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(These minutes have been
seen by the Administration)

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Legislative Council
Bills Committee on Telecommunication (Amendment) Bill 1999

Minutes of meeting
held on Friday, 14 April 2000, at 8:30 am
in Conference Room A of the Legislative Council Building

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

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 Confirmation of minutes and matters arising

The minutes of the meeting held on 26 January 2000 were confirmed without amendments.

II Meeting with the Administration

Further discussion on legal and constitutional issues arising from the Bill

2. The Chairman said that the main purpose of this meeting was to further discuss the major legal and constitutional issues arising from the Telecommunication (Amendment) Bill 1999 (the Bill). As most of the papers listed on the agenda had already been considered at past meetings of the Bills Committee, it was not the intention to re-open fresh discussion on each of them. He suggested members to refer to the updated version of the paper - "Summary of deputations' views and relevant comments on major clauses of the Telecommunication (Amendment) Bill 1999" (CB(1)1354/99-00(01)) for easy reference of deputations' views, the Administration's response and the advice of the legal adviser to the Bills Committee on these legal and constitutional issues.

Presentation by the Administration

3. At the invitation of the Chairman, the Acting Secretary for Information and Technology and Broadcasting (SITB(Atg.)) highlighted the Administration's position as follows -

(a) The Administration gathered from previous meetings of the Bills Committee that members were in support of the policy objectives of the Bill, namely strengthening the regulatory framework for the telecommunications industry to ensure openness and fairness, safeguarding competition, streamlining licensing procedures to cope with the rapid development of the industry and to enable ubiquitous coverage of mobile telecommunications services.

(b) On proposed section 14 relating to access of mobile network operators (MNOs) to land and buildings to place and maintain radiocommunications facilities, the Administration considered that the proposed provisions were reasonable and proportionate. Ubiquitous coverage of mobile networks was necessary to enable Hong Kong to become a telecommunications hub in Asia. The proposed mechanism to enable coverage of mobile services in confined areas was proportionate to this objective. Only if the licensee and the land or facility owner concerned could not reach an agreement on access through commercial negotiation would TA exercise his power to authorise access. The authorisation must also satisfy the public interest test and other requirements prescribed in proposed section 14. Having considered concerns expressed by deputations and members about the impartiality of TA as arbiter of the fee, the Administration would propose CSAs to provide for independent arbitration for determination of the access fee and if necessary, any other terms and conditions, except

technical requirements, to effect the access.

(c) As to whether the authorization of access by TA to private land and buildings (including private tunnels) would amount to deprivation of property, the Administration had already explained, with reference to the jurisprudence developed by the European Court of Human Rights (ECHR), that the authorisation would not amount to deprivation of property; it would only have the effect of controlling or regulating the use of property. It therefore followed that the authorisation would not give rise to the issue of compensation for lawful deprivation of property for the purposes of Article 105 of the Basic Law.

(d) As regards the exercise of power by TA to mandate facility sharing under proposed section 36AA, the Administration held that the proposed provisions would not amount to deprivation of property. For buildings or land where there was limited space for facility installation, facility sharing was necessary to ensure quality telecommunications services for consumers. It should also be recognized that TA's power to direct the sharing of facilities of licensees was already provided in the existing licences of fixed telecommunications network service (FTNS) operators.

(e) The Cable & Wireless HKT (CWHKT) had argued that proposed amendments to section 36C to increase the maximum financial penalty TA might impose on licensees would render TA's power to impose fines a "criminal" process and as such, the exercise of the power should be subject to the requirements of a fair hearing and to the review of a court of full jurisdiction. The Administration considered that the proposed financial penalty was not excessive having regard to the size of operation of the telecommunications sector and its importance to the economy. It was administrative and disciplinary, not criminal, in nature. Reference had also been made to relevant penalties in overseas jurisdictions when drawing up the provisions.

(f) To clear doubts about possible infringement on personal data privacy by TA in exercising the powers to request, inspect and disclose information under the Bill, the Administration had assured the Bills Committee vide paper (CB(1)1147/99-00(01)) that under all circumstances, TA would be bound by the requirements stipulated in the Personal Data (Privacy) Ordinance. In the event that TA was to contemplate disclosure of personal data, he must obtain the data subject's prior consent.

(g) To strengthen checks and balances on TA's powers, the Administration had proposed CSAs to explicitly provide that the exercise of power by TA to suspend or revoke a licence or to impose financial penalty must be proportionate and reasonable. This will enable the court, on judicial review, to also review the reasonableness and proportionality of TA's decisions of significance.

4. At the invitation of the Chairman, Mr Richard FOWLER said that the CSAs introduced by the Administration since the meeting of 26 January 2000 had dealt with most of the constitutional and legal concerns raised under the Bill. He then addressed the Bills Committee on the issues of whether the proposed amendments would amount to deprivation of property and whether there was adequate access to the courts as required under human rights legislation. His submission was summarized as follows -

(a) The exercise of powers by TA to authorise access to shielded areas including tunnels under proposed section 14 and to require the sharing of use of facilities under proposed section 36AA would have the effect of regulating or controlling the use of property and would not result in deprivation of property, mainly because the property owners concerned would not be deprived of their own use of the tunnels or facilities in the process. This view was consistent with the approach adopted by the ECHR in considering cases related to Article 1 of the First Protocol of the European Convention of Human Rights regarding the protection of property rights. In a case concerned with enactment of laws in France to require owners of land to hand over the hunting right on the land, the ECHR considered that the laws did not involve deprivation of property but had the effect of controlling the use of property because the owners of the land still retained their rights to the land and had only lost one aspect of the use of the land, namely the hunting right. The ECHR reached similar conclusions in cases involving rent control laws and planning regulations whereby the right of the property owner to decide the rent to be charged for his property and the right to decide how buildings should be constructed on his land were regulated by the state. The ECHR held that the right to set the rent for one's property and the right to design the buildings on one's land was an independent right which should be distinguished from the ownership of the land/property itself.

(b) Even if it could be argued that the proposed provisions would constitute deprivation of property, Article 105 of the Basic Law acknowledged the possibility of lawful deprivation of property provided that there was fair compensation. As far as proportionality was concerned, the considerations were whether there was a legitimate public good being pursued, and whether the

measures to pursue that public good were proportionate to the objective in question. The Administration had re-affirmed that the policy objective of achieving ubiquitous coverage of mobile telecommunications services was a legitimate public good and served societal and community interests. The fact that there were already agreements between MNOs and tunnel companies on access to tunnels for existing mobile services did not imply that there was no need to enact legislation to achieve the said policy objective. With the advent of new mobile services, notably the third-generation mobile phone services, there was a greater need to establish a statutory mechanism to enable ubiquitous coverage of the new network infrastructure. Proposed section 14 to enable access of MNOs to confined areas, including tunnels, was proportionate to the public good objective as intervention by TA would only arise if the parties were unable to reach agreement through commercial negotiation. Moreover, there were provisions for compensation by way of a fee payable to the land or facility owner concerned. The latest CSAs proposed by the Administration on clause 7 would provide for independent arbitration having regard to factors relating to cost, property value, and the benefits derived from the authorization of access. So even if the argument that there were lawful deprivation of property could stand, the proposed amendments would ensure that the fee to be paid would reflect the real value of the property concerned as required under Article 105 of the Basic Law.

(c) All the decisions taken by TA could be challenged by way of judicial review. The proposed CSAs would further impose on TA the requirement that the sanction to be imposed under section 34(4) and the financial penalty to be imposed under proposed section 36C should be proportionate and reasonable in relation to the contravention concerned. On judicial review, the courts would be able to review the legality as well as the factual basis of TA's decision (whether TA had taken into account irrelevant facts or failed to take into account relevant facts, whether he had acted reasonably and whether he had acted within the scope of his authority). It however remained that the court would not have jurisdiction over the merits of TA's decision and thus could not vary or substitute the decision.

(d) CWHKT argued that judicial review fell short of the requirements under the Hong Kong Bill of Rights and the International Convenant on Civil and Political Rights, and that the merits of the regulator's decision should be subject to the review of an independent appeal tribunal or a court of full jurisdiction. In this connection, under the relevant appeal regulations recently adopted in the telecommunications sector in the United Kingdom (UK), the

appeal court also could not review the merits of the regulator's decision. The valid grounds for appeal under the UK appeal regulations were the same as those that could give rise to judicial review in Hong Kong, i.e., whether there was a material error of fact or law, whether there was a material procedural error, and/or whether there was some other material illegality such as unreasonableness or the lack of proportionality. Hence, the judicial review system available in Hong Kong was in fact comparable in principle and in practice to the appeal system for the telecommunications sector in UK.

(e) The appeal system in UK and the judicial review system available in Hong Kong were in conformity with human rights legislation. There was a growing jurisprudence of the ECHR that a court of full jurisdiction might not be appropriate in cases where the decisions concerned were policy or administrative decisions, for which there were no objective right or wrong answers, and it would not be appropriate for the court to seek to substitute its own judgement for the judgement of the administrator which possessed the expertise in the relevant policy areas. As far as the Bill was concerned, the subject matters on which TA was empowered to make decisions were administrative and technical in nature and thus, in line with the jurisprudence developed by ECHR, it would not be appropriate for the courts to substitute those decisions. The existing system of judicial review, together with the proposed CSAs which made the decision-making process of TA more transparent, was considered an adequate appeal avenue.

Discussion with the Administration

5. Miss Margaret NG pointed out that as land was not portable, the idea of property right was very much associated with its use, and hence the right of the property owner to control or determine its use. She noted that while compensation should only arise when there was deprivation of property, the very fact that under the proposed legislation, authorisation of access to land and buildings would be accompanied by compensation by way of a fee appeared to indicate that the Administration accepted that a certain element of deprivation of property was embodied in the proposed legislation. Otherwise, the provision for compensation would be superfluous. She therefore sought clarification on whether at some point in TA's exercise of his powers, the control or interference of the use of property might amount to deprivation of property.

6. Mr Richard FOWLER clarified that under the Bill, the provision for a fee arose irrespective of whether there was deprivation of property. The Bill provided for a fee to be paid by the licensee to the person having a lawful interest in the land in return for access and for the fee to be determined by an

independent arbitrator if the fee could not be agreed on by commercial negotiation. In practice, as the arbitrator must have regard to the factors expressly set out in the CSAs to proposed section 14(5) in making a determination on the fee, the fee so determined would unlikely fall short of the real value of the property in question. Mr FOWLER pointed out that in essence, irrespective of whether there was deprivation of property or not, the resultant fee payable for access or the compensation payable even if deprivation could be proved would be almost the same in the context of the proposed section 14.

7. As to whether at some point, the control of the use of property could amount to deprivation, Mr FOWLER acknowledged that control of use and deprivation of property were not categorically different; the more aspects of the rights to a property that were taken away by an act, the closer the act would amount to deprivation of property. He however stressed that the extent of interference caused by the access to shielded areas for installation of telecommunications facilities under proposed section 14 and the sharing of facilities under proposed section 36AA would not have the effect of taking away the property owner a valuable bundle of rights. It was because the exercise of the power by the regulator to grant access or to mandate facility sharing was subject to the requirement that the owner of the facility concerned, having allowed the access or sharing of use in question, could still retain adequate capacity for his own uses.

8. Miss Margaret NG maintained that the Administration had not adequately addressed the fundamental question of whether there was deprivation of property. If there was deprivation of property, the principle that there must be compensation on the basis of the real value of the property concerned should apply regardless of the mechanism for fee determination. She considered that property rights were absolute rights. Whether somebody could retain adequate capacity for his own use was immaterial to the deprivation issue under the capitalist system, as distinct from the classical communist system where property was shared according to each individual's needs. Therefore, she could not subscribe to the analysis of Mr FOWLER based on the availability of sufficient capacity to allow access and facility sharing. She then enquired whether there was any primary principle to delineate between the control of use of property and the deprivation of property.

9. In response, Mr Richard FOWLER advised that the ECHR had not attempted to define the ambit of the test to be applied to determine whether there was deprivation of property. Instead, the ECHR had applied a series of tests instead of one particular test in determining whether there was deprivation. In order to come to a balanced view, the ECHR had considered various aspects including the extent of the rights to a property that would be extinguished by the act in question, the extent that the right being regulated was fundamental to the overall bundle of rights to a property etc. Each of these aspects would

need to be examined. He nevertheless pointed out that the aforesaid cases concerning hunting rights and rent control, where the ECHR came to the conclusion that there was no deprivation, indeed involved a higher degree, or at least an equal degree, of interference with the aspects of rights to a property than the interference that would be caused by the exercise of power by TA to authorize access and to require facility sharing under the Bill. As regards the scenario depicted by Miss Margaret NG that the state required the owner of a flat to allow other persons to use the flat, he considered that the act of the state in this case would prevent the normal use and enjoyment of the property by the owner and this appeared to be an extreme case involving an extent of control that might fall within the grey area between control and deprivation. In comparison, TA's authorization of access and mandating the sharing of facilities under the Bill would not in any way deprive the owner of his normal use of the property or facility concerned.

10. In this connection, the Senior Assistant Solicitor General/Basic Law said that while it might be difficult to give a precise definition of deprivation of property, the Administration had delineated in its previous submission (CB(1)820/99-00(01)) the observation of European authorities that the operation of laws or exercise of legal powers would amount to deprivation of property only when it had the effect of taking away the underlying economic use of a property in almost its totality. Ownership was made up of a bundle of rights. The fact that an owner had been deprived of one right would not be sufficient to prove a deprivation of ownership. In the case of planning regulation cited by Mr FOWLER, *Belfest Corporation v O D Cars Ltd [1960] AC 490*, the House of Lords held that "anyone using the English language in its ordinary signification……would agree that "property" is a word of very wide import, including intangible and tangible property. But he would surely deny that any one of those rights which in the aggregate constituted ownership of property could itself and by itself aptly be called "property" and to come to the instant case, he would deny that the right to use property in a particular way was itself property, and that the restriction or denial of that right by a local authority was a "taking", "taking away" or "taking over" of "property." In essence, if an act would only have the effect of restricting or interfering with one particular aspect of ownership of property, it would not by itself amount to taking over or deprivation of property. This analysis was consistent with the approach adopted by the Supreme Court of the United States where total or near total deprivation of the economic use of property would amount to taking of property with which the Fifth Amendment of the US Constitution was concerned. Therefore, the approach taken by the Administration so far was entirely consistent with other common law jurisdictions and the US jurisdiction in terms of the construction of the concept of "deprivation".

11. Miss Margaret NG commented that so far, it seemed that there was no clear principle to distinguish the control of the use of property from deprivation of property. At this stage, she could not fully accept the Administration's view that the proposed provisions in the Bill would not involve deprivation of

property at all.

12. Referring to the Opinion by Mr Geoffrey MA, Senior Counsel, submitted by the tunnel companies in February 2000 (CB(1)998/99-00(01)), Mrs Miriam LAU said that in the Opinion, Mr Geoffrey MA cited some cases in the United States, Australia and UK with a different conclusion as to whether deprivation of property was involved. She sought Mr FOWLER's comment on the relevance of the cases cited by Mr MA and asked why Mr FOWLER considered that the jurisprudence developed by the ECHR, instead of other competent courts, should be relied on in examining the constitutionality of the Bill.

13. In response, Mr FOWLER said that in his opinion, the cases cited by Mr Geoffrey MA were not directed to the question of whether there was deprivation of rights, but whether those rights constituted property. According to Mr MA, the individual aspects of rights to a property in certain context would constitute property rights. Pursuant to this approach, one would come to the conclusion that whenever any individual aspect of rights to a property was taken away or removed from of the owner, there was deprivation of property. While he would not disagree with the logic of the argument, Mr FOWLER considered that the analysis adopted by Mr MA was inconsistent with the approach adopted by the ECHR. If the analysis of Mr MA were applicable, there could never be a real distinction between deprivation and interference of rights, as in any regulation over property rights, there must be one or more aspects of rights to a property of which the owner was being deprived. Mr FOWLER also stated his view that the ECHR was the compelling authority on issues relating to protection of private property.

14. Highlighting her view that the agreements between the Government and tunnel companies had conferred on tunnel companies the right to exclude third parties into tunnel areas and the right to freely negotiate the charges on utilities for access to tunnel areas, Mrs Miriam LAU sought Mr FOWLER's view on whether the removal of these rights, being rights conferred by contractual agreements with the Government, constituted only regulation of the use of property, or confiscation of property rights.

15. In response, Mr Richard FOWLER advised that whether or not the rights to a property arose from a contractual agreement with the state would not alter the nature of such rights. Where regulation or restriction of such rights was contemplated, the same test of legitimate public good and proportionality would apply regardless of the source of the rights. This analysis would also be applicable to the rights of the tunnel companies although such rights arose from a contractual agreement with the Government.

16. Referring to the Administration's comments that including the tests of proportionality and reasonableness under proposed section 34(4A) would have the effect of facilitating the judicial review process, Miss Margaret NG was of

the view that the proposed CSAs would not expand the ambit of judicial review because even without these provisions, the court would still have to consider the question of proportionality and reasonableness of the decision in question.

17. On the financial penalty under proposed section 36C, Miss Margaret NG considered that the critical issue was whether the financial penalty that might be imposed by TA was so severe that it was in effect a criminal sanction. If the financial penalty was criminal in nature, the subject being charged with the offence should be entitled to a fair hearing and a full right of appeal. She thus questioned the basis on which the Administration considered the proposed financial penalty not of a criminal nature.

18. In reply, Mr Richard FOWLER said that according to the principle adopted by the ECHR, sanctions that only applied to a limited category of persons who were in a position to opt into or out of the regulatory regime were essentially administrative in nature as they aimed at ensuring observance of the agreement between the regulator and the licensee. As such, the financial penalty that might be imposed by TA under proposed section 36C should not be regarded as a criminal sanction.

19. Miss Margaret NG said that when the application of the sanction could cause substantial detriment to the person under charge, even though the sanction was only applicable to a defined category of persons, the sanction would still be regarded as criminal sanction. She contended that opting into a regulatory regime would not necessarily imply that the rules per se were not criminal in nature. As such, she was even more concerned with the aggrieved party's right of access to courts. According to her understanding, there were precedent cases that the size of the financial penalty in question was a relevant factor, though not the only factor, in determining whether a sanction with only limited application was criminal in nature.

20. In this connection, SITB(Atg.) reported that during the consultation on the legislative proposals, many submissions had expressed the view that the existing maximum penalty that TA could impose was grossly inadequate. Some even suggested that the proposed ten-fold increase might still be insufficient in view of the size of the operation of the telecommunications sector and widespread effect of a contravention of licence conditions or statutory provisions on the community. For example, a breach by the dominant FTNS operator might affect 97% of the domestic households, and a collusion among mobile phone licensees to increase the subscription fee of each customer by $20 would mean a total increase of $800 million in revenue for the operators. Hence, if the administrative penalty could not reflect the gravity of the offence and the size of the licensees' operations, the regulatory regime would not be effective.

21. The Chairman also recalled that at a motion debate, some LegCo Members had expressed the view that the existing maximum financial penalty

for anti-competitive acts of telecommunications operators was too low to serve the intended regulatory purposes and achieve any deterrent effect.

22. Miss Margaret NG commented that the considerations underlying the proposed penalty provisions as mentioned by SITB(Atg.) fell squarely within the determination of criminal fines. She considered that the Administration had not been able to provide a clear and convincing response to the question that the financial penalty which might be imposed by TA under proposed section 36C was criminal in nature.

Clause-by-clause examination of the Bill and CSAs proposed by the Administration

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

23. Under proposed section 14(1B)(d), TA, in authorizing the access of a licensee, would specify in writing the technical requirements, if any, of the right of access arising from the authorisation. Mrs Miriam LAU enquired whether TA would specify the technical requirements on a case-by-case basis or would follow the relevant guidelines to be issued after enactment of the Bill.

24. The Senior Assistant Director, Office of Telecommunications Authority (SAD/OFTA) advised that the technical requirements to be specified by TA under proposed section 14(1B)(d) would form part of the conditions contained in the access authorisation. In addition, TA might issue separate guidelines to licensees as to the manner in which the right of access should be exercised. Currently, TA planned to issue guidelines regarding the access to the premises of the two railway corporations and the guidelines would include the requirement to observe the by-laws and other safety requirements of the corporations. Apart from the requirement to comply with the guidelines, the guidelines would not form part of the conditions contained in the access authorisation.

25. In reply to Mrs Miriam LAU's enquiry, SITB(Atg.) confirmed that it was the Administration's legislative intent that the technical requirements specified by TA in the access authorization and in the said guidelines should not infringe upon any provisions relating to public safety of any other ordinance. Proposed section 14(8)(a) sought to reflect this intention. The Senior Assistant Law Draftsman (SALD) added that proposed section 14(8)(a) put it beyond doubt that the technical requirements specified by TA in granting authorisation could not override the public safety provisions in any other legislation, both primary and subsidiary.

26. In connection with the safety of telecommunications installations, Dr Philip WONG enquired whether TA would specify in its access

authorisation that the licensee granted access must use state-of-the-art equipment available in the market. SAD/OFTA advised that it was not a normal practice for TA to expressly require licensees to use state-of-the-art equipment. Instead, TA would specify technical requirements pursuant to his regulatory objectives such as the requirement to prevent telecommunications installations from emitting interference that might affect the operation of other services. SITB(Atg.) added that under the pressure of market competition, licensees would probably need to employ modern equipment, lest their competitiveness would be weakened.

27. Mrs Miriam LAU sought clarification on whether the proposed provisions would empower TA to authorise access before the access fee and/or the other terms and conditions relating to access had been determined by arbitration. In reply, SITB(Atg.) explained that the present drafting of the provisions allowed the flexibility whereby a MNO and the land or facility owner concerned might mutually agree on interim access arrangements pending the outcome of arbitration. She also affirmed the Administration's legislative intent that unless there was mutual agreement on interim access between the MNO and the land or facility owner concerned, TA should not authorise access before the access fee had been determined by arbitration.

28. SALD however advised that proposed section 14, as currently drafted, would allow TA to authorise access notwithstanding that the determination of access fee was still underway by arbitration, provided that the authorisation satisfied the public interest test and other requirements under proposed section 14(1B).

29. The Assistant Legal Adviser 3 advised that the requirement of having the fee determined before granting an authorisation was implicit under proposed section 14(2)(b)(ii) which required that where section 14(1A) applied, a fee (a once only fee or a monthly or annual fee) which was fair and reasonable in all the circumstances of the case must be paid by the licensee to any person having a lawful interest in the land. The relevant subsections, when read in conjunction, would imply that a fee which was fair and reasonable must be paid by the licensee authorised by TA before the access right was exercised. She suggested that to address Mrs LAU's concern, the drafting of proposed section 14(1B) might be improved by adding an express provision to the effect that TA should not grant an authorisation referred to in section 14(1A) unless the fee to be paid had been agreed upon or determined.

30. In response, SITB(Atg.) pointed out that stipulating such an express requirement might render the provisions too rigid and remove the flexibility for both parties to reach an interim agreement pending the conclusion of arbitration.

31. In this connection, the Chairman informed members that he had received a letter jointly submitted by six MNOs expressing views on the timing of

access in the case of a failure to reach an agreement through commercial negotiation and on the charging principles for determination of access fees. (The submission (CB(1)1405/99-00(01)) was tabled at the meeting and issued to members on 17 April 2000). He shared MNOs' concern abut possible delay in access if for some reasons, the land/facility owner procrastinated the arbitration process. He expressed the view that when both parties could not arrive at an agreement on the fee and referred the issue to arbitration accordingly, it might be desirable for TA to authorise access first so as to ensure early availability of mobile services. As the access fee subsequently determined by arbitration could take retrospective effect from the date of access, early access by MNOs would not jeopardize the interests of the land or facility owner concerned. The Chairman said that he would not agree to any express provisions which would not allow authorization of access prior to fee determination.

32. Dr Philip WONG expressed his view that it would not be appropriate for TA to step in and mandate access when negotiation between the two parties was still under way. However, when the negotiation came to a deadlock and the dispute on fee was referred to arbitration, TA should have the power to authorise interim access, provided that the arbitration ruling on the access fee could take retrospective effect from the date of access.

33. In this regard, Mrs Miriam LAU stressed that it would be in the interest of land or facility owners to conclude the arbitration proceedings early so that they could receive the access fee as soon as possible. However, if MNOs were authorised by TA to enter tunnels to install equipment and start service operation therein before conclusion of the arbitration, the MNOs might no longer be keen to complete the arbitration process. She also cautioned that apart from the access fee, there might be other aspects of access such as insurance coverage for the radiocomunications installation which had to be determined by arbitration. Authorizing the access before these issues were properly resolved would give rise to serious problems of safety and liabilities.

34. Mr Eric LI concurred that flexibility on the timing of access should be allowed in the legislation as it might not be beneficial to both parties if the legislation required that access should not be granted before the fee had been determined. He also stated his view that apart from the determination of the access fee, the scope of arbitration should also cover other issues incidental to the question of access should the parties concerned fail to reach an agreement.

35. In reply to Dr Philip WONG's enquiry about the interpretation of "a reasonable time" under proposed section 14(5)(b), SITB(Atg.) advised that what would be regarded as a reasonable time would depend on the circumstances of individual cases. Apart from the exact duration of the negotiation between the licensee and the land or facility owner concerned, TA would also take into account whether the parties had made genuine efforts to negotiate for the access agreement.

36. The Chairman directed that discussion on the issue of interim access should continue at the following meeting commencing at 10:45 am on the same day. Members agreed.

37. The meeting ended at 10:30 am

Legislative Council Secretariat
19 June 2000