative decisions of TA, aggrieved parties could appeal against TA's decision on the guidelines by way of judicial review if TA had not given due regard to their views in drawing up the guidelines.

36. Mr Eric LI pointed out that in exercising the authority to grant access to MPOs, TA was required to take into account a wide range of factors including the public interest, commercial considerations, safety requirements etc., some of which fell outside the telecommunications field. For other regulatory regimes which might be involved in mediating between commercial parties, a body comprising members from different fields and professions to advise the regulatory authority was often provided for in the relevant legislation. Moreover, the authority was usually required to reveal the criteria and reasons based on which his decisions of significance were made. These institutional and procedural arrangements could help ensure fairness of the authority's decisions and transparency of the decision-making process. Mr HO Sai-chu shared Mr Eric LI's view.

37. DS/ITB in response said that TA's power to authorize access was subject to various requirements as proposed in the Bill. Procedurally, TA was required to issue relevant guidelines after consultation with all relevant parties, give written notice to affected parties with reasons and provide reasonable opportunity for the affected parties to make representation. TA was also required to apply the public interest test and to take into account the factors provided in new Section 14(1B)(b) in making such a determination on access.

38. Regarding the licence obligation of MPOs to provide service coverage in tunnels, Mrs Miriam LAU sought clarification on whether the relevant licence condition was imposed by TA or proposed by MPOs at their own initiative when applying for the MPO licence. In response, SAD/OFTA explained that when MPOs were invited to apply for MPO licences, they were advised through the relevant guidelines issued by TA that service coverage was an important criterion for granting a licence. Based on this understanding, applicants for MPO licences would make a pledge on the service coverage in

their proposals. In granting MPO licences, TA would incorporate the pledged service coverage into the licence conditions. Compliance with the licence conditions was enforced through a performance bond system. If a licensee failed to provide the specified service coverage by a deadline, TA would require the payment of the bonded sum in accordance with the performance bond provided by the licensee.

39. In reply to the Chairman's enquiry about the course of action TA would take if a MPO licensee unilaterally ceased to provide service coverage in certain areas such as road tunnels, SAD/OFTA advised that TA might not be able to penalize the licensee on grounds of a breach of the service coverage condition if TA had already issued a certificate certifying that the licensee had achieved the pledged coverage and released the performance bond consequently. However, there was a general provision in MPO licences that the licensee should provide a service to the satisfaction of TA. In determining whether a licensee was in compliance with this condition, TA would take into account all relevant factors including the prevailing market conditions, the service demand of mobile phone subscribers etc. He confirmed that so far, there had not been any precedent case of a MPO licensee ceasing to provide service coverage in certain areas.

#### **Any other business**

40. Members agreed that the next two meetings would be held on 6 and 21 October 1999, both starting at 8:30 am.

41. The meeting ended at 12:40 pm.

Legislative Council Secretariat

10 November 1999