

JUDGEMENT –1

PETITION No. 1, 2 AND 3 OF 2001

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

DATED THIS 8th DAY OF AUGUST, 2003

PETITION No.1 OF 2001

Cellular Operators Association of ... Petitioners
India & Others
Vs
Union of India & Others ... Respondents

WITH

PETITION No.2 OF 2001

Usha Martin Telekom Ltd. ... Petitioner
Vs
Union of India & Anr. ... Respondents

AND

PETITION No.3 OF 2001

RPG Cellular Services Ltd. ... Petitioner
Vs
Union of India & Ors. ... Respondents

BEFORE:

**HON'BLE MR. JUSTICE D.P. WADHWA,
CHAIRPERSON**

MR. R.U.S. PRASAD, MEMBER

MR. P.R. DASGUPTA, MEMBER

PETITION No.1 OF 2001

For Petitioners : Mr. C.S. Vaidyanathan,
Mr. Goolam E. Vahanvati,
Senior Advocates
with Mr. Manjul Bajpai,
Mr.R.N.Karanjawala,
Mr. Gopal Jain,
Ms. Ruby Singh Ahuja,

- Ms. Shaily Yogi,
Mr. Praveen Thomas,
Ms. Rameeza Hakeem,
Ms. Meghna Mishra,
Ms. Prashanti Rao, Advocates
- For Respondent – Union of India : Mr. Kirit N.Raval, Solicitor General
with Mr. Jaideep Gupta, Senior Advocate,
Mr. Sanjay R. Hegde and
Mr. Anil K. Mishra, Advocates
- For Respondent-TRAI : None
- For Respondent - ABTO : Dr. A.M. Singhvi, Senior Advocate with
Mr. Ramji Srinivasan,
Mr. Yogesh Gupta, and
Mr. Amit Bhandari, Advocates
- For Intervenor –KALYAN : Mr. Rudreshwar Singh,
Mr. Manish Tiwari,Advocates
- For Intervenor -Telecom Public Policy Forum : None
- For Intervenor -Telecom Watchdog : Mr. Ashok Desai, Senior Advocate
with Mr.M.R.Ramesh Babu,Advocate
- For Intervenor - Reliance Infocomm Ltd. : Dr. A.M. Singhvi, Senior Advocate
with Mr.Ramji Srinivasan,
Mr. Milind Sathe,Mr. Yogesh Gupta and
Mr. Amit Bhandari and
Atul Bhandari, Advocates
- For Intervenor-Bharti Cellular Ltd. : Mr. A. Sundaram, Senior Advocate with
Mr.Sandeep Sethi and
Mr. Sumeet Mehta, Advocates

PETITION No.2 OF 2001

- For Petitioners : Mr. Goolam E. Vahanvati,
Senior Advocate with
Mr. Manjul Bajpai,
Mr.R.N.Karanjawala,
Mr. Gopal Jain,
Ms. Ruby Singh Ahuja,
Ms. Shaily Yogi,
Mr. Praveen Thomas,
Ms. Rameeza Hakim,
Ms.Meghna Mishra and

For Respondent – Union of India : Ms.Prashanti Rao, Advocates
: Mr. Kirit N. Raval, Solicitor General
with Mr. Jaideep Gupta,Senior Advocate,
Mr. Sanjay R. Hegde and
Mr. Anil K. Mishra, Advocates

For Respondent -TRAI : None

For Respondent - ABTO : Dr. A.M. Singhvi, Senior Advocate
with Mr. Ramji Srinivasan,
Mr. Yogesh Gupta, and
Mr. Amit Bhandari, Advocates

PETITION No.3 OF 2001

For Petitioners : Mr. Goolam E. Vahanvati,
Senior Advocate
with Mr. Manjul Bajpai,
Mr.R.N.Karanjawala,
Mr. Gopal Jain,
Ms. Ruby Singh Ahuja,
Ms. Shaily Yogi,
Mr. Praveen Thomas,
Ms. Rameeza Hakim,
Ms.Meghna Mishra and
Ms.Prashanti Rao, Advocates

For Respondent – Union of India : Mr. Kirit N.Raval, Solicitor General
with Mr. Jaideep Gupta, Senior Advocate,
Mr. Sanjay R. Hegde and
Mr. Anil K. Mishra, Advocates

For Respondent -TRAI : None

For Respondent - ABTO : Dr. A.M. Singhvi, Senior Advocate
with Mr. Ramji Srinivasan,
Mr. Yogesh Gupta, and
Mr. Amit Bhandari, Advocates

ORDER

Cellular Mobile Service Providers (CMSPs) have challenged the decision dated 25.1.2001 of the Central Government in the Department of Telecommunications (DOT) allowing Fixed Service Providers (FSPs) [also referred to Basic Service Providers (BSP) or Basic Service Operators (BSOs)] to provide mobility to its subscribers with Wireless Access Systems limited within local area i.e. SDCA (Short Distance Charging Area) in which subscriber is registered

[hereinafter referred to as WLL with limited mobility or WLL (M)]. Arguments have however, also proceeded somewhat that it is CMSPs vs. FSPs though ultimately it may look to be so. Decision which the DOT took is in the form of guidelines issued on 25.1.2001 and pursuant to which licences of FSPs were amended. The decision was based on the recommendations of Telecom Regulatory Authority of India (TRAI). Recommendations of TRAI are dated 8.1.2001. Group on Telecommunications-IT (GOT-IT) was constituted by the Prime Minister which gave its report on 27.4.2001. Petitions were first filed when recommendations of TRAI were made and thereafter these were amended after the guidelines issued by DoT and the report of the GOT-IT was made and accepted by the Central Government. Challenge to the impugned decision is on various grounds, particularly, that the decision was against the avowed policy being the National Telecom Policy, 1999 (NTP-99), tender documents and licence agreements of both the service providers. Assuming that the limited mobility could be permitted the question then arises is, has the level playing field of both the players i.e. CMSP and FSP properly addressed qua the CMSPs as the contention of CMSPs is that allowing FSPs with limited mobility is to trench upon the field exclusively occupied by them.

Earlier this Tribunal dismissed the petition particularly on the ground that granting limited mobility in WLL [WLL (M)] was a matter of policy of the Central Government which Tribunal could not go into. On appeal filed by the CMSPs in the Supreme Court the order of the Tribunal was set aside and the matter remanded to the Tribunal. Bench in the Supreme Court remanding the matter comprised of Hon'ble the Chief Justice of India Mr. Justice G.B. Pattanaik, Hon'ble Mr. Justice H.K. Sema and Hon'ble Mr. Justice S.B., Sinha. Chief Justice Pattanaik wrote the judgment for himself and Sema, J. while Sinha, J. wrote separate concurring judgment. The first question that fell for consideration was whether all the issues raised before the Tribunal in the petition are to be gone into afresh or limited to the question of level playing field. When this matter came up before this Tribunal after remand we passed order on 31st March, 2003, which in relevant part, is as under:

“It is agreed by counsel for the parties that the issues that are formulated in the judgment of Pattanaik, C.J.I. be taken to be the issues on which the arguments are to be addressed by all the parties. These are:

The decision of the government is vitiated for non-compliance of Section 11(1)(a)(i) of the Act.

The NTP-1999 never contemplated of WLL with limited mobility and as such the decision to provide WLL with limited mobility to the Fixed

Service Providers is beyond the policy in question.

The permission to offer WLL with limited mobility is arbitrary, unreasonable and unjust decision on the part of the Government.

TRAI while recommending by its letter dated 8.1.2001 had indicated for compliance of two conditions, but the government decision ultimately taken is contrary to the said recommendations and, therefore, is vitiated.

The ultimate decision of the Government in fact does not deal with the question of level playing field between FSPs offering WLL with limited mobility and CMSPs, as a result of the discriminatory regulatory regime.

The impugned decision conferring the benefit of WLL with limited mobility to the Fixed Service Providers is nothing but a Cellular Mobile Service in SDCA and as such is a substitution for the same and such a substitution ought not to have been allowed.

The Government decision allowing Fixed Service Providers to provide WLL with limited mobility without any entry fee and without any charges for allocation of spectrum and even without a competitive bidding, amount to violation of the recommendations made by the TRRAI dealing with new CMSPs licensees.

However. Mr. Ashok Desai, Senior Advocate appearing for Telecom Watchdog, a voluntary organization, submitted that the remand was limited to the question of 'level playing field' and on all other issues judgment of Chief Justice Pattanaik concluded the matter. During the course of argument, Mr. A.M. Singhvi, Senior Advocate appearing for the ABTO supported this and so also the Solicitor General.

On the other hand Mr. C.S. Vaidyanathan, Senior Advocate and Mr. Goolam Vahanvati, Senior Advocate appearing for the petitioners submitted that the whole matter had to be considered afresh and there was no limit on the Tribunal to give its order on level playing field only.

Though we have heard the arguments on all the issues but since some stress was that it was limited remand, limited only to question of level playing field, we proceeded to examine this issue.

To appreciate the argument we may refer to some portions of the judgment of the Supreme Court remanding the matter.

When we refer to the judgment of Chief Justice Pattanaik, he said that the first issue which arose for consideration was what are the parameters for exercise of appellate power of Supreme Court in view of the provisions contained in

Section 18 of the Telecom Regulatory Authority of India Act, 1997. Chief Justice Pattanaik recorded the submissions of Mr. Desai and Mr. Singhvi that the appeal before the Supreme Court did not raise any substantial question of law particularly when Tribunal had concluded in its order that the impugned decision of the Central Government was in the interest of consumers made on the recommendations by the Telecom Regulatory Authority of India (TRAI) and GOT-IT. These counsel had also said that whether to permit the basic operators to have the privilege of WLL with limited mobility was in the interest of the consumers and was on account of modern technological developments was a question of fact and the conclusions thereon had been based on the strength of report of the expert committee constituted by the Prime Minister and the Government had merely implemented the same.

Attorney General appearing for Union of India had contended that the level of judicial scrutiny and the extent of judicial intervention depended upon the nature of the impugned decision and its subject matter as well as the composition of the decision making body. It was urged that decisions of expert bodies or tribunals dealing with technical, scientific, academic or economic matters are accorded greater latitude and the courts, whether exercising original or appellate jurisdiction, accord much greater deference to such decisions and judicial intervention is restricted and is available only if there is a clear breach of a constitutional or a statutory provision or the approach adopted is totally illegal or if the decision is vitiated by mala fides, properly pleaded and proven.

Attorney General referred to various decision which were noted by Chief Justice Pattanaik. Chief Justice Pattanaik, however, felt it necessary to note all the decisions and he referred to the amendment made in the Act in the year 2000 and the Statement of Objects and Reasons therefor:.

“Since the Tribunal is the original authority to adjudicate any dispute between the licensor and a licensee or between two or more service providers or between a service provider and a group of consumers and since the Tribunal has to hear and dispose of appeals against the directions, decisions or order of TRAI, it is difficult for us to import the self-contained restrictions and limitations of a court under the judge-made law to which reference has already been made and reliance was placed by the learned Attorney-General. By saying so, we may not be understood to mean that the Appellate Tribunal while exercising power under Section 14 of the Act, will not give due weight to the recommendations or the decisions of an expert body like TRAI or in the case in hand, GOT-IT, which was specifically constituted by the Prime Minister for redressing the grievances of the cellular operators. We would, therefore, answer the question of jurisdiction of the Appellate Tribunal by

holding that the said Tribunal has the power to adjudicate any dispute between the persons enumerated in clause (a) of Section 14 and if the dispute is in relation to a decision taken by the Government, as in the case in hand, due weight has to be attached both to the recommendations of TRRAI which consists of an expert body as well as to the recommendations of GOT-IT, a committee of eminent experts from different fields of life, which had been consulted by the Prime Minister.

“The question, therefore, that remains to be considered is, whether from the judgment of the Tribunal, the contentions raised by the appellants can be held to be a substantial question of law, which requires interference with the order of the Tribunal. Before we consider that question, certain broad features may be noticed, namely, that the composition of the Telecom Regulatory Authority of India consisted of as many as five members, which includes the technical personnel, the management personnel and also the financial personnel”.

Thereafter the learned Chief Justice noticed the sequence of events. It was submitted by Mr. Ashok Desai that these would be findings of fact recorded by the Tribunal which could not be disturbed. We do not think Mr. Desai is right. Noticing broad features of the case do not amount to any findings. After considering the arguments of the counsel for the parties in detail on the jurisdiction of the Supreme Court under Section 18 of the Act, Chief Justice concluded:

“In the aforesaid premises, we are unable to sustain the impugned decision of the Tribunal. We accordingly set aside the same and remit the matter to the Tribunal for reconsideration with special emphasis on the question of level playing field, on the basis of materials already on record, after hearing the counsel for the parties concerned”.

In his concurring judgment, S.B. Sinha, J. observed as under:

“S.B. SINHA, J.(concurring) - I agree with the conclusions of the judgment prepared by My Lord, the Chief Justice of India that the matter should be remitted back to the Tribunal but I would like to assign additional reasons therefore”. [para 13]

“21. We, however, need not go into the aforementioned question, in view of the order proposed to be passed by us. In our opinion the learned Tribunal failed to assign sufficient or cogent reasons in support of its findings. In relation to some issues, no reason has been assigned. Some issues although noticed have not been adverted to. Some issues have not even been noticed. The impugned order of TDSAT , therefore, does not fulfil the criteria of a

judgment”.

“50. The learned TDSAT, therefore, has posed absolutely a wrong question and thus its impugned decision suffers from a misdirection in law”.

“53. Furthermore, TDSAT failed to advert unto itself the following issues:

Non-compliance with Sections 11(1)(a)(i) and (ii);

Non-compliance with the fifth proviso by the authority in view of the divergence of opinion between the recommendation dated 8-1-2001 and guidelines made by the Government of India on 25.1.2001;

The issue of substitutability of Cellular Mobile Service with WLL with limited mobility within the area of SDCA like Delhi, Kolkata etc. particularly in a case where the subscribers of cellular phone have not chosen to opt for the roaming facility.

Having regard to the assertions made by the appellants herein that 85% of its business is related to SDCA only and only 15% subscribers have roaming facility, TDSAT ought to have addressed itself on the issue as to whether one service is a substitute of the other or not.

TDSAT had also failed to give its findings on the following issues:

That WLL with limited mobility with the existing service is a new service within the meaning of NTP, 1999.

Whether it is within the policy or outside the policy amounting to a change in the policy.

Whether the conditions attached by the Authority and its recommendations dated 8.1.2001 have been satisfied.

The Tribunal has opined that the technology may or may not be known as early as in 1994-95 but it proceeded to decide the issues only from the angle of the consumers’ interest. Consumers’ interest is only one of the relevant factors. It by itself cannot be decisive. Consumers’ interest is required to be taken into consideration only when it is found that the actions of the Central Government as also the recommendation of the Authority were within their respective jurisdiction.

TDSAT proceeded on the basis that the Central Government is entitled to change its own policy decision without taking into consideration the fact that according to the Central Government itself it was merely a “fine-tuning” of the policy and not a change of policy.

The jurisdiction of the Central Government to effect change in the policy

decisions was also in question. If a national policy had been adopted by the Cabinet, having regard to the provisions contained in Section 14 of the General Clauses Act, although a change in the policy would be permissible, but the procedure laid down therefore was required to be followed. This aspect of the matter has also not been considered by TDSAT”.

“61. Before TDSAT, the appellants argued that the decision of the Central Government was arbitrary. The said question was also not answered.

As regards the level playing field, TDSAT did not refer to a large number of materials at all. It took a wrong decision that the appellants had conceded the power of the Central Government in the matter of change of policy and further more agreed thereto in the event, its offers are satisfied.

We may notice that most of the findings recorded by TDSAT are not supported by any cogent reason. It arrived at some findings without referring to any material on records. As for example we may notice that it referred to a chart purported to have been handed over by Dr. Singhvi but the contents of the chart had not been disclosed. In any event, the materials on the basis whereof the chart was prepared had not been disclosed at all.

It failed to notice that the requirement of increasing tele-density in rural areas was not in question. What was in question was encroachment by the FSPs in the area which is said to be within the exclusive privilege of the cellular operators having regard to the provision of the NTP-99 and the terms and conditions of the licences issued to them. It also failed to arrive at any finding as to whether the concessions given to the appellants by the Central Government were asked for by them or not and/ or whether only because they received such concessions, they were estopped or precluded from raising the issues.

The learned TDSAT further failed to take into consideration the question as to whether the terms of offer made to the appellants as regards for providing fixed service were similar to those offered to the Fixed Service Providers or not. It merely held that the appellants can use latest technology including WLL with limited mobility as also the respondents without taking into consideration the materials to the effect that the letters of the respondents to the authorities of the Central Government for giving the same facilities fell on deaf ears. Furthermore, the issue relating to the grant of concessions to the appellants may be held to be redundant if the purported decision of the Central Government/or the recommendations of the Authority were illegal and without jurisdiction.

We have enumerated some of the issues raised before us only with a view to highlight that TDSAT did not pose unto itself the correct question.

The impugned order, therefore, cannot be sustained and it is set aside accordingly. The matter is remitted to TDSAT for consideration of the matter afresh in accordance with law”.

We have extensively quoted the judgments of the Chief Justice Pattanaik and Sinha, J. Judgment of Sinha J. is concurring judgment. It was submitted by counsel for the respondents that wherever judgment of Sinha, J. deviates from that of Chief Justice Pattanaik, it should be taken as dissenting judgment to that extent. Argument was that when judgment of Chief Justice Pattanaik limits the remand to determination of level playing field, Sinha J. could not say that all the issues are open before the Tribunal. According to the learned counsel for the respondents to this extent judgment of Sinha, J was dissenting and we are bound by the majority judgment of the Chief Justice Pattanaik who delivered the judgment for himself and Sema, J. We are unable to agree with the contention raised by the respondents. It is a practice in the Supreme Court that judgment(s) written by one Judge or different Judges on the Bench, are circulated to all. Each Judge has the opportunity to see the judgment of the other Judge and could express his dissent or disagreement in the judgment of the other Judge [see *Gaurav Jain vs. Union of India – (1998) 8 SCC 114*]. In the present case there is no question of judgment of Chief Justice Pattanaik being majority judgment and that of Sinha, J. minority judgment.

We are unable to see after going through the judgments of the Chief Justice Pattanaik and Sinha, J. as to whether there is any contradiction in the two judgments. Even the judgment of Chief Justice Pattanaik read as a whole does not limit the remand to level playing field only as contended by the respondents. Last line of the judgment reads that the matter is remitted to the Tribunal for reconsideration “with special emphasis” (emphasis supplied) on the question of ‘level playing field’ on the basis of materials already on record, after hearing the counsel for the parties concerned

Whatever meaning we give to the words “special emphasis” it could not be said that other issues were of no significance in nature to the matter of remand. We repeatedly put it to the counsel for the respondents as to what meaning would be placed on the words “special emphasis” but we have been unable to get any answer. If these words of Chief Justice Pattanaik in the matter of remand do not indicate a clear direction, we have to refer to the judgment of Sinha, J., to understand what the Court meant. According to us, a constructive interpretation of both the judgments leave no doubt that all the issues raised in the present

petitions were expected to be looked into afresh.

Mr. Vahanvati, counsel for the Usha Martin Telekom Ltd. and RPG Cellular Services Ltd. brought to our notice an interesting judgement in the case of the Guardians of the Poor of the West Derby Union Vs. the Guardians of the Poor of Atcham Union (1889) 24 QBD 117 delivered by Queens Bench Division, in the Court of Appeal in England. In this case there was some controversy regarding the interpretation of certain provisions of Divided Parishes Act, 1876. House of Lords earlier had given its interpretation and four Law Lords gave four different judgments though concurring. This is how Lord Esher, M.R. said when faced with four different judgments of the House of Lords, though concurring:

“The question is, what is the true construction of the 35th section of the Act of Parliament which is before us, and, when we have got at the true construction, what is the application of it to the case? With regard to the construction of this section, a great many Courts have considered it, and a great many judges have had different opinions about it. That being so, this Court expressed a hope, as we were told that several cases were going to the House of Lords, that the House of Lords would construe the whole section, so that we might know what their view of the true construction was. The House of Lords heard the cases, and did not give judgment at once, but considered the matter carefully, and four of the learned Judges in the House of Lords gave judgment. Now we know that each of them considers the matter separately, and they then consider the matter jointly, interchanging their judgments, so that every one of them has seen the judgments of the others. If they mean to differ in their view, they say so openly when they come to deliver their judgments, and if they do not do this, it must be taken that each of them agrees with the judgments of the others”.

To similar effect there is another judgment of Queens Bench Division in the case of Overseas of Manchester vs. Guardians of Ormskirk Union

(1890) 24 QBD 678 where Lord Coleridge, CJ observed on the interpretation of that very provision in the Divided Parishes Act, 1876 as under:

“The object of that statute has been explained by the House of Lords, and that object has been accomplished as far as it was possible to accomplish it; the matter is one which can be properly effected by legislation, and the conclusion to which I have come, following the evident the language there used as it has been interpreted by the highest Court of the realm. It has been pointed out by the Master of the Rolls in Guardians of West Derly Union v. Guardians of Atcham Union (and I entirely concur with him), that where in the House of Lords one of the learned lords gives an elaborate explanation

of the meaning of a statute, and some of the other learned lords present concur in the explanation, and none express their dissent from it, it must be taken that all of them agreed in it”.

To counter these judgments Dr. Singhvi said that there is distinction in the present case before us and the two aforesaid judgments of the Queen’s Bench Division. He said in the present case judgment of Chief Justice Pattanaik is of two Judges and that would be majority judgment vis-à-vis that of Sinha, J. and majority judgment has to carry more weight. We are unable to agree to such a contention. There is no question of majority judgment in the present case as we have observed above the judgement of Sinha, J. was circulated to both Chief Justice and Sema, J. They would have expressed their dissent if they had disagreement with any portion of the judgment of Sinha J. There is no such dissent in the judgments of Chief Justice Pattanaik. It has to be held that Chief Justice Pattanaik and Sema, J. concurred with the view of Sinha, J. as well.

A few judgments of the Supreme Court on the interpretation of Article 142 and 145(5) of the Constitution were also cited before us including 2nd judgment in the case of Gaurav Jain vs. Union of India - (1998) 8 SCC 270, but we do not think they quite help us in examining the contention raised before us.

We will, therefore, reject the contention of the respondents that the remand was limited only to the question of level playing field.

All the counsel did address arguments on all the issues on the basis that whole of the case was open before us. This was, however, subject to the contention that the remand was limited to the determination of the question of level playing field between the two warring groups.

Licences for mobile telephone service (CMSP) or fixed telephone service (FSP) are granted by the Central Government as licensor under Section 4 of the Indian Telegraph Act, 1885 (Telegraph Act). TRAI is a regulatory body under the Telecom Regulatory Authority of India Act, 1997 (TRAI Act). This Tribunal is an appellate body to hear appeals from the orders of the TRAI and is constituted under the TRAI Act after its amendment in 2000 (Act 2 of 2000 w.e.f. 24.1.2000). Tribunal also exercises original jurisdiction. It will be appropriate to set out the relevant provisions of law for understanding the controversy raised in the petitions:

“The Telecom Regulatory Authority of India Act, 1997

Preamble:

An Act to provide for the establishment of the Telecom Regulatory Authority of India and the Telecom Disputes Settlement and Appellate Tribunal to regulate the telecommunication services, adjudicate disputes, dispose of

appeals and to protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector and for matters connected therewith or incidental thereto.

Section 2(1): In this Act, unless the context otherwise requires:

‘Licensee’ means any person licensed under sub-section (1) of section 4 of the Indian Telegraph Act, 1885 (13 of 1885) for providing specified public telecommunication services;

(ea) ‘licensor’ means the Central Government or the telegraph authority who grants a licence under section 4 of the Indian Telegraph Act, 1885 (13 of 1885);

‘service provider’ means the Government as a service provider and includes a licensee;

‘telecommunication service’ means service of any description (including electronic mail, voice mail, data services, audio tex services, video tex services radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electromagnetic means but shall not include broadcasting services:

Provided that the Central Government may notify other service to be telecommunication service including broadcasting services.

“11. Functions of Authority. – [(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to-

make recommendations, either suo motu or on a request from the licensor, on the following matters, namely:-

need and timing for introduction of new service provider;

terms and conditions of licence to a service provider;

revocation of licence for non-compliance of terms and conditions of licence;

measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;

technological improvements in the services provided by the service providers;

type of equipment to be used by the service providers after inspection

of equipment used in the network;
measures for the development of telecommunication technology and any other matter relating to telecommunication industry in general;
efficient management of available spectrum;

discharge the following functions, namely:-

ensure compliance of terms and conditions of licence;
notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;
ensure technical compatibility and effective inter-connection between different service providers;
regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;
lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;
lay-down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;
maintain register of interconnect agreements and of all such other matters as may be provided in the regulations;
keep register maintained under clause (vii) open for inspection to any member of public on payment of such fee and compliance of such other requirement as may be provided in the regulations;
ensure effective compliance of universal service obligations;

(c) levy fees and other charges at such rates and in respect of such services as may be determined by regulations;

perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act;

Provided that the recommendations of the Authority specified in clause (a) of this sub-section shall not be binding upon the Central Government;

Provided further that the Central Government shall seek the recommendations

of the Authority in respect of matters specified in sub-clauses (i) and (ii) of clause (a) of this sub-section in respect of new licence to be issued to a service provider and the Authority shall forward its recommendations within a period of sixty days from the date on which that Government sought the recommendations:

Provided also that the Authority may request the Central Government to furnish such information or documents as may be necessary for the purpose of making recommendations under sub-clauses (i) and (ii) of clause (a) of this sub-section and that Government shall supply such information within a period of seven days from receipt of such request:

Provided also that the Central Government may issue a licence to a service provider if no recommendations are received from the Authority within the period specified in the second proviso or within such period as may be mutually agreed upon between the Central Government and the Authority:

Provided also that if the Central Government having considered that recommendation of the Authority, comes to a *prima facie* conclusion that such recommendation cannot be accepted or needs modification, it shall, refer the recommendation back to the Authority for its reconsideration, and the Authority may within fifteen days from the date of receipt of such reference, forward to the Central Government its recommendations after considering reference made by that Government. After receipt of further recommendation if any, the Central Government shall take a final decision.

(2). Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India.

Provided that the Authority may notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefor.

While discharging its functions under sub-section (1) or sub-section (2) the Authority shall not act against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.

The Authority shall ensure transparency while exercising its powers and discharging its functions.

Application of certain laws.- The provisions of this Act shall be in addition to the provisions of the Indian Telegraph Act, 1885 (13 of 1885) and

the Indian Wireless Telegraphy Act, 1933 (17 of 1933) and, in particular, nothing in this Act shall affect any jurisdiction, powers and functions required to be exercised or performed by the Telegraph Authority in relation to any area falling within the jurisdiction of such Authority.”

“The Indian Telegraph Act, 1885

Definitions. - In this Act, unless there is something repugnant in the subject or context, -

“telegraph” means any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images, and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, Radio waves or Hertzian waves, galvanic, electric or magnetic means;

Explanation.- “Radio waves” or “Hertzian waves” means electro magnetic waves of frequencies lower than 3,000 giga-cycles per second propagated in space without artificial guide.

“telegraph line” means a wire or wires used for the purpose of a telegraph, with any casing, coating, tube or pipe enclosing the same, and any appliances and apparatus connected therewith for the purpose of fixing or insulating the same;

“telegraph authority” means the Director-General of Posts and Telegraphs, and includes any officer empowered by him to perform all or any of the functions of the telegraph authority under this Act;

4. Exclusive privilege in respect of telegraphs, and power to grant licences.-

Within India, the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs:

Provided that the Central Government may grant a licence, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of India.

Provided further that the Central Government may, by rules made under this Act and published in the Official Gazette, permit, subject to such restrictions and conditions as it thinks fit, the establishment, maintenance and working –

of wireless telegraphs on ships within Indian territorial waters and on aircraft within or above India, or Indian territorial waters, and

of telegraphs other than wireless telegraphs within any part of India,

The Central Government may, by notification in the Official Gazette, delegate to the telegraph authority all or any of its powers under the first proviso

to sub-section (1).

The exercise by the telegraph authority of any power so delegated shall be subject to such restrictions and conditions as the Central Government may, by the notification, think fit to impose”.

“The Indian Wireless Telegraphy Act, 1933

Definitions. – In this Act, unless there is anything repugnant in the subject or context –

“wireless communication” means any transmission, emission or reception of signs, signals, writing, images and sounds, or intelligence of any nature by means of electricity, magnetism, or Radio waves or Hertzian waves, without the use of wires or other continuous electrical conductors between the transmitting and the receiving apparatus.

Explanation – “Radio waves” or “Hertzian waves” means electromagnetic waves of frequencies lower than 3,000 gigacycles per second propagated in space without artificial guide”.

“Indian Telegraph Rules, 1951

SDCA and SDCC have been defined in the Indian Telegraph Rules, 1951. These clauses were inserted by the amendments in the Rules w.e.f. 15.6.1992:

“zzd) ‘Short Distance Charging Area (SDCA)’ means one of the several areas in which a long distance charging area is divided by the telegraph authority and declared as such for the purpose of charging for trunk calls;

zze) ‘Short Distance Charging Centres (SDCC)’ means a particular exchange in a short distance charging area declared as such by the telegraph authority for the purpose of charging trunk calls”.

Local area is defined in clause (w) of these Rules and was inserted w.e.f. 15.8.98. “Local Area” means:

“Local Area” in respect of an exchange system means the area coterminous with the Short Distance Charging Area (SDCA) or where the Telegraph Authority has declared any area served by an exchange system to be the local area for the purpose of telephone connections, then such declared area”.

It would be now appropriate to record the sequence of the events that led to passing of the impugned order dated 25.1.2001 and consequently the amendment of licence agreements with FSPs allowing WLL(M). It is clause/para 18 of the order dated 25.1..2001 (also described as guidelines) which is basically under challenge and we may set out the same herein:

Basic Service Operator shall be allowed to provide mobility to its subscribers with Wireless Access Systems limited within the local area i.e. Short Distance Charging Area (SDCA) in which the subscriber is registered. While deploying such systems, the operator has to follow numbering plan of that Short Distance Charging Area (SDCA) and it should not be possible to authenticate and work with the subscriber terminal equipment in SDCAs other than in which it is registered. The system shall also be engineered so as to ensure that hand over of subscriber does not take place from one SDCA to another SDCA while communicating. Further, the operator shall ensure that the Radio Transmitters may be located and established at a distance of 10 KMs from the international border of India, and such radio transmitters will work in such a fashion that any signal or signals, emanating therefrom, fade out when nearing or about to cross international border and also become unusable with a reasonable distance across such border.

Telecom sector was opened to private sector in early 1990. In 1992 eight tenders were invited for 4 Metros for CMTS (Cellular Mobile Telephone Service), two tenders for each of the Metros i.e. Delhi, Mumbai, Calcutta and Chennai. In November, 1994 eight metro cellular licences were granted. In March, 1995 tenders were issued for Fixed Service Providers for non-exclusive basis in various telecom territorial circles. Tenders were also issued for cellular mobile service for telecom circles separately. Meanwhile Central Government had come up with a National Telecom Policy in 1994. In the introductory part it said that the new economic policy aims at improving India's competitiveness in the global market and rapid growth of exports and another element of the economic policy is attracting foreign direct investment and stimulating domestic investment. It was noticed that telecommunication services were necessary for success of the policy. Policy set out the objectives and one of the objectives was to achieve universal service covering all villages as early as possible. The expression 'universal service' was explained to mean provision of access to all people for certain basic telecom services at affordable and reasonable prices. Policy noticed the present status, revised targets, resources for the revised targets, hardware and value added services. Clauses 8 and 9 deal with value added services and these are as under:

“Value Added Services

In order to achieve standards comparable to the international facilities, the sub-sector of value-added services was opened up to private investment in July 1992 for the following services :

- a. Electronic Mail
- b. Voice Mail

dealing with Basic Services, it is clear that Value Added Services are not part of Basic Services. Value Added Services are considered separate services, especially Radio Paging and Cellular Mobile Telephone. It cannot be said that Value Added Services are something like added features to basic services. Mobile service whether limited or not cannot be said to be Value Added Services to FSP. In common parlance it may be that when we use the term value added with reference to some goods it may mean the goods having added features for which the buyer is prepared to pay extra and that is not the case here.

In pursuance of the tenders which had been invited earlier eight licenses were granted for cellular mobile telephone service in four metros in November, 1994. Tenders were thereafter invited for cellular mobile telephone service for 19 circles telecom circles. These did not include four metros for which licences had already been granted. Tenders were also invited by the DOT for providing telephone service in 20 telecom circles covering whole of the country. These tenders were for fixed telephone service (FTS). The scope of service is mentioned in para two which is as under:

“2.0 SCOPE OF SERVICE:

SERVICE covers transmission of voice or non-voice message inclusive of ISDN (Integrated Services Digital Network) facilities over LICENSEE's PSTN (Public Switched Telephone Network) in real time only. (Store and forward)/ (Store and retrieve) type of message transmission is not permissible.

SERVICE does not cover broadcasting of any messages voice or non-voice over wire or wireless media.

SERVICE does not cover packet switched data, Telex or Telegraph service.

SERVICE does not cover mobile voice and non voice services, Value Added Service such as Voice-Mail, Audio-Text, E-Mail etc. as defined by TELECOM AUTHORITY from time to time”.

Para 4.5 provided for frequency spectrum allocation and it reads as under:

“4.5 FREQUENCY SPECTRUM ALLOCATION

4.5.1. Based on the availability of equipment for Wireless in Local Loop (WILL), in the world market, the Wireless Planning and Coordination Wing (WPC Wing) is considering to allocate suitable slots of frequency spectrum for WILL technologies in the following frequency bands, subject to satisfactory coordination with existing usages:-

- a. 864 to 868 MHz
- b. 824 to 849 MHz
- c. 869 to 889 MHz

4.5.2 Following frequency bands could be considered for fixed point to point radio relay links subject to satisfactory frequency co-ordination:

3.6 to 3.8 GHz for 140 Mbps point to point links.

3.3 to 3.7 GHz for 2 Mbps, 8 Mbps, 34 Mbps point to point and 2 Mbps point to multi-point links.

13.25 to 14.25 GHz for fixed point to point links.

14.8 to 15.35 GHz for fixed point to point links.

17.7 to 19.7 GHz for fixed point to point links”.

When one refers to the list of specifications for terminal equipment with the tender there is a mention of cordless telephony.

Licences for CMTS were issued for telephone circles in view of tenders already issued on 28.12.1995. In the licence agreement Cellular Mobile Telephone Service has been described to mean:

“(e) Cellular Mobile Telephone Service means telecommunication service provided by means of a telecommunication system for the conveyance of Messages through the agency of wireless telegraphy where every Message that is conveyed thereby has been, or is to be, conveyed by means of a telecommunication system which is designed or adapted to be capable of being used while in motion”.

Cellular Telecommunication System means a telecommunication system in which:

- “i) ‘Service Area’ connotes the geographical limits within which the Licensee may operate and offer the services,
the area in which services are provided is divided into a number of Cells;
stations for Wireless Telegraphy comprised in the system are automatically controlled by a central processor;
the radio frequencies used to connect the Stations for Wireless Telegraphy comprised in the system to telecommunication systems which are designed or adapted to be capable of being use while in motion are assigned automatically;

conveyance of message which is in progress as the telecommunication system designed or adapted to be capable of being used while in motion transmitting or receiving the Messages which are being conveyed moves from Cell to Cell is Handed-Off automatically; and

the strength of the emissions of the Stations for Wireless Telegraphy is automatically controlled so as to secure as far as is technically possible that each Station for Wireless Telegraphy can effectively provide services only in the Cell in which it is located.

Fixed Wireless Telegraphy Station means:

“(k) Fixed Wireless Telegraphy Station means any Station for Wireless Telegraphy or Wireless Telegraphy Apparatus which is not used while in motion and which is not used to provide Mobile Radio Telecommunication Services”

Handover means:

“(l) ‘Handover’ means the action of switching a call in progress from one radio channel to another radio channel and is used to allow established calls to continue by switching them to another radio source, e.g. when mobile stations move from one base station area to another”.

These CTMS licenses provided for duopoly regime for cellular operators in their respective telecom circles. FTS licences were, however, granted on non-exclusive basis on various dates in 1997 and all made effective from 30.9.97. In the case of Shyam Tele Link however, an FTS holder of licence, for Rajasthan Circle, licence was made effective from 4.3.98. (FTS is fixed telephone service and FSP with reference to that is fixed service provider). Clause 3 of the Licence granted to FSP provides for Scope of Service. Clauses 3.0, 1.7.2.2(v), 1.7.9.4 and 1.7.9.2 in the license agreement are as under:

“3.0 SCOPE OF SERVICE:

SERVICE covers transmission of voice or non-voice message inclusive of ISDN (Integrated Services Digital Network) facilities over LICENSEE’s PSTN (Public Switched Telephone Network) in real time only. (Store and forward)/ (Store and retrieve) type of message transmission is not permissible.

SERVICE does not cover broadcasting of any messages voice or non-voice over wire or wireless media.

SERVI CE does not cover packet switched data, Telex or Telegraph service.

SERVICE does not cover mobile voice and non voice services, Value Added Service such as Voice-Mail, Audio-Text, E-Mail etc. as defined by TELECOM AUTHORITY from time to time.

“1.7.2.2(v):

For subscriber loop (local loop) optical fiber and wireless are the preferred technologies. Copper cable technology shall not be permitted, except over the last 500 meters of the loop. In exceptional circumstances in rural telephone systems where the penetration of DOT network is marginal, the LICENSEE may be permitted to lay copper cables.

1.7.2.4 SUBSCRIBER END TERMINAL

All terminal equipment shall conform to all relevant specifications so that the end to end quality of performance is not compromised.

The details of terminal equipment shall conform to all relevant specification against which they are to be interface approved shall be as indicated at Annexure 9 to tender documents.

1.7.9.2

The LICENSEE may provide Value added Services, other than mobile telecommunication and paging services after obtaining a separate license from the LICENSOR.

LICENSEE's ISDN subscribers may be able to connect to I-net for which LICENSEE/LICENSEE's subscribers shall pay as per the prescribed I-net tariff.

In the Licence Agreement for CMSP there is a clause which gives right to the licensor to modify the terms of the license and is in the following terms:

“The Licensor reserves the right to modify at any time the terms and conditions of the licence covered under Schedules “A” and B” and “C” annexed hereto, if in the opinion of the Authority it is necessary or expedient to do so in the interests of the general public or for the proper conduct of telegraphs or for security considerations and reasons”.

Similar clause is there in the agreement with FPS which is as under:

“The LICENSOR reserves the right to modify at any time the terms and conditions of the license covered under Schedules “A”, “B” and “C”, annexed hereto, if in the opinion of the LICENSOR it is necessary or expedient to do so in the interests of the general public or for the proper conduct of telegraphs or on security consideration”

MTNL (Mahanagar Telephone Nigam Ltd.) has been granted licence under the Indian Telegraph Act on 27.3.1996 to operate FSP in Delhi and Mumbai. On 10.10.97 Government amended the licence of MTNL allowing it to provide cellular mobile telephone service. This was challenged by the Metros Cellular Operators before TRAI on the grounds that cellular licensees were promised duopoly regime and that TRAI's recommendations were mandatory before introduction of any new service provider. On the complaint of Cellular Operators TRAI stayed the entry of MTNL as third service provider by way of an interim order. This order was challenged by the MTNL in the Delhi High Court. It is not relevant to go into all these proceedings except to note that CMSPs never accepted grant of mobility to MTNL and BSNL (Bharat Sanchar Nigam Ltd.) which operates in whole of the country as FSP except Delhi and Mumbai. COAI (Cellular Operators Association of India) has always been objecting to the grant of mobility to FSP in any form whether in WLL or otherwise. In their letter dated 19.8.98 addressed to the Chairman, Telecom Commission*1,

*1 Telecom Commission was constituted by the Central Government by Resolution dated 11.4.1989. The constitution and functions are described in the Resolution and the same are as under:

“CONSTITUTION OF TELECOM COMMISSION

“1. Telecommunication service is an essential infrastructure for national development. It has impact on social and economic activities. Besides, business, industry and administration depend heavily on information and telecom for productivity, efficiency and their day-to-day operations. Its development, therefore, is vital for nation building.

In order to promote rapid development in all aspects of telecommunications including technology production and services, the Government of India consider it necessary to set up an organisation, which will have responsibility in the entire field of telecommunications.

COAI protested against WLL(M). and reiterated that only cordless telephone with a range of 100 meters could be permitted. The letter also stated that COAI had been assured that license agreement of FSP would be adhered to. On 30.3.98 5th co-ordination meeting between COAI and DOT was held and it is stated that it was recorded in the minutes of the meeting that in basic tender and licence conditions of FSP there is no provision for limited mobility through WLL.

Under FSP licence commercial code fixing tariff had to be got approved from DOT. This is in clause (v) of the licence agreement as under:

“The LICENSEE shall frame a set of commercial code to govern registration, provisioning, operation, maintenance and billing for the service and the same approved by the LICENSOR within 4 weeks of issue of license. LICENSOR shall accord approval after satisfying itself that such code is consistent with the Indian Telegraph Act 1885 and does not violate the upper limit of tariff specified by the DOT and otherwise is in the general interests of the public.

Bharti Telenet Ltd., an FSP holder licence in Madhya Pradesh, submitted its commercial code wherein it mentioned tariff for WLL with limited mobility [WLL (M)] and use of handsets. This was not agreed to by DOT and ultimately Bharti Telenet Ltd. amended their commercial code and deleted wireless mobility from its commercial code. On 8.1.99 while approving the commercial code of Tata

After careful consideration, the Government of India have decided to establish a Telecommunication Commission with full executive and financial powers modelled on the lines of the Atomic Energy Commission.

2. Constitution of the Commission

The Commission will consist of full time and part time Members;

The Secretary to the Government of India in the Department of Telecommunications shall be the ex-officio Chairman of the Commission;

The full time Members of the Commission shall be ex-officio Secretary to the Government of India in the Department of Telecommunications. One of these Members shall be Member for Finance; and

The Secretary and the full time Members of the Commission shall be drawn from the best persons available, including from within the Department of Telecommunications.

Tele Services, another FSP, DOT wrote that “you will not provide mobile handsets to customers or wireless in local loop service”. Similarly on 2.2.99 by their letter to Bharti Telenet Ltd., DOT again clarified that handsets will not be provided to customers for wireless in local loop service.

On 9.6.1999 TRAI wrote a letter to DoT pointing out that COAI by its letter dated 2.6.1999 had requested TRAI to intervene in the matter of proposed introduction of service called “WILL with limited mobility” by the MTNL on commercial basis. In this letter TRAI drew attention of DoT to its earlier letter dated 7.4.99 on the same subject. TRAI said that COAI had in their letter submitted as follows:

“i) The aspect of providing Limited Mobility Services through Wireless in the Local loop is a long pending issue between COAI and DOT. In this connection, they have invited reference to COAI’s letter No.TVR/COAI/219 dated May 08, 1998 addressed to Shri J.R. Gupta, DDG(VAS) giving full details of the ongoing discussions with DOT on the subject.

That the Telecommunication Tariff Order (TTO) 1999 dated March 09, 1999 issued by the TRAI does not provide for any form of Limited mobility service through WILL. In fact, in schedule-I for Basic Services the reference under 3.B and 4.B is clearly to “Fixed Line Telephone Service using Wireless in Local Loop Technology”.

Functions

The Telecom Commission shall be responsible:

For formulating the policy of the Department of Telecommunications for approval of the Government;

For preparing the budget for the Department of Telecommunications for each financial year and getting it approved by the Government; and

Implementation of the Government’s policy in all matters concerning telecommunication.

Within the limits of the budget provision, approved by the Parliament, the Commission shall have the powers of the Government of India, both administrative and financial, for carrying out the work of the Department of Telecommunications.

Even in New Telecom Policy 1999, in the Section on Fixed Service providers (reference 3.1.2 of New Telecom Policy 1999), it is noted that “The FSP shall be free to provide, in a Service Area of Operation, all types of Fixed Services”. There is no mention whatsoever of permission to provide Limited Mobility through WILL in New Telecom Policy 1999”

After recording this submission of COAI, TRAI sought direction as under:

“2. According to COAI, there is no basis for provision of Limited Mobility Services by DOT or MTNL through WLL technology and consequently no justification for issuing tariff for the same. In regard to (ii) above, COAI seems to suggest that since the proposed service is not a separately licensed service, no tariffs have been fixed for the same by TRAI under TTO 1999. This is true inasmuch as MTNL/DOT did not approach TRAI for fixing

tariffs for this service before and after the issue of the TTO 1999, nor was this issue raised during the consultation process leading to the finalization of TTO 1999.

Since the issues raised by COAI are substantive and have far reaching implications relating to the scope of Basic and Cellular Mobile Services as stipulated in the Licence Agreement, I am further directed to request comments from the DOT on the issue at the earliest, and that pending the examination of all the relevant issues in this regard, the commercial introduction of the proposed service by the MTNL/DOT may meanwhile be held in abeyance”.

It may also be noticed that another letter dated 27.8.99 was written by TRAI to DoT stating that MTNL by its letter dated 23.8.99 had sought

5. Chairman

The Chairman, in his capacity as Secretary to the Government of India in the Department of Telecommunications, shall be responsible under the Minister of Communications for arriving at decisions on technical questions and advising Government on policy and allied matters of telecommunications. All recommendations of the Commission on policy and allied matters shall be put to the Minister of Communications through the Chairman.

In case of any difference of opinion in the meetings of the Commission, the decision of the Chairman shall be final, but in financial matters, Member (Finance) of the Commission will have access to Finance Minister.

The Chairman may authorise any Member of the Commission to exercise on his behalf, subject to such general or special orders as he may issue from time to time, such of his powers and responsibilities as he may decide.

permission for approval of tariffs for cellular mobile telephone services in parts of Delhi using CDMA (Code Division Multiple Access) technology with limited mobility. TRAI referred to its earlier letter on the subject and desired DoT to send its comments on the issues raised in this letter as well as those issues in its letter dated 9.6.99. Relevant part of letter dated 27.8.99 of the TRAI reads as under:

“You may recall that TRAI had requested the Department of Telecommunications, through letter No.310-1(5)/99-TRAI , dated 9th June 1999, for comments on the issue relating to the scope of Basic and Cellular Mobile Services, with particular reference to use of CDMA technology with limited mobility. A reminder was sent through letter No.310-1(5)/99-TRAI(Econ.) dated 15th June, 1999, to expedite a reply to the TRAI’s letter of 9th June 1999. A further reminder was sent though TRAI letter No.306-

7/99-TRAI(Econ.), dated 6th July 1999, requesting that “the requisite comments of the Department may please be sent early so as to enable the Authority to take a final view of the matter”. A reply was received from the DOT through letter No.7-8/99-Regln.I/190, dated 14th July 1999, stating that “the matter is being examined and detailed comments will follow shortly”. We are yet to receive any comments on this matter.

As will be observed from MTNL’s communication, MTNL proposes to introduce “cellular mobile telephone service in parts of Delhi using CDMA technology with limited mobility”. This has thrown up a number of policy issues about the classification of various telecom services, use of technology, and scope of services. We have raised the same in our intervention letter to MTNL, a copy of which is enclosed. Issues listed in paragraph 3, items i) to iv) of this letter can perhaps be better clarified by the Department of Communications in its capacity as policy maker and the licensing authority. Some of the issues thrown up are those relating to Government’s policy stance on the :

6. Member Finance

The Member for Finance shall exercise powers of the Government of India in financial matters concerning the Department of Telecommunications except in so far as such powers have been, or may in future be conferred on or delegated to the Department.

The Commission shall have power to frame its own rules and procedures. The Commission shall meet at such time and places as fixed by the Chairman.

The Telecom Commission shall take over all legal and statutory authority vested with the Telecom Board”.

use of any technology other GSM for providing cellular service by the DOT/MTNL as third operators in the country and implications thereof for the existing licensees;

scope and definition of cellular mobile service with limited mobility;

facility of macro cell and micro cell mobile wireless in the local loop reportedly available to DOT/MTNL, being extended to other basic service operators;

possibility of using the same or similar technologies for providing mobility in WLL or cellular service”

These two communications from TRAI were replied to by letter dated 17.9.99 written by DOT to TRAI. It will be advantageous to quote this letter in full:

“Kindly refer to your letters of even No. dated 9th June and 27th August,

1999 regarding above subject. The various issues raised in your above letters have been examined and I have been directed to intimate you as follows:-

Scope of Basic and Cellular Mobile Services:- Scope of Basic and Cellular Mobile Services has been described categorically in NTP – 1999 which is reproduced below for your kind information.

Scope of Basic Service:

The fixed Service Provider shall be free to provide, in his service area of operation, all type of fixed services including voice and non-voice messages and data services, utilizing any type of network equipment, including circuit and/or packet switches, that meet the relevant International Telecommunication Union (ITU)/Telecommunication Engineering Centre (TEC) standards.

Provision of Mobile Services by Private Basic Service Operators is, therefore, not permitted. (emphasis supplied is in the letter itself.)

Scope of Cellular Mobile Telephone Service:-

The Cellular Mobile Service Provider shall be free to provide in its service area of operation, all types of Mobile services including voice and non-voice messages, data services and PCOs utilizing any type of network equipment, including circuit and/or packet switches, that meet the relevant International Telecommunication Union (ITU)/Telecommunication Engineering Centre (TEC) standards.

Use of any technology other than GSM for providing Cellular Service by DoT/MTNL as third operators in the country and implications thereof for the existing licensee:-

The issue has been discussed and deliberated though public consultation while formulating NTP-99 which envisages that Cellular Mobile Telephone Service Providers under the new licensing regime shall be free to provide all types mobile services utilizing any type of network equipment including circuit and/or packet switches that meet the relevant International Telecommunication Union (ITU)/Telecommunication Engineering Centre (TEC) standards. NTP-99 envisages that DoT/MTNL would be the third operator in each Service Area in addition to the existing two CMTS operators and would operate Cellular Mobile Services under the same terms and conditions of the Licence as would be applicable to Private Operators. It is further to inform you that the existing licensees of Cellular Services on their migration to the NTP-99 regime in terms of migration package already offered to them, will also be permitted to expand their networks using any other technology or the GSM

technology to which they have been bound so far as per the existing licenses. A press release to this effect was issued by DOT, copy was sent to TRAI also (copy enclosed as Annex-I for ready reference).

3. Scope and definition of Cellular Mobile Service with Limited Mobility:-

It is to inform you that NTP-99 does not provide for any service known as Cellular Mobile Service with Limited Mobility. However, as per the Licence Agreement for Cellular Mobile Telephone Service, the licensee may start the service in its Service Area in a phased manner. So services provided will be in a way available in a small area to start with till whole of the Service Area is illuminated by expansion of the network.

Facility of macro cell and micro cell Mobile wireless in the local loop reportedly available to DoT/MTNL, being extended to other basic service operators.

The Basic Service Operators are not permitted to provide Mobile Services as per the licence granted to them. NTP-99 also does not envisage the provision of Mobile Service by Fixed Service Providers.

Possibility of using the same or similar technologies for providing mobility in WLL or Cellular Service.:-

In this regard, it is to inform you that NTP-99 envisages utilization of any type of network equipment, including circuit and/or packet switches that meet the relevant ITU/TEC standards by the Cellular Mobile Service Providers.

It has been mentioned in your letter dated 10th September, 1999 that TRAI is releasing a Consultation Paper on 17.09.1999 on these issues. The issues as above are all addressed adequately by the NTP-99 which has been adopted by the Government of India on the basis of report of GOT which in turn had formulated the same after lot of deliberations and public consultations. It is, therefore, felt that there is no relevance of any further public consultation on the subject”.

It was thus after full examination of the issues that the decision was taken by the DOT and thereafter communicated to TRAI. This stand of DOT was reaffirmed on 3.8.2000 when DOT by its letter to ECL Communication, while approving a commercial code, clearly stipulated that mobile handsets shall not be provided to the customers for wireless in local loop services. No one could now be left in any doubt about the interpretation of NTP-99 and licence agreement.

On 26.3.99 Central Government announced New Telecom Policy (NTP-99). Objectives and achievements with reference to NTP 94 and need for New Telecom

Policy were stated. NTP-99 recognized convergence and at the same time stipulated that the new policy framework would look at the Telecom Service Sector as follows:

“Cellular Mobile Service Providers, Fixed Service Providers and Cable Service Providers, collectively referred to as ‘Access Providers’

Radio Paging Service Providers

Public Mobile Radio Trunking Service Providers

National Long Distance Operators

International long Distance Operators

Other Service Providers

Global Mobile Personal Communication by Satellite (GMPCS) Service Providers

V-SAT based Service Providers. “

Role of the three access providers was formulated as under:

“3.1 Access Providers

3.1.1 Cellular Mobile Service Providers

The Cellular Mobile Service Providers (CMSP) shall be permitted to provide mobile telephony services including permission to carry its own long distance traffic within their service area without seeking an additional licence. Direct interconnectivity between licensed CMSP’s and any other type of service provider (including another CMSP) in their area of operation including sharing of infrastructure with any other type of service provider shall be permitted. Interconnectivity between service providers in different service areas shall be reviewed in consultation with TRAI and the same would be announced by August 15, 1999 as a part of the structure for opening up national long distance. The CMSP shall be allowed to directly interconnect with the VSNL after opening of national long distance from January 1, 2000. The CMSP shall be free to provide, in its service area of operation, all types of mobile services including voice and non-voice messages, data services and PCOs utilizing any type of network equipment, including circuit and/or packet switches, that meet the relevant International Telecommunication Union (ITU)/Telecommunication Engineering Center (TEC) standards.

CMSP would be granted separate licence, for each service area. Licences would be awarded for an initial period of twenty years and would be extendible by additional periods of ten years thereafter. For this purpose, service areas would be categorized into the four metro circles and Telecom circles as per the

existing policy. CMSP would be eligible to obtain licences for any number of service areas.

Availability of adequate frequency spectrum is essential not only for providing optimal bandwidth to every operator but also for entry of additional operators. Based on the immediately available frequency spectrum band, apart from the two private operators already licenced, DOT / MTNL would be licenced to be the third operator in each service area in case they want to enter, in a time bound manner. In order to ensure level playing field between different service providers in similar situations, licence fee would be payable by DoT also. However, as DoT is the national service provider having immense rural and social obligations, the Government will reimburse full licence fee to the DoT.

It is proposed to review the spectrum utilisation from time to time keeping in view the emerging scenario of spectrum availability, optimal use of spectrum, requirements of market, competition and other interest of public. The entry of more operators in a service area shall be based on the recommendation of the TRAI who will review this as required and no later than every two years.

CMSP operators would be required to pay a one time entry fee. The basis for determining the entry fee and the basis for selection of additional operators would be recommended by the TRAI. Apart from the one time entry fee, CMSP operators would also be required to pay licence fee based on a revenue share. It is proposed that the appropriate level of entry fee and percentage of revenue share arrangement for different service areas would be recommended by TRAI in a time-bound manner, keeping in view the objectives of the New Telecom Policy.

3.1.2 Fixed Service Providers

The Fixed Service Providers (FSP) shall be freely permitted to establish 'last mile' linkages to provide fixed services and carry long distance traffic within their service area without seeking an additional licence. Direct interconnectivity between FSP's and any other type of service provider (including another FSP) in their area of operation and sharing of infrastructure with any other type of service provider shall be permitted. Interconnectivity between service providers in different service areas shall be reviewed in consultation with TRAI and the same would be announced by August 15, 1999 as a part of the structure for opening up of national long distance. The FSP shall be allowed to directly interconnect with the VSNL after the opening up of national long distance from January 1, 2000. The FSP may also utilize last mile linkages or transmission links within its service area made available by other service providers. The FSP shall be free to provide, in his service area of operation, all types of fixed services including voice and

non-voice messages and data services, utilizing any type of network equipment, including circuit and/or packet switches, that meet the relevant International Telecommunication Union (ITU) / Telecommunication Engineering Center (TEC) standards.

The FSP shall be granted separate license, on a non-exclusive basis, for each service area of operation. Licences would be awarded for an initial period of twenty years which shall be extended by additional periods of ten years thereafter. The FSPs shall be eligible to obtain licences for any number of service areas.

While market forces will ultimately determine the number of fixed service providers, during transition, number of entrants have to be carefully decided to eliminate nonserious players and allow new entrants to establish themselves. Therefore, the option of entry of multiple operators for a period of five years for the service areas where no licences have been issued is adopted. The number of players and their mode of selection will be recommended by TRAI in a time-bound manner.

The FSP licencees would be required to pay a one time entry fee. All FSP licencees shall pay licence fee in the form of a revenue share. It is proposed that the appropriate level of entry fee and percentage of revenue share and basis for selection of new operators for different service areas of operation would be recommended by TRAI in a time-bound manner, keeping in view the objectives of the New Telecom Policy.

As in the case for cellular, for WLL also, availability of appropriate frequency spectrum as required is essential not only for providing optimal bandwidth to every operator but also for entry of additional operators. It is proposed to review the spectrum utilisation from time to time keeping in view the emerging scenario of spectrum availability, optimal use of spectrum, requirements of market, competition and other interest of public.

The WLL frequency shall be awarded to the FSPs requiring the same, based on the payment of an additional one time fee over and above the FSP entry fee. The basis for determining the entry fee and the basis for assigning WLL frequency shall be recommended by the TRAI. All FSP operators utilising WLL shall pay a licence fee in the form of a revenue share for spectrum utilization. This percentage of revenue share shall be over and above the percentage payable for the FSP licence. It is proposed that the appropriate level of entry fee and percentage of revenue share for WLL for different service areas of operation will be recommended by TRAI in a time-bound manner, keeping in view the objectives of the New Telecom Policy.

3.1.3 Cable Service Providers

Under the provisions of the Cable Regulation Act, 1995, Cable Service Providers (CSP) shall continue to be freely permitted to provide 'last mile' linkages and switched services within their service areas of operation and operate media services, which are essentially one-way, entertainment related services. Direct interconnectivity between CSP's and any other type of service provider in their area of operation and sharing of infrastructure with any other type of service provider shall be permitted.

Interconnectivity between service providers in different service areas shall be reviewed in consultation with TRAI and the same would be announced by August 15, 1999 as a part of the structure for opening up national long distance. In view of convergence, it is highly likely that two-way communication (including voice, data and information services) through cable network would emerge in a significant way in future. Offering of these services through the cable network would tantamount to providing fixed services. Accordingly, in case the above two-way communication services are to be provided by CSPs utilising their network, they would also be required to obtain FSP licence and be bound by the licence conditions of the FSPs, with a view to ensure level playing field.

Thus NTP-99 stipulated that CMSPs are free to provide all types of mobile services. FSPs are free to provide all types of fixed services. Cable operators when they wished to provide two way communication i.e. fixed phone service, they could do so only by securing separate fixed service licence. When on 7.4.99 DOT issued tariff circular for telephone services and also fixed tariff for WLL technology having limited mobility it was objected to by COAI.

On 23.4.99 DOT sought recommendations from TRAI on the issue of fresh licences for fixed service providers. Relevant portion of this letter reads as under:

“The New Telecom Policy 1999 announced on 26.3.99 envisages the entry of multiple operators for a period of five years for the service areas where no licences have been issued. The number of players and their mode of selection are to be recommended by TRAI in a time bound manner. The Policy also envisages that the Fixed Service Providers (FSPs) licensees shall pay one time entry fee and licence fee in the form of a revenue share. The appropriate level of entry fee and the percentage of revenue share and the basis of selection of new operators would be recommended by the TRAI.

Out of the 21 Telecom Circles, licences have been issued for 6 circles namely, Andhra Pradesh, Madhya Pradesh, Gujarat, Maharashtra, Punjab and Rajasthan. In respect of 7 circles, Letters of Intent were issued but the licences

have not been signed. These 7 Circles are Delhi, Haryana, U.P.(West), Orissa, Tamilnadu, Karnataka and Bihar. The remaining 8 circles namely, Andaman & Nicobar Islands, Assam, North East, Himachal Pradesh, J & K, U.P. (East), Kerala and West Bengal are vacant.

It is requested that recommendations of the TRAI for the issue of fresh licences in the vacant circles may be made in a time bound manner at the earliest, keeping in view the objectives of the New Telecom Policy on (i) Number of private service providers in a circle besides DOT; (ii) Selection criteria; and (iii) Licence Fee structure. The recommendation should also include other facets of licence conditions”.

It is stated that on this date a separate reference simultaneously was also made by DOT to TRAI for recommending fourth CMSP in view of NTP-99. On 12.7.99 DOT wrote letter to TRAI with reference to earlier recommendations for FSP and CMSP and now seeking recommendations with reference to licence fee arrangements under NTP-99 regime. This letter reads as under:

“I am directed to inform that pursuant to announcement of New Telecom Policy-1999 (NTP-99), the Government have now taken the following decisions.

Permit migration of existing licensees or Cellular, Basic and other Value Added Telecom Services to NTP-99 regime. Under the scheme of migration, it is the Government’s intention to issue additional licences early for Cellular as well as Basic Telecom Services in the Service Areas in which the existing licensees opt to migrate to NTP-99 regime.

In the case of Cellular Services, as present availability of spectrum DOT/MTNL will be the third operator. DoT/MTNL would pay license fee as per NTP-1999. In addition there will be one more private operator, bid for this license will be issued on the new licensing regime i.e. a one time entry fee plus percentage share of revenue as license fee; decision on the percentage share of more licences in future would be decided based on emerging scenario of Spectrum availability and based on recommendations of TRAI (as per NTP-99, TRAI will review this as required and no later than every two years).

In the case of Basic Telecom Services, bids for new licences to be invited on the new licensing regime i.e. one time entry fees plus percentage share of revenue as license fee; decision on numbers of operators and the percentage share of revenue to be taken on receipt of TRAI’s recommendations.

The cut off date for change over to NTP-99 regime for the existing

Cellular and Basic Service Operators will be 1.8.1999. Starting from this date, the percentage of gross revenue to be paid towards licence fee will be the same as would apply in future to the new licensee(s) in the same service area. The licence fee dues payable upto 31.7.1999 would be treated as the Entry Fee for the existing operators. The new operators will bid for the Entry Fee.

In the light of the above decisions of the Government keeping in view the earlier references sent to TRAI vide letter No.842-153/99-VAS/Vol.IV dated 23.4.1999 regarding CMSP licences and No.10-6/99-BS.I dated 23.4.1999 regarding basic service licences and also keeping in view the time frame of migration, TRAI may kindly provide their recommendations on an urgent basis regarding the licence fee arrangement (revenue share) for the existing Cellular Metros, Cellular Circles and Basic Service Operators to be made applicable to them on migration w.e.f. 1.8.1999 (the same percentage of revenue share will be made applicable to the new Licensees of Cellular Metros, Cellular Circles and Basic Service respectively).

I am, therefore, directed to request the following:

Recommendation of TRAI as per para 2 above, may kindly be provided latest by this date, the Government will take interim decision to fix up an appropriate percentage of gross revenue as per the provisional licence fee to be adjusted retrospectively as per final Government decision to be taken on receipt of recommendations of TRAI. This will enable the Government to implement the policy decision for migration of the existing licensees to NTP-99 regime with effect from 1.8.99.

The recommendations regarding the number of new operators for Basic Telecom Service as sought under letter No.10-6/99-BS.I dated 23.4.1999 may be expedited.

- (c) Other relevant recommendations in regard to Basic Telecom Services as sought under letter No.10-6/99-BS.I dated 23.4.1999 and Cellular Services vide letter No.842-153/99-VAS/Vol.IV dated 23.4.1999 may also be provided”.

On 22.7.99 DOT offered the proposed package for migration of existing licensees of cellular (Metros and Telecom Circles) and Basic Telecom Services to New Telecom Policy-1999 regime. Relevant terms of the proposed package are as under:

“In accordance with Government approval, the following Package is proposed for migration of the existing Cellular (Metros and Telecom Circles) and

Basic Telecom Service Operators to NTP-99 regime:

The cut off date for change over to NTP-99 will be 1.8.99.

The licensee will be required to pay one time Entry Fee and License Fee as a percentage share of gross revenue under the licence. The Entry Fee chargeable will be the licence fee dues payable by existing licensees upto 31.07.1999, calculated upto this date duly adjusted consequent upon notional extension of effective date as in para (ix) below, as per the Conditions of existing licence.

The Licence fee as a percentage of gross revenue under the licence shall be payable w.e.f. 1.8.99. The Government will take a final decision about the quantum of the revenue share to be charged as licence fee after obtaining recommendations of the Telecom Regulatory Authority of India (TRAI). In the meanwhile, Government have decided to fix 15% of the gross revenue of the Licensee as provisional license fee. The gross revenue for this purpose would be the total revenue of the Licensee company excluding the PSTN related call charges paid to DOT/MTNL and service tax collected by the licensee on behalf of the Government from their subscribers. On receipt of TRAI's recommendation and Government's final decision, final adjustment of provisional dues will be effected depending upon the percentage of revenue share and the definition of revenue for this purpose as may be finally decided.

A total of at least 35% of outstanding dues including interest payable as on 31.7.1999 and LD Charges in full will have to be paid on or before 15.8.1999. The amount paid, if any, against the earlier demand sent under letter dated 25.1.99 for paying 20% or more of the outstanding dues, may be adjusted at licensee's option. The balance dues will have to be paid on or before 31.1.2000 alongwith interest calculated upto the actual date of payment.

Even where the existing bank guarantees (FBG), have been encashed earlier, these will need to be kept alive/recouped simultaneously with the acceptance of this package. The value of the financial bank guarantee(s) will have to be further enhanced within a period of four months i.e. by 30.11.1999 so as to cover the outstanding amounts due including further sums which may become due.

If either of the cellular operator in a given service area does not accept the package, both the existing operators will continue in the existing licensing arrangement until the validity of the present licences.

Consequent upon migration to the NTP-99, the licensees will forego the right of operating in the regime of limited number of operators as per the existing licence agreement and would operator in a multipoly licensing regime i.e. additional licenses without any limit may be issued in a given Service Area.

There shall be a lock-in- of the present share-holding for a period of five years counted from the date of licence agreement (effective date). Transfer of share holding directly or indirectly through subsidiary or holding companies shall not be permitted during this period. However, issue of additional equity share capital by the licensee companies/their holding companies by way of private placement/public issues shall be permitted. Further, the lock-in provisions shall not be applicable in case the shares are transferred pursuant to enforcement of pledge by the lending financial institutions/banks due to events of defaults committed by the borrowers with the condition that such shares should have been pledged for investment only in the particular licensed project.

For the purpose of calculation of outstanding licence fee upto 31.7.1999, the effective date of all the licenses of Cellular Telecom Circles and Basic Telephone Services will be notionally extended by a period of six months. This does not apply to metro cellular licences. This is with the further condition that where extension of effective date has been given earlier due to whatever circumstances, further extension will be given after deducting the period of extension already given subject to the total extension period not exceeding six months. In cases where extension of period of more than six months has already been given, there will be no further change.

The liquidated damages as per the existing licence agreement shall be paid latest by 15.8.99.

The period of licence shall be 20 years starting from the effective date of the existing licence agreement.

Migration to the NTP-99 on the conditions mentioned above will be permitted on the premise that the aforesaid conditions are accepted as a package in its entirety and simultaneously all legal proceedings in Courts, Tribunals, Authority or in Arbitration instituted by the licensee and Associations of Cellular and Basic Service Operators (COAI & ABTO) against DoT or UOI shall be withdrawn. Further any dispute with regard to the license agreement for the period upto 31.7.1999 shall not be raised at any future date. The acceptance of this package will be deemed as a full and final settlement of all existing disputes

whatsoever irrespective of whether they are related with the present package or not.

After the terms and conditions of the package are accepted, amendments to the existing licence agreement will be signed between the licensor and the licensee”.

The proposed migration package was accepted by CMSPs and FSPs and they migrated to NTP-99.

On 14.12.99 TRAI issued Consultation Paper for introduction of 4th CMSP and gave its recommendation on 23.6.2000. While noting the relevant features of NTP-99 TRAI observed the New Policy Framework for Cellular Mobile Service Providers as follows:

CMSPs would be granted separate license, for each service area, Licenses would be awarded for an initial period of twenty years and would be extendible by additional periods of ten years thereafter.

Apart from the two private operators already licensed, DOT/MTNL would be licensed to be the third operator in each service area in case they want to enter, in a time bound manner.

The entry of more operators in a service area shall be based on the recommendations of the TRAI who will review this as required and no later than every two years.

CMSPs would be required to pay a one-time entry fee.

Apart from the one time entry, CMSPs would also be required to pay license fee based on a revenue share. The appropriate level of entry fee and percentage of revenue share arrangement for different service areas would be recommended by TRAI.

The basis for determining the entry fee and the basis for selection of additional operators other than DoT/MTNL) would be recommended by the TRAI

The CMSP shall be free to provide, in its service area of operation, all types of mobile services including voice and non-voice messages, data services and PCOs utilizing any type of network equipment, including circuit and/or packet switches, that meet the relevant International Telecommunication Union (ITU)/Telecommunication Engineering Centre (TEC) standards.

Direct interconnectivity between licensed CMSPs and any other type of service provider (including another CMSP) in their area of operation

including sharing of infrastructure with any other type of service provider shall be permitted.

Interconnectivity between service providers in different service areas shall be reviewed in consultation with TRAI.

The CMSP shall be allowed to directly interconnect with VSNL after opening of national long distance from January, 2000.

The Cellular Mobile Service Providers (CMSP) shall be permitted to provide mobile telephony services including permission to carry its own long distance traffic within their service area without seeking an additional licence”.

On 12.6.2000 TRAI issued Consultation Paper on licensing issues relating to Fixed Service Providers for which recommendations had been sought on 23.4.99 and sent in its recommendations to DOT on 31.8.2000. In the Consultation Paper on licensing issue relating to Fixed Service Providers, TRAI noted the policy frame work for basic telephony under NTP-1999 as under:

“17. In regard to the provision of basic telephone service, NTP 199 envisages the following new framework:

Fixed Service Providers (FSPs) shall be granted separate license on a non-exclusive basis for each service area of operation.

Licenses would be awarded for an initial period of twenty years that can be extended by additional periods of ten years thereafter. FSPs shall be eligible to obtain licenses for any number of service areas.

An FSP shall be free to provide, in its service area of operation, all types of fixed services including voice and non-voice messages and data services, utilizing any type of network equipment, including circuit and/or packet switches that meet the relevant ITU/TEC standards.

FSP shall be freely permitted to establish ‘last mile’ linkages to provide fixed services and carry long distance traffic within their service area limited to their own customers without seeking an additional license.

An FSP may also utilize last mile linkages or transmission links within its service area made available by other service providers

Direct interconnectivity between FSPs and any other type of service provider (including another FSP) in their area of operation and sharing of infrastructure with any other type of service provider shall be permitted.

Interconnectivity between service providers of different service areas shall be reviewed in consultation with TRAI and the same would be announced as part of the structure for opening up of national long distance.

FSPs shall be allowed to directly interconnect with the VSNL after the opening up of national long distance from January 1, 2000.

Market forces will ultimately determine the number of FSPs. During transition, however, number of entrants will have to be carefully decided to eliminate non-serious players and allow new entrants to establish themselves. The option is, therefore, adopted to have entry to multiple operators for a period of five years for the service areas where no licenses have been issued.

FSP licensees would be required to pay one time entry fee. All FSP licensees shall pay license fee in the form a revenue share.

Number of players, their mode of selection, appropriate level of entry fee and percentage of revenue share will be recommended by TRAI.

Since availability of appropriate frequency spectrum is essential not only for providing optimal bandwidth to every operator but also for entry of additional operators, spectrum utilization would be reviewed keeping in view the emerging scenario of spectrum availability, optimal use of spectrum, requirements of market competition and public interest.

WLL frequency shall be awarded to FSPs on the payment of an additional one-time fee (over and above the entry-fee for obtaining the FSP license). The basis for determining this one-time fee and for assigning WLL frequency shall be recommended by TRAI.

All FSP operators utilizing WLL shall also pay a license fee in the form of a revenue share for spectrum utilization. This percentage of revenue shall be over and above the percentage share payable for the FSP license. TRAI would recommend the level of percentage revenue share for WLL for different service areas of operation.

NTP 1999 also envisages the participation of Cable Service Providers (CSPs) in providing last mile linkages and switched services within their areas of operation. It permits direct inter-connectivity between CSPs and any other type of service provider including share of infrastructure within their area of operation.

In view of convergence two-way communication (including voice, data and information services) through cable networks would emerge in a significant way in future. CSPs would be required to obtain an FSP

license for providing such two-way communication services.

It is expected that the aforementioned guidelines of NTP-1999 would provide a framework for the spread of telecom services and support business cases that ensure adequate rate of return on investment, and facilitate quick rollout of the telecom network by new entrants. Allotment of fresh licenses for different Circles is to be taken up under the new policy initiatives of NTP 1999”.

We may also note some relevant observations of the TRAI in this Consultation Paper as follows:

“ALTERNATIVES TO COPPER BASED LOCAL LOOP.

A number of alternatives to copper based local loop have emerged notable amongst these being wireless link also called WLL systems. WLL systems are applications of cellular technology (either micro or macro) to connect a fixed telephone set to the exchange through an open interface (v 5.2). Such systems employing different access technologies (CDMA/GSM etc.) & operating in different frequency bands are increasingly becoming available and are likely to play an important role in increasing the level of competition for the last mile connection. NTP -99 has treated WLL as a technique to provide connectivity for fixed service. It also stipulates separate frequency bands for WLL i.e. other than mobile. ITU has defined WLL as follows:

‘The proper terms to use for WLL, which has received wide acceptance is Wireless Access which is defined as “End User Radio Access Connection(s) to Core Networks’.

Core Networks include for example, PSTN, ISDN, PLMN PSDN internet, WAN/LAN, CATV, etc. Wireless Access may be considered from a number of perspectives, such as:

Fixed Wireless Access” Wireless Access application in which location of the end-user termination and the network access point to be connected to the end-user are fixed.

(ii) Mobile Wireless Access: Wireless Access System in which the location of end-user termination is mobile.

Nomadic Wireless Access: Wireless Access Application in which the location of end user termination may be in different places but it must be stationary while in use.

The basic service license issued by the DOT stipulates WLL as the preferred method for providing basic service. However, the WLL systems

employed till date in India do not provide all the bearer, tele & supplementary services available to a wire-line subscriber. Such systems have been found to be deficient in regard to Internet access, as the speed at which Internet nodes can be accessed is limited to only 9.6 Kbits. However, third generation wireless systems are round the corner and some of these limitations are likely to be removed in the next 3/5 years.

POSSIBILITIES OF INFRASTRUCTURE SHARING

Cellular Mobile Telephone Service (CMTS) networks have been expanding steadily in Circles, covering progressively larger geographical areas in various States. Mobile communications are becoming an important tool for business and domestic use and are tending to improve the ability of Cellular Mobile Service Providers (CMSPs) to provide ubiquitous coverage on all mobile networks. In fact, the two different network platforms PSTN and CMTS) offer the ability to carry essentially similar kind of services. One can foresee that in not too distant a future the distinction between the two services may well disappear. A few years down the line, there may be a case for fixed service provider to get license for providing mobile services also and vice versa so that the two technologies can be leveraged to the best advantage of the consumer. As of now, however, it seems that the basic service provider has his plaice determined and role well cut out in the Indian Telecom Services market.”.

ACHIEVING RURAL CONNECTIVITY

“11. In this context it is noteworthy that private sector basic service providers have not made any noticeable progress in providing VPTs despite this being a condition of the license granted to them. As against the expected 42,856 VPTs to be provided by the private sector operators, they had till the end of September 1999, succeeded in providing only 12 VPTs, which by any standard is dismal performance. The commitments made in this regard at the time of getting the license have clearly not been kept. The reasons for this gross under-performance need to be gone into carefully as this was one of the criteria for the grant of the license to them. New licensees will have to weigh the constraints carefully and think of ways and means by which such commitments can be fulfilled”.

SCOPE OF SERVICE

“21.cAs per the existing license agreement, the scope of service of basic service provider is as follows:

Transmission of voice or non-voice messages inclusive of ISDN facilities over licensee’s public switched telephone network (PSTN) in real time only. (Store and forward)/(Store and Retrieve) type of message

transmission is not permissible.

Broadcasting of any voice or non-voice messages over wire or wireless media is not covered.

Packet switched data, telex or telegraph service is not covered.

It also does not cover mobile voice and non-voice services, value-added service such as voice mail audio text, E-mail etc. as defined by licensor from time to time.

Separate licenses are required for providing any value-added services.

After detailing the background and noting various factors some of which we have set out above TRAI raised issues for consideration and two of these being on the scope of service and access network (xiv and xxiv) as follows:

“(xiv) As per the existing Basic Service License (granted to six operators), following is the definition of Basic Service:

‘SERVICE covers transmission of voice or non-voice message inclusive of ISDN facilities over LICENSEE’s PSTN in real time only. (Store and forward) (Store and retrieve) type of message transmission is not permissible.

SERVICE does not cover broadcasting of any messages voice or non-voice over wire or wireless media.

SERVICE does not cover packed switched data, Telex or Telegraph services.

SERVICE does not cover mobile voice and non-voice services, Value Added Service (VAS) such as Voice-Mail, Audio-Text, E-Mail, etc. as defined by Licensor from time to time”.

In the light of the latest technological developments in both switching and transmission technologies, do we need to change the above definition of basic service? If the answer is yes, its impact on other licensees such as CMTS need to be discussed.

Should a FSP be allowed to exercise any of the following options or a combination thereof for provisioning of service..

Build its infrastructure

Buy and/or lease infrastructure from other service/infrastructure providers.

Buy and/or lease bandwidth from other service/Infrastructure Providers.

“xxiv) The existing basic service license prohibits mobility of the

customers' terminal or telephone set. Similarly, the mobile service provider is debarred from giving fixed service. Should we change terms and conditions of the existing license both the fixed service provider and Mobile Service Provider to accommodate the concept of limited mobility? If so, the scope of 'limited mobility' needs to be defined i.e. whether it should be at par with the mobility of a cordless telephone set (say 100 M) or that of cellular mobile set which is in Kms. Suggestions in this regard are solicited during the consultation".

Though in the Consultation Paper there is reference to limited mobility for FSP no such recommendations were sought by DOT in its letter dated 23.4.1999 seeking recommendations of the TRAI. In the recommendations sent on 31.8.2000 there was no recommendation by TRAI for any limited mobility in FSP or use of hand held sets. Recommendations were made for 15 vacant FSP Circles and one time entry fee was recommended along with performance bank guarantee. Minimum pace of roll out obligation was also stipulated. In these recommendations two factors may be noted (i) relating to number of Basic Service Operators in service area and (ii) building of sub-networks by franchisees to spread the network beyond the POP (Point of Presence)*2.

Recommendations of the TRAI on FSPs was considered by the Government. By letter dated 9th October, 2000, Secretary DOT wrote to the Chairperson, TRAI that "the recommendations have been considered by the Government and TRAI is requested to reconsider the issues enclosed in Annexure-I". Then the Secretary adds:

"3. I take this opportunity to thank TRAI for making recommendations in such a short time which will pave the way for making available affordable communications to the citizens of the country.

As per Chapter III, Clause 11(d) of TRAI Amendment Act of 2000, TRAI is requested to consider the reference made on the points indicated in the Annexure-I. I look forward to receive the reconsidered opinion within 15 days as stipulated in the said Act.

If we now refer to Annexure –I issues raised for consideration are : (i) roll out obligations for new and existing FSP licensees, net work requirements, paid up equity capital, one time entry fee, licence fee in the form of revenue share and (ii) waiving of licence fee for a limited period of four years in respect of existing licensees, revenue share definition, resale, infrastructure providers, franchising of services, billing services, access deficit charge.

***2Point of Presence (POP):**

"The physical connection from the subscriber's premises to the carrier's

POP(Point of Presence). The local loop can be provided over any suitable transmission medium, including twisted pair, fiber optic, coax, or microwave. Traditionally and most commonly, the local loop comprises twisted pair of pairs between the telephone set, PBX or key telephone system, and the LOC (Local Exchange Carrier) CO (Central Office). As a result of the deregulation of inside wire and cable in the United States, the local loop typically goes from the demarc (demarcation point) in the phone room closet, in the basement or garage, or on the outside of the house, to the CO. The subscriber or building owner is responsible for extending the connection from the demarc to the phone, PBX, key system, router, or other CPE device. See also Demarc. (Newton's Telecom Dictionary – P.523 of the 16th edition)".

It was here it is strongly alleged by the petitioners that Government in the garb of faster roll out made an absolutely new case for allowing FSPs to use hand held terminals contrary to its longstanding consistent stand. As a matter of fact, there was no occasion for the Government to ask the TRAI to reconsider the issue of hand held subscribers terminals by FSP and no recommendations to that effect was made neither sought by the Government. Sub paras Paras (a) to of para 2.9 of annexure-I set out the case of the Government for consideration by TRAI. It is part of Annexure-I and we reproduce the same:

2.9 MEANS FOR FASTER ROLL OUT

TRAI in their recommendation A(ii) has noted that the existing licence for basic service stipulates wireless as the preferred technology for subscriber loop (local loop). It has further noted that employment of this technology i.e. wireless would appear to be inescapable if quick roll out and connection on demand in congested areas is to be given as per TRAI's quality of service guidelines. The experience has shown that Right of Way is also a limited resource, as Highway/Environmental authorities do not permit repeated diggings along the highways and vacant land with forestation. It has further noted that a factor which could inhibit the entry of large number of players is the paucity of frequency spectrum which is a scarce national resource and this will be required by the basic service operator to provide the last mile connectivity if they employ WLL technology.

Para 1.3 of NTP-99 the need for a new telecom policy states that convergence of both markets and technologies is a reality that is forcing re-alignment of the industry. It also mentioned that this convergence now allows operators to use their facilities to deliver some services reserved for other operators, necessitating a re-look into the existing policy framework.

The objective of NTP-99 (para 2) states that access to telecommunications

is of utmost importance for achievement of the country's social and economic goals. Availability of affordable and effective communication for the citizens is at the core of the vision and goal of the telecom policy. Another objective of NTP-99 (para 2 of NTP-99) stipulate to transform in a time bound manner, the telecom sector to a greater competitive environment in both urban and rural areas providing equal opportunities of level playing field for all the players.

The tender for basic service operation and the licence agreement based on that specifies that for subscriber loop, optical fibre and wireless are the preferred technologies. The agreement does not bar specifically deployment of the hand held subscriber sets. Later on in a clarification, the permission for use of subscriber hand held sets was not granted. It was felt that this may amount to a mobile service for which separate licence is required & frequency band was different. However, it may be worthwhile to mention that today's subscriber does not want to be tied down by fixed cord of telephone instrument. A wireless subscriber terminal cannot be fixed as a wireline terminal and at the most it can be portable instead of hand held.

At present the following frequency bands have been stipulated for allocation in respect of WLL operations by existing Basic Telephone Service providers:

864 to 868MHz

824 to 849 MHz paired with 869 to 889 MHz

1.8 to 1.9 GHz

The Cellular Mobile service was permitted with only Digital GSM technology and not even with analogue technology. The band allocated to cellular mobile operator, as per GSM technology is in Frequency band of 890-915 MHz paired with 935-960 MHz and 1710-1785 MHz paired with 1805-1880 MHz which do not fall within the bands indicated above. The above bands are for basic and mobile services operation as per NFAP-2000 and does not use GSM technology. However, the band between 1.8 to 1.9 GHz is to be coordinated with Defence on case to case basis. As per foot note, frequency band paired with 869 to 889 MHz has been earmarked for WLL services. 864-868 MHz for requirement of EPABX for wireless extension requirement of Cellular and WLL frequency in 1.7 to 2 GHz 10 ... 10 MHz in frequency band 1710 to 1785 paired with 1805 to 1880 MHz. 1880 to 1900 MHz for DECT is to be coordinated with Defence on case to case basis. With duopoly regime, it was decided that 40% spectrum will be allocated from the above band to each of the operator and balance 20% will be allotted on first request. However, this requires a re-look with free entry. With free entry, three or four basic service operators can be expected and spectrum

can be considered for sharing with about 4 MHz for each.

The technologies available for the frequency bands are also different and it is not possible for a subscriber of one technology to ram into another technology. Thus, a subscriber of basic service operator having a hand held set has a disadvantage of not being able to roam across the board in various networks in the country. The agreement for basic service provides for cordless telephones and WLL technology, but there is no mention of TEC specification of TEC at that time for the same. The intention and thrust of private service was to infuse new technology to provide affordable world-class communication to subscribers.

As already pointed out above, the cost of hand held instrument is around Rs. 6,000/- against the cost of about Rs. 15,000/- for fixed wireless instrument. Thus, it amounts to saying that in order to ensure inconvenience to the subscribers, the operator has been asked to invest more in the network, which is against the basic principles of rapid roll out, affordable communication to the subscribers at reasonable cost.

ABTO, CII and ASSOCHAM has proposed full mobility for FSPs within the service area while COAI has apposed it indicating that this will be against the level playing field as the cellular operator has paid large amount of entry fee and are paying spectrum charges.

It is worthwhile to mention that spectrum charges for use of frequencies are based on same formula which is applicable for basic service operator as well as cellular mobile service operators.

NTP-99 stipulates protection for existing basic service operators for a period of five years and four operators in cellular service. It is worthwhile to mention that initially GSM digital technology was envisaged for mobile service, which may have been a reason for restricting the number of operators so as to provide spectrum to all the operators with reasonableness in 800 MHz band of GSM but as per the migration package offered after NTP-99, both cellular and basic service operators have agreed to operate in multiply regime. Thus, any contention for protection of service sector for any of the operators is not in line with the unconditional acceptance given by them to the migration package.

Further, basic service operators have pointed out that with the present low amount of entry fees it will be possible very easily for a cellular operator to become a basic service operator while vice-versa it will not be possible.

NTP-99 as per para 3.1.2 envisaged that WLL frequency shall be awarded to the FSPs requiring the same, based on the payment of an additional one time fee over and above the FSP entry fee. The basis for determining the entry fee and

the basis for assigning WLL frequency shall be recommended by the TRAI. All FSP operators utilizing WLL shall pay a licence fee in the form of a revenue share for spectrum utilization. This percentage of revenue share shall be over and above the percentage payable for the FSP licence. NTP-99 further proposed that the appropriate level of entry fee and percentage of revenue share for WLL for different service areas of operation will be recommended by TRAI in a time bound manner, keeping in view the objectives of the New Telecom Policy.

Telecom Commission has recommended the uses of hand held terminal in local are i.e. Short Distance Charging Area (SDCA). This is to be on wireless Local Loop Platform, which means that Numbering Plan of local area is to be followed and Inter Base Station Controller/Manager authentication is not permitted. No basic service operator is to be allocated frequency from GSM band.

However, while considering the recommendations of Telecom Commission keeping in view the need of new telecom policy for free competition, the objectives of NTP-99, the subscriber convenience, available frits of technology and above facts, Government felt that hand held terminals in wireless access technology with full mobility within the service area may be permitted to the basic service operator also. This will also ensure a competition and deregulation of the cellular sector keeping pace with the trends in National Long Distance, International Long Distance. Basic Service sector of telecommunications.

It is worthwhile to make clear that the frequency in GSM band in of 890-915 MHz paired with 1805-1880 MHz will not be allocated under any circumstances to the basic service operators in order to avoid any conflict of interest with present cellular operator.

Response by TRAI to the issues on which it had given its recommendations on 31.8.2000 and DOT required reconsideration, was sent on 31.10.2000. At the same time it was noted by the Chairman, TRAI that there was yet another issue sent to TRAI for reconsideration which related to means for faster roll out. Here the Government requested TRAI to consider the suggestions and make suitable recommendations in respect of scope of area of hand held subscribers terminals under wireless access system, basis for assigning WLL frequency and the amount of entry fee and spectrum charges as a percentage of revenue to be charged from the basic service operator for extending the above facility in respect of existing as well as future basic service licensees, so as to ensure a level playing field with the cellular operators

There was nothing in the earlier recommendations of the TRAI regarding use of handheld subscribers terminals, nor was any such recommendation

sought from TRAI on this issue in DOT's letter dated 23.4.99 and there could not, therefore, be any question of reconsideration by the TRAI in terms of the fifth proviso to Section 11 of the TRAI Act. Chairman, TRAI, recognized this and in his letter dated 31.10.2000 to the Secretary DOT told him that use of WLL services i.e. WLL (M) was not part of the earlier recommendations of TRAI and therefore usual process of consultation will be gone through. Chairman also wrote that TRAI was conscious about the time frame within which this decision needs to be taken and shall, therefore, endeavour to complete the process and submit its recommendations to the Government, as early as possible and that it is estimated that it should be possible to submit the relative recommendations in about 5-6 weeks from now.

On 3.11.2000 TRAI issued Consultation Paper on limited mobility by use of Wireless in Local Loop by BSPs after the Chairman, TRAI wrote to the Secretary, DOT on 31.10.2000. In the preface to the Consultation papers issued on Limited Mobility by use of WLL it is mentioned that local loop has so far been provided mostly by laying underground cables or construction of overhead alignment. Typical length of this wire based on local loop is about 8/10 Kms.. Then it adds:

“The laying of underground copper cable specially in congested areas is not only cumbersome but also time consuming. This comes in the way of quick roll out of Telecom Networks. To overcome this problem, one of the solutions is the deployment of Wireless in Local Loop (WLL) systems in the last mile. WLL systems are application of Cellular technologies such as CDMA, DECT, PHS, GSM etc. As the Basic Service Operators in India have begun providing the last mile connectivity through WLL Systems, there is a demand from them to offer Limited Mobility also to subscribers as part of the Basic Service package. However, once Mobility features are added to WLL, the differentiation in Service between Fixed and Mobile is no more significant. It can also be argued by some that this may affect the market available to the Cellular Operators. The matter to be considered, therefore, is whether mobility should be provided to WLL subscribers and if so, what should be the extent of this mobility and what will be its impact on various Licensing and Regulatory issues.

Another matter to be considered is the Frequency Spectrum. National Frequency Allocation Plan 2000 (NFAP 2000) and Basic License Agreement have provided various specified frequency bands for WLL systems. Efficient utilization of Frequency Spectrum for Cellular and WLL systems and their proper allocation is another issue for consideration.

Department of Telecommunications has sought TRAI's recommendations on the above issues in the context of permitting WLL Limited Mobility Services to be offered by Basic Service Operators to customers."

It is mentioned in the Consultation Papers that there is no provision in the licensing agreement for Basic Service Operator to provide mobility using WLL technology and that the Government had also clarified by their letter dated 17.9.99 that "NTP -99 does not provide for any service known as Cellular Mobile Service with Limited Mobility".

Also it was mentioned that when hand held terminals in wireless access technology with full mobility within the service area is permitted to the Basic Service Operators the service definition between them and Cellular Mobile Service Operator will be largely obliterated.

It was noticed that WLL systems generally use a Micro Cellular architecture and provide a very Limited Mobility, i.e. Limited to the neighbourhood. Cellular Mobile and CDMA WLL Systems, however, use Macro Cellular architecture. The speed of Mobility is limited in WLL Systems to pedestrian speeds and not that of fast moving cars. WLL Systems based on Micro Cellular architecture do not permit handover from one cell to another. The consultation paper records in the context of the issue of level playing field:

"However, in case the Government's suggestion of Full Mobility within the Service Area of Basic Service Operators is implemented, there will be practically no differentiation in the Mobile Service offered by the Basic Service Operators and those offered by CMTS in a Circle which is the Service Area of both Operators. As discussed in Chapter I, both GSM and CDMA technologies belong to the same category of "MICRO Cellular" architecture, and provide almost identical bearer and tele-services to the subscribers. In fact, these two technologies are competing internationally in the same market i.e. for the Cellular Mobile Services. Since the financial terms and conditions of licensing of the BSOs and CMTSOs are quite different, such as the amount of License Fee i.e. Revenue Share/Entry Fee, Interconnection/Access charges, spectrum charges, tariff etc., it will open up a larger number of issues relating to the level playing field as well as policy issues relating to convergence.

After the process of consultation was gone through, TRAI sent its recommendations to DOT on 8.1.2001. These recommendations were sent by covering letter of the Chairman, TRAI, to the Secretary, DOT. The letter mentions four main questions which were considered in the deliberations:

“(i) Whether WLL with mobility should be permitted;

If it is to be permitted what should be its extent i.e. how much mobility is to be allowed;

The likely economic consequences of the mobility granted as in (ii) above and their impact on the main stake holders, and;

In case the likely consequences of the grant of mobility are adverse for any of the stake holders in economic terms do these merit mitigation? If so, to what extent such mitigation is feasible and needed and what would be the modus operandi to achieve it.”

In the recommendations TRAI refers to the context and background of the matter came to it. This was in the following back ground:

“Cost effective last mile connectivity i.e. connection between Exchange and Customer’s Premises Equipment (CPE) is a critical and often the most difficult part of the Telecom Network roll out. This provides customer accessibility and therefore, the growth of telecommunication network is affected significantly by the cost and quality of last mile connectivity as well as the ease and speed with which it can be provided. In India local loop has thus far been provided mostly by laying underground cables or by construction of overhead alignment. The laying of underground cables especially in congested areas is both cumbersome and time consuming. This has, therefore, come in the way of quick roll out of Telecom Networks and contributed to delay in achievement of the teledensity targets. This problem has been taken note of in NTP, 1999, and in order to obviate the necessity of laying underground copper cables in congested areas, the Basic Service License issued by Department of Telecommunications (DoT) stipulates Wireless in Local Loop (WLL) as the preferred method for providing Basic Service.

While the License Agreement for the Basic Service Operator provides for use of WLL, it does not permit mobility. The Basic Service Operators (BSOs) have, therefore, thus far deployed WLL Systems as Fixed Wireless Access Systems. These systems, are, however capable of being engineered to provide mobility within a specified area using the same frequency spectrum as already allotted to them. Therefore, there is a growing demand from the BSOs to offer some limited mobility as part of the Basic Service package to the customers. In this background, the Department of Telecommunications (DOT) had recently written to the TRAI seeking its recommendations in regard to permitting limited mobility by use of WLL systems in the last mile.

The question which DOT requested TRAI to submit recommendation was in respect of the following:-

Scope of Area of Hand Held subscriber terminals under Wireless Access System operations,

Basis for assigning WLL frequency,

Amount of Entry Fee and spectrum charges as a percentage of revenue to be charged from the Basic Service Operator for extending the above facility in respect of existing as well as future Basic Service Licensees, so as to ensure a level playing field with the Cellular Operators.

On the first question whether mobility in WLL should be permitted TRAI has given the following reason:-

High tariffs of Cellular mobile telephones have kept this service largely outside the reach of consumer with modest means.

Consumer should not be deprived of the available technology as well as economic considerations and the facility should not be denied as long as the likely adverse impact of level playing field is kept in view and to mitigate this.

Cost of the infrastructure required to be erected for providing WLL base mobility service would be less than that incurred by giving wireless connections. TRAI, however, did not give any credence to the figure provided by DOT that while cost of the former is Rs. 15,000/- the latter costs only Rs. 6000/-.

Arguments of CMSOs permitting WLL mobility are not valid. CMSOs had opposed permitting WLL mobility on the grounds that this should be against terms and conditions of their license.

WLL with limited mobility is a backdoor entry for the BSOs in the market licensed to the mobile operator of the CMSOs. There is limited availability of spectrum granted to basic operators for fixed connections and permitting WLL with mobility on the number of such connections would create severe imbalance in the supply and demand position resulting in unduly long waiting list etc. This is how TRAI considered these objections:

“TRAI has considered these arguments against providing WLL with mobility carefully. CMSOs main objection is on the ground that the two services will become substitutable and since the BSOs intend offering WLL services at the same tariff as applicable to local calls, the CMSOs will face unequal and unfair

competition which will disturb level playing field conditions. A close examination of the issue, however, shows that the apprehensions expressed by the CMSOs can be said to have some basis only if the extent of mobility provided by the basic operators is the same as the one available based on GSM systems i.e. if the extent of mobility under the two systems is identical. But, as long as there is a significant difference in the scope of the two services in terms of coverage and facility, such as seamless roaming nationally and internationally, as well as a larger number of tele & supplementary services which the GSM network is capable of offering whereas the basic is not, the quality and scope of service provided by CMSOs will continue to be different. It follows that GSM service providers will be able to command a premium on their services in comparison to the basic service operators.

CMSOs have time and again stressed the point that they are not against competition. The issue, then, is only about comparability of the two services and their pricing. The currently obtaining competitive environment for cellular service, even with only two operators in each service area, has already driven the tariffs of mobile services substantially down. This process is bound to intensify with the entry of the third and fourth operators into the market in the very near future. Noticeably, in at least one service area viz. Tamil Nadu competition has already driven the air time tariffs of cellular services down to the levels which are quite comparable with the basic services tariffs. However, even as cellular tariffs continue to fall, the subscriber base is growing fast mitigating to a large extent the loss in revenue caused by tariff reduction. The direction of the market is, thus, clear. The fall in tariff rates is to be made up and in fact more than made up by the increasing subscriber base. This has been the pattern of the growth of cellular mobile services worldwide and there is every reason for it to be so here as well. The TRAI is, therefore, of the view that as long as the extent of WLL mobility is not comparable with that of the mobility and roaming enjoyed by mobile subscribers of GSM networks, the apprehensions of the CMSOs that they may be priced out of the market are exaggerated. In the short run, there would be some loss of revenue as the CMSOs in their effort to retain the customers reduce their tariffs to match that of their competitors. However, in the longer run the effect will largely be mitigated as with the reduced tariff the customer base expands faster. It also needs to be kept in view that due to paucity of the available frequency spectrum the supply of WLL services will be limited.

As regards the argument that permitting WLL mobility will amount to violation of the CMSOs licence terms, it needs to be noted that with the acceptance of migration of NTP 99, the CMSOs have accepted that their markets will no more be protected for them by the terms of their licenses. NTP-99 as well as the recent

policy announcements acknowledge greater competition as the policy norm in both basic and cellular mobile sectors. Increased competition, therefore, cannot be denied. Of course, it will have to be ensured that such competition is generated without making the level playing field uneven. In making these recommendations, TRAI has been conscious of the need to address this aspect of the issue adequately.

As regards the reservations expressed on the limited supply of WLL services due to scarcity of available frequency spectrum for the purpose, it can be said that introduction of a service cannot be restrained only because in the initial stages the demand is likely to outstrip the supply. Firstly, such a situation is likely to arise only in the metros and in a few large cities. The BSOs offering the service are expected to manage the situation adequately by adopting suitable pricing mechanisms. The highest rate basic services call charges and differential rentals for WLL Services would obviously reduce its attraction to a large majority of telephone users with whom loser tariffs resulting from permissible free and concessionary call charges are important and for whom mobility is not such a big issue. Moreover, the price to be paid for WLL (M) handsets will also be a factor whether the consumer purchases the handset himself or the service provider provides it to him against a deposit which is the present practice. On overall consideration TRAI is of the view that for some time to begin with demand may outstrip supply of WLL services as some places, particularly in metros, but eventually market mechanisms will prevail and an equilibrium between supply and demand will be reached.

In view of the foregoing, TRAI has arrived at the conclusion that in case the WLL mobility is not the same as that of the cellular mobile services and provided that the disturbance expected to be created in the level playing field by the BSOs introducing this service can be evened out by making some necessary policy changes, permitting WLL with mobility will be in the best interests of the consumer and the telecom services in the country”.

On the second question which had been raised by TRAI as to what would be the extent of mobility i.e. how much mobility should be allowed, it was of the view that extension of WLL mobility only upto the local area i.e. SDCA will be the most optimal solution and serve telecom growth in the country best.

Then the TRAI considered third question i.e. the likely consequences of the mobility granted and their effect on the main stake holders. TRAI was, however, aware of the fact that CMSOs were likely to encounter at least some loss of market.

Recommendations of the TRAI were accepted by the Government on

25.1.2001 and order/guidelines issued on the same day. Clause/para 18 of the order/guidelines which is particularly under challenge by the petitioners, we again set out hereunder:

Basic Service Operator shall be allowed to provide mobility to its subscribers with Wireless Access Systems limited within the local area i.e. Short Distance Charging Area (SDCA) in which the subscriber is registered. While deploying such systems, the operator has to follow numbering plan of that Short Distance Charging Area (SDCA) and it should not be possible to authenticate and work with the subscriber terminal equipment in SDCAs other than in which it is registered. The system shall also be engineered so as to ensure that hand over of subscriber does not take place from one SDCA to another SDCA while communicating. Further, the operator shall ensure that the Radio Transmitters may be located and established at a distance of 10 KMs from the international border of India, and such radio transmitters will work in such a fashion that any signal or signals, emanating therefrom, fade out when nearing or about to cross international border and also become unusable with a reasonable distance across such border.

On 25.1.2001 itself letters were issued to the existing FSPs informing them of Government's decision allowing them to provide hand held telephone sets to their subscribers subject to certain restrictions.

The controversy regarding matter of wireless in local loop based on limited mobility service was referred to the Group on Telecom & IT Convergence (GOT-IT). The Group was directed to consider and submit its recommendations on the following:

“a) Whether the New Telecom Policy 1999 permits ‘Limited Mobility’ service to be offered by Fixed Service Providers.

If it is permitted under NTP-99, how it can be introduced to be consistent with the principle of level playing field among different categories of operators with the objective of assured services at cheapest possible rates.

If it is not permitted under NTP-99, how the policy can be suitably modified to facilitate limited mobility to ensure faster achievement of the targets for tele-density as well as rural and remote area telephony at cheaper and affordable rates”.

In para 8 of the report of GOT-IT it is recorded that “It has been reported that TRAI had, in the year 1999 rejected the concept of limited mobile services on the application of MTNL for approval of tariff for such services; the Group noted that this was not in the context of the reference made by the Government

in April, 1999, seeking recommendations of TRAI”.

With reference to Annexure – III to the report the Group observed that the sequence of events showed that the current recommendations of the TRAI in favour of limited mobility was taken after following a transparent procedure of extensive consultation with all stakeholders and after modifying terms applicable to cellular operators.

Now when we refer to Annexure-III, we find that full picture was not presented to the GOT-IT. We are saying so with reference to notings in various files maintained in the DOT and various orders passed by the DOT from time to time particularly the letter dated 17.9.99 of DOT to TRAI and the stand of the DOT till August, 2000. We are unable to find any reason why these files and documents were not placed before the GOT-IT as these find no mention in the report and, in our opinion, would have important bearing on the issues before the GOT-IT. We have not been able to get any answer from the counsel of Union of India as to why this was not done. It was not TRAI which had objected the concept of limited mobile service rather it was the DOT which after careful examination of the issued raised before it, had felt that limited mobility in WLL was not permissible and handsets not permitted. Commercial codes of various FSPs on many occasions were not approved till there was a clear undertaking or direction that hand-held sets to the subscribers in wireless local loop service would not be provided. It was not that the question of limited mobility in WLL was pending consideration till it was finally decided by the Government on 25.1.2001. This argument was raised by the learned counsel for the ABTO with reference to the letter of 9th June, 1999 written to DOT by TRAI where it was mentioned that: “That the aspect of providing Limited Mobility Services through Wireless in the Local loop is a long pending issue between COAI and DOT”. This observation was made by TRAI in view of its earlier letter of COAI to DOT. As far as DOT was concerned there was no such issue pending as notings on the various files of the DOT showed and particularly the letter dated 17.9.99 from DOT to TRAI.

The approach which the GOT-IT adopted in its report was to consider how to accelerate universal access to enable provision of telecom services at affordable rates specially in the rural areas. The Group thereafter felt it necessary to ensure that advice it gave would be such as would be fair and equitable to service providers and at the same time would be in the interest of subscribers.

On the first question as to whether the NTP-99 permitted limited mobility to be offered by Fixed Service Providers, the Group observed as under:

“Since the issue of offering limited mobility to FSP operators was raised before the TRAI, the Group decided, keeping in view the purposive

construction given by the TRAI on NTP-99, permitting WLL technology, coupled with the desirability of encouraging a technology which holds the potential for providing affordable telecom service and increasing tele-density rapidly, that it was not necessary to reopen the issue of enabling limited mobility technology to the FSP operators. Where technology allows and expanded service to the advantage of consumers, especially in rural areas, the general approach should be to interpret policy so as to permit maximum competition keeping always in view the need for a level playing field”.

It would, therefore, appear that the Group did not of its own examine the issue so raised. It was on the basis of NTP-94 that tenders were invited and licence issued to the service providers. It is difficult to appreciate what “purposive construction” TRAI gave to NTP-99. Since relevant information was withheld by DOT the Group was deprived of the views of DOT on limited mobility in NTP-99 which was not permitted. The Group, however, recognised that all the issues which were before it, fell squarely within the jurisdiction of TRAI/TDSAT and that Group was giving its assessment in response to specific reference to the Group in terms of reference and keeping in mind the observations made by TDSAT in its order dated 17th April, 2001.

The group noted that the facility of limited mobility was being suggested for accelerating development of telecom services particularly in rural areas, the manner in which spectrum would be made available had to ensure that this object was achieved. Group suggested that SDCA be divided into three sub-categories (i) rural, (ii) semi-urban, and (iii) urban and made suggestions to cover these areas for each phase of the roll out prescribed.

From the report it would be seen that the Group only considered issue No.2

On the question of decision whether or not to charge a separate one time entry fee for utilizing WLL being, in the opinion of the Group, the matter exclusively in the domain of TRAI [Section 11(1)(c)], it must rest there.

As noted above, the GOT-IT did not feel it necessary to answer the third question in the reference.

Opening his arguments Mr. C.S. Vaidyanathan, Senior Advocate for the Cellular Operators Association of India first gave the back ground of Telecom Policy in the country. He referred to NTP-94, NTP-99, targets which were to be achieved in next couple of years and failure of the Fixed Service Providers to achieve those targets of rural coverage of providing telephones. He then referred to the migration package and the revenue sharing regime. Mr. Vaidyanathan said cellular mobile is a premier service and its requirement was to reach District

Headquarters and it was for the fixed service operators to provide Direct Exchange Telephone (DET) and Village Public Telephones (VPT). Various provisions of the Telegraph Act and TRAI Act were referred to. It was stated that while reaching the impugned decision Government ignored the mandate of the Preamble to the TRAI Act which was amended by Act 2 of 2000 inasmuch as it failed to protect the interests of service providers and the consumer of the Telecom Sector, and to promote and ensure orderly growth of Telecom Sector.

Mr. Vaidyanathan criticized the recommendations of the TRAI dated 8.1.2001 and said that the speed with which TRAI gave recommendations and the Government accepted the same, would show command performance as was rightly pointed out by Mr. C.S. Vaidhyathan, learned Senior Advocate appearing on behalf of the petitioners. He said that a right which is inherent to a person to whom it has been granted cannot be effected specifically when the right conferred was a contractual right under the statute or was a statutory right. He submitted that licence agreement was a statutory document and that basic right of mobile operators had been substantially affected and could not be taken away by providing WLL limited mobility to basic operators. The impugned decision of the Central Government is in violation of Article 14 of the Constitution and against the legitimate expectations of CMSPs and decision is also barred by promissory

estoppel. Referring to the recommendations sought by the DOT with respect to FSP and the recommendations made by TRAI there was no occasion for the DOT to ask for reconsideration of recommendations by TRAI on the issue of limited mobility in WLL FSPs when no recommendation was made with that respect. It was for the Government to seek recommendations on the need and timing for introduction of a new service provider and terms and conditions of licence of a service provider it could seek recommendation from TRAI under sub clauses (i) and (ii) of clause (a) to sub section (1) of Section 11 of the TRAI Act and second proviso so mandates. Resort of the Government to proviso fifth of Section 11 was not legal. Provisions of Section 11 have been violated, Mr. Vadyanathan asserted. He said everything was done in a hush-hush manner and there was no transparency of the whole process . Reference to TRAI was wrong, recommendations of the TRAI were rushed through and the Government acted with pre-determined mind to give undue advantage to FSPs by allowing them limited mobility in WLL. In this respect, Mr. Vaidyanathan prayed that the relevant files of the TRAI and DOT be summoned and examined by the Tribunal. Mr. Vaidyanathan then said that NTP-99, tender and licence documents did not provide for WLL with limited mobility and all through till 25.1.2001 Basic Service Providers have been prohibited to provide handsets . They were not offering WLL with limited mobility or allowing their subscribers to use of handsets. It was WLL (fixed). Again referring to fifth proviso to Section 11, Mr.

Vaidyanathan said that when DOT did not accept the recommendations dated 8.1.2001 of the TRAI in some respects it was duty bound to send the matter back to TRAI for reconsideration. Its failure to do so was illegality, again contravening the provisions of Section 11. Mr. Vaidyanathan said by allowing the FSPs to provide WLL with limited mobility was to confer undue benefit upon them and even though they would be limited to offer cellular mobile service in SDCA. There is substitution of mobile service which cannot be permitted under the licence agreement of CMSPs.

Mr. Goolam Vahanvati, appearing also for the petitioners rested his case on the law of contract. He submitted that it was the issue of rights and obligations when dispute arose between the licensor and licensee. He said what was granted to the petitioner was not a largess or quota. It was a contractual right which contained implied terms flowing from the nature of transaction and tacit agreement between the parties that cellular mobility in any form will not be granted to any service providers except CMSPs. Two separate tenders were floated one for CMSPs and second for FSPs. Need for two separate tenders was only because services to be rendered were kept separate. There is fundamental difference between CMSP and FSP. He, therefore, submitted that the Government cannot re-write terms of the contract or alter the terms of the contract in the guise of policy. Mr. Vahanvati said he will not be claiming protection under the doctrines of legitimate expectation or promissory estoppel but will base his case squarely on the terms of the lawful concluded contract between the parties. He submitted that implied terms are as much part of the contract as express terms. In this

connection Mr. Vahanvati, made submissions on contractual obligations. His argument was that it is implied condition of the contract that nothing will be done to disturb the rights of CMSPs under the terms of their licence. He referred to the definition of “implied condition” in Black’s Law Dictionary (Seventh Edition) in which “implied condition” is defined to be “a condition that is not expressly mentioned, but is imputed by law from the nature of the transaction or the conduct of the parties to have been tacitly understood between them as a part of the agreement”.

He also referred to treatise on ‘Indian Contract & Specific Relief Acts by Pollock & Mulla - (Volume-I, 12th Edition, pages 235 to 249) as to the implied terms. A contract whether implied or express gives an equal cause of action. An express contract can be proved by a written or spoken words, which constitutes an agreement between the parties, while an implied promise may be proved by circumstantial evidence of an agreement. The pages from the treatise also explain as to ‘the necessity of implying a term’, ‘types of implied terms’, and ‘when will a term be implied’. Mr. Vahanvati also referred to two reported decisions. In

Goldtaper Pty Ltd. & Ors. v. Berelq Pty Ltd. [2001] QSC 104, the Supreme Court of Queensland, Australia was considering the issue of implied term in the following words:

“53. In clause 4.04, the defendant expressly agreed that the plaintiffs might, and should be afforded by the defendant, the opportunity to make submissions to the Council supporting the relaxation, in whole or in part, of the Road Contribution. The express promise made in the contract, as Dixon J held in *Shepherd v Felt and Textiles of Australia Ltd.*, (1931) 45 CLR 359 at 378 ‘necessarily includes an obligation not to hinder or prevent the fulfilment of its purpose’. This is an implied term which is a legal incident of this type of contractual arrangement. The plaintiffs would not be able to have the benefit of this term of the contract if the defendant made application for relaxation and so obtained the financial benefit of relaxation which the parties clearly intended by clause 4.05 should go to the plaintiff.

In these circumstances, there was an implied term that the defendant would do all things necessary to enable the plaintiffs to have the benefit of the contract. As Griffith CJ held in *Butt v. MC Donald* [(1896) 7 QJLJ 68 at 70-71] :

‘It is general rule applicable to every contract that each party agrees by implication, to do all such things as are necessary on his [or her] part to enable the other party to have the benefit of the contract’.

Implication of this term necessarily implies that the defendant would not do anything that would impede the plaintiffs’ obtaining the benefit of the contract (*Australian Course Grains Pool Pty Ltd. v Barely Marketing Board* [1989] 1QR 499 at 507). As Griffith CJ explained in *Marshall v the Colonial Bank of Australia* [(1904) 1CLR 632 at 647]:

‘Now all contractual relations impose upon the parties a mutual obligation that neither shall do anything which is calculated to hamper the other in the performance of the contract on his [or her] part. This rule was recently expressed by Vaughan – Williams, LJ, as follows:-

In this contract, as in every other there is an implied contract by each party that he will not do anything to prevent the other party from performing the contract.... I agree that generally such a term is by law imported into every contract’ (*Barque Quilpue Ltd. Brown* [1904] 2 KB 264 at 271)”

In *Shephert vs. Felt and Textiles of Australia Ltd.* – (1931) 45 CLR 359, High Court of Australia laid the principle which was followed in the aforesaid

decision of the Supreme Court of Queensland in *Goldtaper Pty Ltd. & Ors. v. Berelq Pty Ltd.* (supra) where the Court held:

“In considering whether the appellant’s conduct amounted to a breach of the conditions of his contract of agency, it must first be ascertained what material conditions the contract contained. The express promise of the appellant to use his best endeavours to obtain orders for the respondent and to influence business on its behalf necessarily includes an obligation not to hinder or prevent the fulfilment of its purpose. Moreover, the contract established a relation between the parties intended to subsist for a period, and it involved some degree of mutual confidence and required a continual co-operation. Its object was the increase of the sale of the respondent’s manufactures, and to that end the extension of the respondent’s business connection. Such an agreement inevitably imported a tacit condition that the appellant should perform the services faithfully which he contracted to give the respondent, and should not endeavour to impede or defeat the respondent in the sale of its manufactures at the prices it might think proper to ask”.

Mr. Vahanvati also relied on *In Re Liverpool Taxi Owners’ Association* [1972] 2 All ER 589 where one of the issues before the English Court of Appeal was if the undertaking given by the Chairman of the Liverpool Corporation which was not inconsistent with the statutory duties of the Corporation could be breached by subsequent resolution of the licensing authority which was the Corporation. Liverpool Corporation had granted number of licences for taxi cabs in the city of Liverpool which has been limited to 300 by the licensing authority, though the taxi cab owners wanted the numbers to be increased to meet competition from unlicensed private hire cars. In a meeting of the council on 4th August Chairman of the sub-committee gave an undertaking that no licenses additional to the existing 300 licences would be issued until proposed legislation to control private hire cars had come into force. Chairman’s undertaking was put into writing. Subsequently, however, Corporation was advised that Chairman’s undertaking was unlawful and the Corporation was not bound by it. Without granting further hearing to the taxi cab owners the decision was taken to increase the number of licences. This was challenged. Lord Denning MR commenting that the fairness was the key word and observed:

“The other thing I would say is that the corporation were not at liberty to disregard their undertaking. They were bound by it so long as it was not in conflict with their statutory duty. It is said that a corporation cannot contract itself out of its statutory duties. In *Birkdale District Electric Supply Co. Ltd. v Southport Corpn* –[1926] AC 355 at 364 the Earl of Birkenhead said that it was –

‘a well established principle of law, that if a person or public body is entrusted by the Legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties’.

But that principle does not mean that a corporation can give an undertaking and break it as they please. So long as the performance of the undertaking is compatible with their public duty, they must honour it. And I should have thought that this undertaking was so compatible. At any rate they ought not to depart from it except after the most serious consideration and hearing what the other party has to say; and then only if they are satisfied that the overriding public interest requires it. The public interest may be better served by honouring their undertaking than by breaking it. This is just such a case. It is better to hold the corporation to their undertaking than to allow them to break it. Just as it was in *Robertson v Minister of Pensions* [1948] 2 All ER 767, [1949] I KB 227 and *Lever (Finance) Ltd. v. Westminster Corpn.* (1970) 3 All ER 496, [1971] I QB

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plying these principles, it seems to me that the corporation acted wrongly at their meetings in November and December 1971. In the first place, they took decisions without giving the owners’ association an opportunity of being heard. In the second place, they broke their undertaking without any sufficient case or excuse”.

Lord Roskill LJ. and Sir Gordon Willmer agreed. Roskill LJ observed that there was flagrant breach of the undertaking by the Corporation and said that the decision of the *William Cory & Sons vs. London Corporation* [1951] 2 All ER 85 was distinguishable and that it showed that local authority, such as the council, cannot contractually fetter the performance of its statutory duties. Roskill LJ said that that was not the case now before the Court. We may note that the judgment of the Court of Appeal in *William Cory* case was cited by the Solicitor General and it is clearly distinguishable and has no applicability to the facts of the present case.

On the question whether a particular contractual term could be valid and should not integrity of contracts be maintained, reference was made to a decision of the Supreme Court in the case of *National Fertilizers vs. Puran Chand Nangia* - (2000) 8 SCC 343: The court observed:

“The point raises certain important issues concerning integrity of the contract. The concept of variation of the question of work is no doubt a common feature of works contracts. This is because in contracts relating to major

works, the estimates of work at the time the tenders are invited can only be approximate. But, it was also realised that the power of the employer to vary the terms relating to the quantum of work cannot be unlimited. In Hudson's Building and Engineering Contracts (8th Edn.) (pp.294-96) it has been pointed out that this power:

‘although unlimited, is in fact limited to ordering extras up to a certain value’.

McCardie, J. in *Naylor, Benson & Co. v. Krainische Industrie Gesellschaft* [(1918) 1 KB 331] said that the words ‘even though general must be limited to circumstances within the contemplation of the parties’. In *Parkinson (Sir Lindsay) Co. Ltd. v. Commrs. of Works and Public Buildings* [(1949) 2 KB 632] Asquith, L.J. stated (at p.682) that the words enabling the employer to add extra work, though wide, have to be limited for otherwise it would amount to ‘placing one party so that completely at the mercy of the other’. Singleton, LJ observed (p.673) that, to confer an unbridled power on the employer to vary the quantities of work would lead to ‘to manifest absurdity and injustice as stated by Mathew, J. in *Bush v. Whitehaven Town & Harbour Trustees (I)* [1888] 52 JP 332.

We may also state that under the general law of contracts, once the contract is entered into, any clause giving absolute power to one party to override or modify the terms of the contract at his sweet will or to cancel the contract – even if the opposite party is not in breach, will amount to interfering with the integrity of the contract (per Rajamanner, CJ. In *Maddala Thathiah v. Union of India* [AIR 1957 Mad 82]. On appeal to this Court, in that case, in *Union of India v. Maddala Thathaiah* [AIR 1966 SC 1724] the conclusion was upheld on other grounds. The said judgment of the Madras High Court was considered again in *Central Bank of India Ltd. v. Hartford Fire Insurance Co. Ltd.* [AIR 1965 SC 1288] but the principle enunciated by Rajamanner C.J. was not differed (see the discussion on this aspect in Mulla's Contract Act, (10th Edn.) pp.371-72 under Section 31 of the Indian Contract Act.)”

Continuing from here Mr. Vahanvati said that under NTP-99 there are three types of access providers namely, CMSP, FSP and Cable. Role of these three service providers has been stated in the policy. NTP-99 thus formed service specific sectors. There is no change in that respect and every body understood the implied terms all through and acted on them. He, therefore, submitted that even NTP-99 is not in variance or inconsistent with the implied terms of the licence of CMSPs and FSPs.

Then came the migration package and both parties i.e. the licensor and licensees gave up certain rights. CMSPs gave up duopoly rights and agreed to

multipoly regime. Migration package was accepted by 1.8.1999 and on 13.9.99 licences are made technically neutral. Mr. Vahanvati then referred to the recommendations sought by the DOT from TRAI for entry of more FSPs and fourth CMSP and the recommendations made by the TRAI on 31.8.2000 regarding FSPs. He said by this time a plot had taken shape to provide WLL mobility to FSPs against earlier stand of DOT and then came the letter of 9.10.2000 from DOT to TRAI for reconsideration.

Mr. Vahanvati strongly commented on how the things moved and the great haste with which recommendations were made by TRAI on 8.1.2001 and the decision taken by the Telecom Commission on 24.1.2001 and accepted by the Central Government on 25.1.2001 and decision communicated on the same day. He said there was a contradiction between para 18 and 21 of the press note communicating the decision. Mr. Vahanvati also pointed out various contradictions in the recommendations of the TRAI and said TRAI was re-reading and rewriting the conditions in the contract. Mr. Vahanvati said if we look at the state of things that showed how wrong TRAI was in its recommendations. He submitted that even after migration package was announced, CMSPs made huge investments. Now the difference between the two service sector had also gone for ever. If FSPs wanted WLL (M) they had to take separate licence. The fact of convergence was wrongly taken into account while allowing WLL mobility. Mr. Vahanvati said even anything less than mobility could not be given without answering the question if at all it could be given. Now as the decision stands both CMSPs and FSPs would have full mobility though FSPs' mobility would be confined to SDCA. Mr. Vahanvati said the question if NTP 99, tender documents and the contract allowed limited mobility in WLL was not squarely answered by TRAI or even by GOT-IT. It was so because it could not be done. Even the recommendations of the TRAI dated 8.1.2001 were not accepted by the Government in its entirety. On two occasions there had been violations of Section 11 of the Act firstly Section 11(1)(a) (i) and (ii) and 2nd proviso and secondly 5th proviso.

Mr. Sundaram, Senior Advocate appearing for the Bharti Cellular Ltd. (Bharti), Intervenor submitted that Bharti possessed both the licences i.e. CMSP and FSP in some circles. He said that Bharti was never in confusion or doubt as to the difference between the two licences and that was the reason why two separate licences were given and taken in terms of the tenders floated. In Madhya Pradesh where Bharti was having two separate licences, it was stated that Bharti did provide WLL service under FSP licence which was fixed. Mr. Sundaram said WLL technology was known as far back as in 1995 and was being used in India since 1997 for the purpose of fixed line and not for the purpose of mobility. Mr.

Sundaram referred to the terms of the tender and the licence and said CDMA technology can be used in different areas as also WLL. He said in the FSP licence of Bharti it was stated that WLL was preferred technology for last mile connectivity. There was no doubt, he said, as to what it meant. The licence of FSP prescribed scope of service. It did not cover mobile. Mr. Sundaram referred to clause 10 of the licence document which described 'Value Added Service' for which separate licence is required and CMSP is one of such "Value Added Service". "Value Added Service" are described in the licence agreement for BSPs as under:

"Value Added Service": Value Added Service are enhanced services which add value to the basic tele services and bearer services for which separate licenses are issued. At present, Government is issuing licenses for following value added services:

- Cellular Mobile Telephone Service
- [Public Land Mobile Network]
- Radio Paging Service
- Public Mobile Trunking Service
- Electronic Mail
- Voice Mail Service
- Closed Users Group Domestic 64 Kbps data network via INSAT Satellite System
- Videotext Service
- Video Conferencing."

Mr. Sundaram said that he would not subscribe to geographical mobility. It is either mobility or no mobility. Limited mobility has no meaning as such. First we describe as to what is mobility and then limitations are prescribed to say that it is limited mobility and that is regulated and to say otherwise completely arbitrary. He said the basic issue was fixed line vis-à-vis mobile. There is nothing called as 'limited mobility'. WLL Technology was to get over geographical obstacles or for use in congested areas. Cordless is an attachment where a person moves while in the other case it is the instrument and that is the handset which is mobile. With reference to tender documents of FSPs which described equipment it was submitted that hand held instrument was not contemplated. Mr. Sundaram asserted that concept of limited mobility was arbitrary and had no meaning. To what extent 'last mile' is to be allowed it is a question of degree. It cannot be in terms of SDCA. Whole of the State of Delhi is SDCA. Mr. Sundaram wondered how the concept of limited mobility suddenly cropped up when Bharti was told

not to use handsets and it was barred from using limited mobility in WLL earlier by DOT. Mr. Sundaram lastly said that if WLL mobility was included in FSPs licence there was no need for him to go for two licences. Referring to the migration package Mr. Sundaram said that Bharti knew that a further cellular licence can be issued but not that a non-cellular operator can operator cellular. Referring to the argument of affordability Mr. Sundaram pointed out that benefits have been given to Basic Service Providers and not consumers.

Mr. Gopal Jain learned counsel also addressed arguments on the question of level playing field on behalf of the petitioners. He referred to the present day scenario with reference to the chart filed by him which showed that the stand of TRAI that WLL mobile service will cost Rs.1.20 for 180 seconds has been found not to be true and today it is Rs.3.60 per minute with a hike of 300 per cent and there is a further rental which subscribers will have to pay @ Rs.200/- per month. This, he said, would show that affordability was a wrong premise. He said on the question of roll out also the target set out for FSPs have not been met. While Tata Tele Services installed 1314 VPT till 31.10.2002 when they were required to install 9635. Similarly Reliance Infocomm installed 502 instead of 8635 till 31.10.2002. He said that the very basis of speedy roll out, expanded rural connectivity and affordable service was belied. He said that the thrust is only in the Metros and big cities at the cost of CMSPs. Mr. Jain said as a matter of fact, FSP tariff of Rs.1.20 for three minutes was below cost and this aspect was not examined by the TRAI.

Mr. Jain then said that there was undue haste in sending recommendations and that while for 4th CMSPs entrant it took TRAI 2-1/2 years to make recommendations, but in the case of WLL (M) recommendations have been made within 3-1/2 months period. He said TRAI did not consider relevant questions if at all mobility could be allowed to FSP licence holder. There were no proper consultations and TRAI rushed with the recommendations with a pre-determined mind. The assumption which the TRAI took into consideration was erroneous. Mr. Jain also filed chart to show that huge advantage running into crores of rupees has been conferred on FSPs and CMSPs have been left to a great disadvantage. While arguing that level playing field has been disturbed Mr. Jain said the basic question which was not answered was if mobility was at all allowable under NTP-99, the tender documents and the licence agreement. As regards PCOs which CMSPs were allowed to open Mr. Jain said it has nothing to do with the allowing of the WLL (M) and could not be said to be 'sop' as contended by Mr. Singhvi.

According to Mr. Kirit Raval, Solicitor General, appearing on behalf of Union of India, CMSPs have essentially challenged para 18 of the guidelines

issued by Union of India on 25.1.2001 in so far as it permitted BSOs to offer hand held subscribers terminals as part of wireless in local loop (WLL) services. He said other peripheral issues were also raised but the focus was on para 18 of the guidelines. He said entitlement of BSOs to use wireless in the local loop is not under challenge as BSOs under the terms of their licence are entitled to utilize wireless technology in the local loop as one the preferred technology. He referred to BSOs licence where it provided that copper cable technology is not permissible except in the last 500 meters of the loop. The Solicitor General said that initially the instrument used by the subscriber was a somewhat bulky set resembling the conventional set which was not fixed but could be carried around in a briefcase. Slowly these largish sets have become outdated and replaced by hand held subscriber terminals. Wireless terminal does not have wire line connection as with conventional telephone and cordless telephones, so mobility is inherent.

Solicitor General then added that from 1995 the question of allowing the basic service operator to switch to handheld subscriber terminals has been under consideration. Initially, he said, the view taken was that the licence of the BSOs did not permit this because it would incidentally encroach upon the restriction in the BSO licence with respect of mobile services. But with the march of technology it became necessary to consider the possibility in detail. All this Solicitor General said culminated in a recommendation by TRAI to amend the terms and conditions of the BSO licence by allowing handheld subscriber terminals subject to certain crucial restrictions, which recommendation was accepted and implemented by the impugned guidelines on 25th January 2001. He submitted that the only legal impediment to allowing handheld terminals was thereby removed. Solicitor General then added that arguments that there is breach of the terms of conditions of their licence to BSO cannot stand inasmuch as licences have since been amended by reason of the guidelines dated 25.1.2001. to bring it in line with the terms of the guidelines. Solicitor General defended the report of TRAI dated 8.1.2001 and the process undertaken to send in the report. He also relied on the report of GOT-IT to support his contentions. Solicitor General then referred to addition of limited mobility to justify the impugned order.

Learned Solicitor General questioned the stand of CMSPs. He said provision of WLL(M) is within the parameter of NTP-99 and even if it is not so, the policy being a non-statutory instrument does not create any legal right in favour of the petitioners. He said that the Government has vast powers to change policy and no formalities are required to be followed in order to give effect to policy changes. Questioning the right of cellular operators to a monopoly, he said no such term could be implied in the cellular licence and rather the express terms

grant the licence on non-exclusive basis and further the migration package permitted additional licences without any limit. Government has express powers to change the terms and conditions of the licence. He did not agree that migration package only meant that there could be unlimited competition amongst the persons who hold cellular licence. He said the words of the undertaking given by the cellular operators while accepting migration package provided to the contrary.

As to why the Government changed its mind from its earlier stand it was the submission of Solicitor General that there was no change of the stand but that the matter had been under consideration of the Government for a long time. The issue was also mentioned in the TRAI Consultation papers dated 12.6.2000. He denied that there was any lack of bona fides. He said Petitioners have neither pleaded nor proved mala fides. Solicitor General said it was not a case of introduction of a new service provider and it merely related to utilisation of a existing licence and clarifying the terms permitting the proposed service. Meeting the arguments of the petitioners that the Government referred the matter for the first time in the garb of referring the matter back to TRAI for reconsideration implying lack of bona fides, he said the issue was referred back as in fact raised by TRAI itself in Consultation Paper on 12.6.2000 but had not been fully dealt with in the recommendations dated 31.8.2000. Hence the request for reconsideration. On the plea by the petitioners that TRAI acted with a pre-determined mind and rushed through the recommendations again implying lack of bona fides, Solicitor General said that TRAI was required to submit its recommendations within sixty days and its reconsidered opinion within 15 days and TRAI in fact took more time than was provided under the statute. Adequate opportunity had been granted to cellular operators and therefore, they could not make any grievance in this regard. TRAI's recommendations were well considered, balancing the rights of various segments of the industry against what is admittedly dominant interest, namely that of the consumer. When Petitioner said subsequent events showed that entire basis of the recommendations had disappeared, Solicitor General explained that the basis of recommendation could not be affected by subsequent events and that subsequent decisions could be dealt with without affecting the service itself. WLL(M) technology was in its nascent stage in 1995 and in any case it could not be doubted that the technology had marched forward and that India was a few years late in recognizing the advancement in technology but that did not mean that it was debarred from doing so for all times to come.

Lastly, it is contended by the Solicitor General that the litigation is motivated and an attempt to delay the entry of others so that they could enjoy monopoly rights for a longer time and further that past performance of certain BSOs in providing Village Public Telephone PVT is certainly not material factor for the

purpose of present case.

Solicitor General referred to a decision of the London Court of Appeal in *William Corry & Son Ltd. Vs. City of London Corporation* to support his stand that terms of a contract can be changed by the Government. It was held in that case as follows:

“While it was an implied term of any contract that one party would not do anything to disable the other party from performing the contract, the implication of a term that the corporation would not make bye-laws of the nature of that now in dispute would impose an unwarrantable fetter on the corporation in the exercise of their statutory duties under the Public Health (London) Act, 1936, s.84(1)(a); such a term would be ultra vires the corporation; and, therefore, the sealing of the bye-laws was not a breach of a valid term of the contract and did not entitle the contractors immediately to treat the contract as repudiated”

In the same judgment it was further observed as under:-

“In general, no doubt, it is true that a term is necessarily implied in any contract, the other terms of which do not repel the implication, that neither party shall prevent the other from performing it, and that a party so preventing the other is guilty of breach, but an act cannot be a breach of a term of the contract, express or implied, (let alone a repudiation) unless the term in question is valid.

We are afraid this judgment is of no help to the case of the Solicitor General and rather this judgment has been distinguished in the case of *Re Liverpool Taxi Owners’ Association* [1972] 2 All ER 589. Nobody, in the present case, can dispute that implied term in the present case in any way not valid.

It was submitted by the learned Solicitor General that in any event NTP-1999 was a non-statutory policy document and did not create any legal rights and obligations between the service providers and the Government and that the policy document could not be interpreted or enforced like a statute or a statutory instrument. He said the policy document was not binding on the Government and therefore, it created no legal rights in favour of the CMSPS.

In support of his submissions Mr. Raval referred to a few decisions of the Supreme Court.

In *Nagendra Nath Bora & Anr. Vs. Commissioner of Hills Division* – AIR 1958 SC 398 (Constitution Bench), there was some controversy regarding the manner of the exercise of the jurisdiction of the Appellate Authority. The Court observed:

“The jurisdiction of the Appellate Authority, to entertain the appeals , has never been in doubt or dispute. Only the manner of the exercise of its appellate jurisdiction was in controversy. It has not been shown that in exercising its powers, the Appellate Authority disregarded any mandatory provisions of the law. The utmost that has been suggested is that it has not carried out certain Executive Instructions. For example, it has been said that the Appellate Authority did not observe the instructions that tribal people have to be given certain preferences, or, that persons on the debarred list, like smugglers, should be kept out (see. P. 175 of the Manual). But all these are only Executive Instructions which have no statutory force. Hence, even assuming, though it is by no means clear, that those instructions have been disregarded, the non-observance of those instructions cannot affect the power of the Appellate Authority to make its own selection, or affect the validity of the order passed by it”.

In the case of *State of Assam & Anr.. Vs. Ajit Kumar Sarma & Ors. – AIR 1965 SC 1196 (Constitution Bench)*, the Court was considering validity of the conditions for giving grants-in-aid to educational institutions by mere executive instructions not having the force of statutory rules. The Court observed:

“We may in this connection refer to *M/s. Raman and Raman v. State of Madras, (1959) Supp (2) SCR 227: (AIR 1959 SC 694)* where this Court had to consider certain orders and directions issued under S.43A of the Motor Vehicles (Madras Amendment) Act, 1948. The question arose whether the orders issued under S.43A had the status of law or not. This Court held that such orders did not have the status, of law regulating the rights of parties and must partake of the character of administrative orders. It was further held that there could be no right arising out of mere executive instructions, much less a vested right, and if such instructions were changed pending any appeal, there would be no change in the law pending the appeal so as to affect any vested right of a party. That decision in our opinion governs the present case also, for it has been found by the High Court, and it is not disputed before us, that the Rules are mere administrative instructions and have not the force of law as statutory rules. They therefore confer no right on the teachers of the private colleges which would entitle them to maintain a writ petition under Art.226 for the enforcement or non-enforcement of any provision of the Rules. The Rules being mere administrative instructions are matters between private colleges and the Government in the matter of grant-in-aid to such colleges, and no teacher or a college has any right under the Rules to ask either for their enforcement or for their non-enforcement. We are therefore of opinion that the High Court was in error when it granted a writ against

the State through the Director, by which the Director was asked not to give effect to its letter dated March 20, 1962, against the Governing Body of the College”.

In *Joint Chief Controller of Imports and Exports vs. M/s. Amichand Mutha* – AIR 1966 SC 478 (Constitution Bench), the Court was considering the legal effect of the instructions issued as per Red Book of Rules and Procedure for Import Trade Control under Imports and Exports (Control) Act, 1947.

In *R. Abdulla Rowther vs. The State Transport Appellate Tribunal, Madras Ors.* - AIR 1959 SC 896, the Court was considering legal effect of the executive or administrative actions. It observed as under:

“As the Govt. Order contains merely executive or administrative directions, their breach, even if patent would not justify the issue of a writ of certiorari. Though the executive orders properly so-called do not confer any legal enforceable rights on any persons and impose no legal obligations on the subordinate authorities for whose guidance they are issued, that not to say that the directions are not valid and should not be followed by the said authorities; the said authorities are undoubtedly expected to follow the said directions and their breach may expose them to disciplinary or other appropriate action. Even if any of the directions contained in the order is found to have been ignored or mis-applied, the applicant for a permit cannot claim any relief by way of a writ of certiorari. The direction itself, though valid, and in a sense binding on the subordinate authorities is not a statutory rule and has not the force of law; and so its misconstruction cannot be said to be an error of law”.

In *Narendra Kumar Maheshwari vs. Union of India & Ors.* - 1990 (Supp) SCC 440, the petitioner was a potential investor for issue of shares and debentures proposed to be issued by a Company with certain conditions under the Capital Issues (Control) Act, 1947. It was contended on behalf of the Controller of Capital Issues that guidelines which had been framed should not be construed in a manner which would fetter, constrict or a statutory discretions vested in him for taking decisions in interest of capital market and for national purpose of furthering the growth of industrialisation and invested in priority sectors so as to encourage employment and demand in the national economy. One of the issues to be considered was whether the guidelines or the provisions of law under which the Controller had functioned or has purported to function or there had been deviations from those guidelines and if so what such deviations possibly were permissible. Paras 106 and 107 of the judgment would be relevant which we reproduce:

“106. “It may, however, be stated that being not statutory in character, these

guidelines are not enforceable. See the observations of this Court in *G.J. Fernandez v. State of Mysore* (also see *R. Abdullah Rowther v. State Transport Appellate Tribunal, Dy. Asstt. Iron & Steel Controller v. L. Manekchand, Proprietor; Andhra Industrial Works v. CCI, K.M. Shanmugam v. S.R.V.S. Pvt. Ltd.*). A policy is not law. A statement of policy is not a prescription of binding criterion. In this connection, reference may be made to the observations of *Sagnata Investments Ltd. v. Norwich Corpn.* Also the observations in *British Oxygen Co. v. Board of Trade*. See also Foulkes” *Administrative Law*, 6th edn. At pp.181-184.. In *R. v. Secretary of State, ex parte Khan* the Court held that a circular or self-made rule can become enforceable on the application of persons if it was shown that it had created legitimate expectation in their minds that the authority would abide by such a policy/guideline. However, the doctrine of legitimate expectation applies only when a person had been given reason to believe that the State will abide by the certain policy or guideline on the basis of which such applicant might have been led to take certain actions. This doctrine is akin to the doctrine of promissory estoppel. See also the observations of Lord Wilberforce in *IRC v. National Federation*. However, it has to be borne in mind that the guidelines on which the petitioners have relied are not statutory in character. These guidelines are not judicially enforceable. The competent authority might depart from these guidelines where the proper exercise of his discretion so warrants. In the present case, the statute provided that rules can be made by the Central Government only. Furthermore, according to Section 6(2) of the Act, the competent authority has the power and jurisdiction to condone any deviation from even the statutory requirements prescribed under Sections 3 and 4 of the Act. In *Regina v. Preston Supplementary* it had been held that the Act should be administered with as little technically as possible. Judicial review of these matters, though can always be made where there was arbitrariness and mala fide and where the purpose of an authority in exercising its statutory power and that of legislature in conferring the powers are demonstrably at variance, should be exercised cautiously and soberly.

We would also like to refer to one more aspect of the enforceability of the guidelines by persons in the position of the petitioners in these cases. Guidelines are issued by governments and statutory authorities in various types of situations. Where such guidelines are intended to clarify or implement the conditions and requirements precedent to the exercise of certain rights conferred in favour of citizens or persons and a deviation therefrom directly affects the rights so vested the persons whose rights are affected have a clear right to approach the court for relief. Sometimes guidelines control the choice of persons competing with one another for the grant of benefits, largesses or favours and, if the guidelines are

departed from without rhyme or reason, an arbitrary discrimination may result which may call for judicial review. In some other instances (as in the Ramana Shetty case), the guidelines may prescribe certain standards or norms for the grant of certain benefits and a relaxation of, or departure from, the norms may affect persons, not directly but indirectly, in the sense that though they did not seek the benefit or privilege as they were not eligible for it on the basis of the announced norms, they might also have entered the fray had the relaxed guidelines been made known. In other words, they would have been potential competitors in case any relaxation or departure were to be made. In a case of the present type, however, the guidelines operate in a totally different field. The guidelines do not affect or regulate the right of any person other than the company applying for consent. The manner of application of these guidelines, whether strict or lax, does not either directly or indirectly, affect the rights or potential rights of any others or deprive them, directly or indirectly, of any advantages or benefits to which they were or would have been entitled. In this context, there is only a very limited scope for judicial review on the ground that the guidelines have not been followed or have been deviated from. Any member of the public can perhaps claim that such of the guidelines as impose controls intended to safeguard the interest of members of the public investing in such public issues should be strictly enforced and not departed from; departure therefrom will take away the protection provided to them. The scope for such challenge will necessarily be very narrow and restricted and will depend to a considerable extent on the nature and extent of the deviation. For instance, if debentures were issued which provide no security at all or if the debt-equity ratio is 6000: 1 (as alleged) as against the permissible 2:1 (or thereabouts) a court may be persuaded to interfere. A court, however, would be reluctant to interfere simply because one or more of the guidelines have not been adhered to even where there are substantial deviations, unless such deviations are, by nature and extent such as to prejudice the interests of the public which it is their avowed object to protect. Per contra, the court would be inclined to perhaps overlook or ignore such deviations, if the object of the statute or public interest warrant, justify or necessitate such deviations in a particular case. This is because guidelines, by their very nature, do not fall into the category of legislation, direct, subordinate or ancillary. They have only an advisory role to play and non-adherence to or deviation from them is necessarily and implicitly permissible if the circumstances of any particular fact or law situation warrants the same. Judicial control takes over only where the deviation either involves arbitrariness or discrimination or is so fundamental as to undermine a basic public purpose which the guidelines and the statute under which they are issued are intended to achieve.

The cases of Nagendra Nath Bora (AIR 1958 SC 398); Ajit Kumar Sarma

(AIR 1965 SC 1196); M/s. Amichand Mutha (AIR 1966 SC 478); R. Abdulla Rowther (AIR 1959 SC 896) and Narendra Kumar Maheshwari [1990 (Supp) SCC 440] deal with the power of authorities to change administrative instructions or guidelines and do not deal with the issues involved in the present case. Rather in the case of Narendra Kumar Maheshwari it has been laid that where there is deviation from the guidelines and those deviations directly affect the rights so vested, the persons whose rights are affected have a clear right to approach the Court for relief and further judicial control takes over where deviation either involves arbitrariness or discrimination or is so fundamental as to undermine a basic public purpose which the guidelines and the statute under which they are issued are intended to achieve.

Meeting the argument that if a situation requires a change of policy, such a change of policy could not be done except by formally amending NTP-1999, Mr. Raval said that no change was required in the policy which permitted the service in question. He said without prejudice to his contention Government had wide powers to change policy and the Court has limited powers to interfere. In support of his submission he referred to a decision of the Supreme Court in the case of Balco Employees' Union (Regd.) vs. Union of India & Ors. – (2002)2 SCC 333. In this case Supreme Court observed that wisdom and advisability of economic policies were ordinarily not amenable to judicial review unless it could be demonstrated that the policy was contrary to any statutory provision or the constitution. It is not for the courts to consider relative merits of different economic policies and consider whether a wiser or better one can be evolved: In the concluding paras (92 and 93) the court observed as under:

“92. In a democracy, it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered with by the court.

Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. In other words, it is not for the courts to consider relative merits of different economic policies and consider whether a wiser or better one can be evolved. For testing the correctness of the policy, the appropriate forum is Parliament and not the courts. Here the policy was tested and the motion defeated in the Lok Sabha on 1-3-3001.

In this case Supreme Court said that economic policies were not ordinarily

amenable to judicial review unless it may be demonstrated that that was contrary to any statutory provisions or the Constitution. A change in policy which is mala fide can be challenged. In the present case we are not considering the wisdom or advisability of economic policy of the Government but terms of contractual document and interpretation of the policy document NTP-99 and not its change. Any question of change in policy (NTP-99) is not the case of the Government.

In the case of State of U.P. and others vs. Vijay Bahadur Singh AIR 1982 SC 1234 there was a challenge to the action of the State in deciding to get the work done through Forest Corporation even though the bids had been invited but not finally accepted. The challenge was by the higher bidders. The following observation of the court could be said to be relevant:

“There is no reason why the power vested in the Government to refuse to accept the highest bid should be confined to inadequacy of bid only. There may be a variety of good and sufficient reasons, apart from inadequacy of bids, which may impel the Government not to accept the highest bid. In fact, to give an antithetic illustration, the very enormity of bid may make it suspect. It may lead the Government to realise that no bona fide bidder could possibly offer such a bid if he meant to do honest business. Again the Government may change or refuse its policy from time to time and we see no reason why change of policy by the Government, subsequent to the auction but before its confirmation, may not be sufficient justification for the refusal to accept the highest bid. It cannot be disputed that the Government has the right to change its policy from time to time, according to the demands of the time and situation and in the public interest. If the government has the power to accept or not to accept the highest bid and if the Government has also the power to change its policy from time to time, it must follow that a change or revision of policy subsequent to the provisional acceptance of the bid but before its final acceptance is a sound enough reason for the Government’s refusal to accept the highest bid at an auction.”

We do not think this judgment of the Supreme Court has any application to the issues involved in the present petitions before us.

In Delhi Science Forum & Ors. vs. Union of India & Anr. – (1996) 2 SCC 405, the writ petitioner questioned the powers of Central Government to grant licenses to different non-government companies to establish and maintain telecommunications system in the country and the validity of the procedure adopted by the Central Government for the said grant. The Supreme Court referred to the provisions of Telegraph Act, 1885. The Court said that the Supreme Court cannot review and examine as to whether the policy should have been adopted

which of course can be examined if there is any legal or constitutional bar in adopting such policy. It was also observed that any decision taken by any authority or by a body can be questioned primarily on the ground (i) decision has been taken in bad faith; (ii) decision is based on irrational or irrelevant considerations; decision has been taken without following the prescribed procedure which is imperative in nature.

This judgment is also inapplicable as nobody is questioning the validity of NTP-99.

To rebut the contentions of the petitioner that there is any implied terms in the license of cellular operators that monopoly in their favour cannot be taken away reference was made to the decision of the Supreme Court in the case of the *Naihati Jute Mills Ltd., vs. Khyaliram Jagannath- AIR 1968 SC 522*. This judgment was cited to support the contention that no term may be implied in a contract which is against the express terms of the contract. But as stated above, nobody has argued that the implied term in the licence is against the express terms of the licence or is in any way invalid.

Referring to another judgment of the Supreme Court in the case *Jit Ram Shiv Kumar & Ors. vs. State of Haryana & Ors. – (1981) 1 SCC 11* it was submitted by Mr. Raval that in fact the only implied term that could be read into the Government contract is the power to change the terms in the public interest. In this case there was a plea of promissory estoppel which was negated by the Supreme Court and it was held that the plea of promissory estoppel was not available in exercise of its legislative, sovereign or executive powers or the statutory functions of the State and that the doctrine cannot also be invoked for preventing the government from discharging its functions under the law. The case arose in the following circumstances:

“A municipal committee established a mandi and resolved that the purchasers of the plots for sale in the mandi would remain exempted for ever from payment of octroi duty on goods imported in the mandi. Subsequent to the purchase of the plots, the committee changed its mind and resolved to levy octroi duty on the said goods, but the resolution was annulled by the Punjab Government under Section 236 of the Punjab Municipal Act. The committee thereupon by a resolution requested the State Government to cancel the committee’s earlier resolution granting exemption from levy of octroi and the government accepted the same. The appellants who were hit by this decision, contended that the municipal committee and the government are estopped from deviating from the earlier decision exempting them for ever from levy of octroi”.

This judgment no doubt supports the proposition that a term in the contract can be changed in public interest. In fact, there is a term in both the contracts of CMSP and FSP which give right to the licensor i.e. the DOT to vary the term of licence if TRAI opines it is necessary or expedient to do so in the interest of general public. It has not been pointed out where TRAI has given its opinion that it is necessary or expedient to modify the terms and conditions of the licence and what it is that “in the interest of general public” requiring modification by the Government. The factors which are to be taken into account to use the terminology “interest of the general public” have not been spelt out. These factors have to be those which were not known earlier to the NTP-99 and to the licence. Moreover from the record of DOT it is not the case of the Government that it is exercising its powers under the terms of the contract “in the interest of general public” and what is “in the interest of general public” is not stated.

It was submitted by Mr. Raval that it would be against public interest and national interest to give a non-revocable monopoly to anybody or any group of people in this sector. He said no question of promissory estoppel or legitimate expectation arose in the present case because they were also subject to public policy. He said that there was never any express clause to this effect in cellular license and that on the contrary the license was expressly stated to be non-exclusive. He said it also contains an express stipulation that the Government could change the terms of the license and subsequently the migration package permitted additional licenses without any limit. In answer to an argument that Government had no power to change the terms of license it was submitted that there was express provision in the license and that license was not a mere contract and could not be interpreted as such, It was submitted that it was a statutory contract granting privilege and in this respect reference was made to the decision of the Supreme Court in the case of State of Haryana & Ors. vs. Lal Chand & Ors.- (1984) 3 SCC 634. This, case, however related to levy of excise on liquor vend and liquor vend has been sold by auction sale and would not be relevant.

Reliance was placed to another decision of the Supreme Court in the case of India Thermal Power Ltd. vs. State of M.P. & Ors. – (2000) 3 SCC 379. In this case what came up for consideration before the Supreme Court was the Government policy of private participation in generation, distribution and supply of electricity. Supreme Court said that a contract does not become a statutory contract merely because it was entered into in exercise of an enabling power conferred by statute. It will be statutory only as regards those terms and conditions of contract which are statutory and to this extent only.

In support of the contention that the licensor has power to interfere, reference

was made to yet another decision of the Supreme Court in the case of Deepak Theatre vs. State of Punjab - 1992 Supp (1) SCC 684. In this case there was a license for exhibiting movies. In this case Supreme Court was of the firm view that conditions of license issued under statutory rules becomes part of the statute. The court observed:

“It is settled law that the rules validity made under the Act, for all intents and purposes, be deemed to be part of the statute. The conditions of the licence issued under the rules form an integral part of the statute”.

In answer to the argument that Government changed its mind without any justification and on that lack of bona fides implied reference was made to the decision of the Supreme Court to the case of M/s. Sukhwinder Pal Bipan Kumar Ors. vs. State of Punjab & Ors. (1982) 1 SCC 31 wherein it is held that allegations regarding mala fide on the part of the licensing authority must be specifically stated in the petition by way of affidavit and burden of proof lies on the person making the allegations. It is contended by Mr. Raval that there was no allegation of mala fides made in the petition. Two more decisions on this aspect were referred and those being Prabodh Sagar vs. Punjab State Electricity Board & Ors. – (2000) 5 SCC 630 and State of M.P. & Ors. Vs. Nandlal Jaiswal Ors. – (1986) 4 SCC 566. In the case of Prabodh Sagar, Supreme Court observed as under:

“Mala fides have been alleged against the statutory Board (Punjab State Electricity Board) but the contextual facts negate such an allegation. Incidentally, be it noted that the expression “mala fide” is not meaningless jargon and it has its proper connotation. Malice or mala fides can only be appreciated from the records of the case in the facts of each case. There cannot possibly be any set guidelines in regard to the proof of mala fides. Mala fides, where it is alleged, depends upon its own facts and circumstances” .

Learned Solicitor General cited decision of the Supreme Court in the case of E.P. Royappa vs. State of Tamil Nadu & Anr. – AIR 1974 SC 555 to contend that the onus of establishing mala fides rests heavily in the petitioners.. However, with reference to the facts of the case before it the Court did observed “But we cannot help mentioning that there are certain disturbing features which cause us anxiety”. It also adds:

“93. These and a few other circumstances do create suspicion but suspicion cannot take the place of proof and, as pointed out above, proof needed here is high degree of proof. We cannot say that evidence generating judicial certitude in upholding the plea of mala fides has been placed before

us in the present case. We must, therefore, reject this contention of the petitioner as well”.

Reference was also made to another judgment of the Supreme Court in the case of *M. Sankaranarayanan, IAS vs. State of Karnataka & Ors. – (1993) 1 SCC 54* which relied on the judgement of the Supreme Court in *Royappa’s* case. The court said:

“12. Such facts alone do not constitute any foundation for a finding that because the appellant was not agreeable to oblige the Chief Minister by accepting all his suggestions and putting up notes to that effect, he had incurred the displeasure of the Chief Minister and the impugned order has been passed not on administrative exigencies but only to malign the appellant and to humiliate him. It may not always be possible to demonstrate malice in fact with full and elaborate particulars and it may be permissible in an appropriate case to draw reasonable inference of mala fide from the facts pleaded and established. But such inference must be based on factual matrix and such factual matrix cannot remain in the realm of insinuation, surmise or conjecture. In the instance case, we are unable to find that there are sufficient materials from which a reasonable inference of malice in fact for passing the impugned order of transfer can be drawn. It is an admitted position that the Chief Secretary and the Chief Minister had differences of opinion on a number of sensitive matters. If on that score, the Cabinet and the Chief Minister had taken a decision to relieve the appellant from the post of Chief Secretary and post a very senior officer of their confidence to the post of Chief Secretary, it cannot be held that such decision is per se illegal or beyond the administrative authority. The position in this regard has been well explained in *Royappa* case by this Court”.

With respect to the allegation that the TRAI did not follow the usual process showing that it was acting with a pre-determined mind and rushed through the recommendations showing the lack of bona fides, reference was made to certain decisions of the Supreme Court as follows:

In *Madhya Pradesh Industries Ltd. vs. Union of India & Ors. – AIR 1966 SC 671* the Supreme Court observed that the principle of natural justice required that a quasi judicial Tribunal should not make any decision adverse to a party without giving him an effective opportunity of meeting any relevant allegation against him. The opportunity, however, need not necessarily be personal hearing, it could be by certain representation. Whether the said opportunity by written representation or by personal hearing depends upon the facts of each case and ordinarily it is in the discretion of the Tribunal.

In *Union of India & Anr. Vs. Jesus Sales Corporation-* (1996) 4 SCC 69 the question before the Supreme Court was whether under certain provisions under the Imports and Exports (Control) Act, 1947 the Appellate Authority before refusing to entertain an appeal on the ground that no deposit of the amount of penalty imposed had been made should hear the appellant on the question of dispensing with such deposits unconditionally or subject to conditions. In the context of the question so raised the Supreme Court observed as under:

“It need not be pointed out that under different situations and conditions the requirement of compliance of the principle of natural justice vary. The courts cannot insist that under all circumstances and under different statutory provisions personal hearings have to be afforded to the persons concerned. If this principle of affording hearing is extended whenever statutory authorities are vested with the power to exercise discretion in connection with statutory appeals, it shall lead to chaotic conditions. Many statutory appeals and applications are disposed of by the competent authorities who have been vested with powers to dispose of the same. Such authorities which shall be deemed to be quasi-judicial authorities are expected to apply their judicial mind over the grievances made by the appellants or applicants concerned, but it cannot be held that before dismissing such appeals or applications in all events the quasi-judicial authorities must hear the appellants or the applicants, as the case may be. When principles of natural justice require an opportunity to be heard before an adverse order is passed on any appeal or application, it does not in all circumstances mean a personal hearing. The requirement is complied with by affording an opportunity to the person concerned to present his case before such quasi judicial authority who is expected to apply his judicial mind to the issues involved. Of course, if in his own discretion if he requires the appellant or the applicant to be heard because of special facts and circumstances of the case, then certainly it is always open to such authority to decide the appeal or the application only after affording a personal hearing. But any order passed after taking into consideration the points raised in the appeal or the application shall not be held to be invalid merely on the ground that no personal hearing had been afforded”.

In the case of *State Bank of Patiala v. Mahendra Kumar Singhal - 1994 Supp SCC 463*, the court said that in the absence of any rule, the rule of natural justice does not necessarily in all cases confer a right of audience at the appellate stage.

In *Carborundum Universal Ltd. vs. Central Board of Director Taxes – 1989 Supp (2) SCC 462*, the court said that personal hearing cannot always be insisted

where opportunity to make written representation is available and decision is taken after considering the same, personal hearing can be dispensed with.

These judgments do not lay down universal rule that personal hearing is not required before quasi judicial Tribunal. As to what should be the amount of hearing and whether it should be oral or documentary or both would certainly depend on the facts of each case. It is the case of the petitioners here that in spite of their requests hearing was not granted to them though their case fully justified full hearing by TRAI before sending in its recommendations and that opportunity was denied as TRAI was in a hurry to send its recommendations.

Dr. A.M.Singhvi, Senior Advocate appearing for ABTO and Reliance Infocomm Ltd. stated that concept of wireless technology was embedded from very origin in the Basic Service Providers' licence. He said wireless is a path for future growth and it is the key to increase in teledensity. Dr. Singhvi said CMSPs have no objection to wireless technology in basic telephony and they have also no objection to the use of bigger instrument which were only known in 1994- As the time passed, the instrument became smaller and apart from their size diminishing, everything else remaining the same. It started with four, then 3, 2 and then everything got into handset. He said that now suddenly, there is objection to the smaller size of handsets. He said if such an argument is accepted it will amount to legal restrictions on technology. According to Dr. Singhvi, therefore, WLL was and is embedded in the original licence itself.

Dr. Singhvi said that NTP 99 itself recognized wireless technology and wireless telephone as the intrinsic part of the basic service provider. Dr. Singhvi laid a great deal of stress on level playing field after the grant of limited mobility in WLL to Basic Service Providers. He referred to sub clause (v) of clause 1.7.2.2 relating to Technology in the licence agreement of FSP which reads as under:

“(v) For subscriber loop (local loop) optical fiber and wireless are the preferred technologies. Copper cable technology shall not be permitted, except over the last 500 meters of the loop. In the exceptional circumstances in rural telephone systems where the penetration of DOT network is marginal , the LICENSEE may be permitted to lay copper cables.

He said concept of subscribers local loop, optical fibre and wireless are preferred technology and obviously it is substitute for copper technology. He asserted that problem started when the instrument became small and was workable within the SDCA. Limited mobility is not even implied but is very much part of the FSP licence far from being stranger to it. He said there is no encroachment on the market of CMSPs and they are prospering.

Dr. Singhvi said more sops have been given to CMSPs and he said they are only shedding crocodiles tears. Lastly Dr. Singhvi stated that both CMSPs and FSPs are profit making bodies and it is ultimately the consumer who is king and that both cannot develop unless consumer is treated as a king and he is given choice. It is the question of teledensity and a affordability which is important, observed Dr. Singhvi.

Two Non-Government Organizations (NGOs) also jumped in the fray. While Kalyan supported the contention of the petitioners, Telecom Watchdog supported that of the Basic Service Providers. Kalyan pointed out that even though the licence of Basic Telecom Operators was amended on 25.1.2001 and the facility to offer hand held sets and limited mobility in SDCA to their consumers was provided to them, not a single existing or new operator has ventured towards the semi urban and rural areas. Kalyan wanted a direction to TRAI and the Central Government to furnish statistics to demonstrate whether there has been any increase of tele-density in the semi-urban or rural areas as a consequence of the decision to allow the providers of basic telecom operators to offer limited mobility service also.

Mr. Ashok Desai, learned Senior Advocate appearing for Telecom Watchdog while giving us the background of the case, did not refer to the earlier stand of DOT declining limited mobility in WILL to FSPS and prohibiting them from using handsets. Telecom Watchdog was perhaps not aware of the earlier stand of the DOT and the reasons which led to change in thinking in the Department. It is also not clear to us from the stand of the Telecom Watchdog if it protested when DOT earlier held the view that limited mobility and use of handsets was not permitted or took up the cause in favour of BSPs.

According to Telecom Watchdog, the decision to allow limited mobility in WLL is in the consumer interest. Watchdog has stated that SDCA is equivalent to revenue Tehsil or Taluk and that the mobility of WLL subscriber has necessarily to be restricted by the Service Provider to SDCA in which his phone is connected. Further that SDCA is not the same and does not coincide with the circle of CMSPs. Telecom Watchdog also struck a note of warning that rolling back of WLL (M) service would be a retrograde step considering the consumer interest, technological advancement and would be against NTP-99 which recognises the convergence and blurring of differences in technologies.

By order dated 8.4.2003 this Tribunal rejected the claim of Union of India claiming privilege for production of documents relating to issues involved in the present petitions. At the same time we recorded as under:

“We are, however, quite appreciative of the stand taken by the Government

that it has no objection to place the relevant file before this Tribunal”.

Against that order Union of India filed appeals in the Supreme Court, these being Civil Appeal Nos.3527 – 3529/2003. By order dated 24.4.2003 Supreme Court while admitting the appeals passed the following order:

“The Telecom Disputes Settlement and Appellate Tribunal by the impugned order has rejected the claim of privilege of Union of India and directed that the documents in respect of which privilege is claimed be filed before the Tribunal. The Tribunal has also noticed the stand of the Government that it has no objection to place the relevant files for perusal of the Tribunal. The matter requires consideration. Accordingly, we admit the appeals without prejudice to the right of the respondents to make all factual and legal submissions including the objection regarding maintainability of the appeals. Hearing of the appeals is expedited. Parties are granted liberty to mention before the Hon’ble the Chief Justice.

Learned counsel for the respondents submit that in the meanwhile the hearing before the Tribunal on production of the record by the appellants before the Tribunal, may go on and till these matters are decided, they will not ask for inspection of the files. It would be open to the Tribunal to go on with the hearing. We only stay the direction of the Tribunal to the extent it requires the Government to file the record in respect of which privilege is claimed. In case the Tribunal so directs the record would be produced before the Tribunal for Tribunal’s perusal”

After the arguments were resumed it was stated by learned counsel for the petitioners that they would not insist upon the documents to be disclosed to them and they would be satisfied if these are shown to the Tribunal. We, therefore examined the relevant files of the DOT of our own. Some of the files deal with approval of the commercial code of the licensees. This approval is required from the licensor under clause (v) of the licence agreement of Fixed Service Providers. This clause (v) is as under:

“The LICENSEE shall frame a set of commercial code to govern registration, provisioning, operation, maintenance and billing for the service and the same approved by the LICENSOR within 4 weeks of issue of license. LICENSOR shall accord approval after satisfying itself that such code is consistent with the Indian Telegraph Act 1885 and does not violate the upper limit of tariff specified by the DOT and otherwise is in the general interests of the public.

By letter dated 5.5.98 Tata Tele Service (TTS) submitted their commercial code for approval for basic telecom service in Andhra Pradesh service area

to the Department of Telecommunication. Commercial code so submitted was examined and various deficiencies pointed out to TTS. When amended commercial code was submitted, it was recorded by the Member (Production) that “basic service licensees should not offer mobile services on the pretext of wireless service” It was also noted that TTS had confirmed that it shall not provide mobile handsets to customers for its wireless in the local loop services. In view of this clarification received from TTS, their commercial code was approved. It was also recorded that the case of MTNL/DOT cannot be equated with private basic service operators since MTNL/DOT are going to be cellular mobile operators also. However, further noting show it being a policy matter it was thought expedient to refer the matter to Telecom Commission for detailed examination. However, at the same time, commercial code of TTS was approved. In fact the final note is approved by the Chairman, Telecom Commission. By letter dated 8.1.99 TTS was informed about the approval of the commercial code and at the same time it was pointed out that “you will not provide mobile handsets to customers for your wireless in local loop service”

Bharti Telenet Ltd. who had licence of basic telephone service in the Madhya Pradesh service area submitted their commercial code for approval to DOT by their letter dated 11.3.97. The proposal was examined at various levels. A letter dated 2.2.99 was sent by DOT to Bharti Telenet with stipulation that “you will not provide mobile hand held sets to customers for your wireless in local loop service.” It was always WLL (Fixed) which was understood in FSP licence.

Shyam Tele Link, basic service provider for Rajasthan service area submitted their commercial code for approval on 25.5.98 and themselves undertook that “only fixed wireless terminals will be given as part of WLL connection, mobile WLL handsets will not be offered”. Containing this condition, commercial code was approved by letter dated 7th March, 2000.

M/s. ECL Telecommunication who were having FSP license for Punjab submitted their commercial code for approval on 30th January, 1998. A letter dated 3.8.2000 granting approval of the commercial code was sent by DOT wherein it is recorded “mobile handsets was not provided to the customer for your wireless in local loop service.”

Going little back we record that on 17.9.99 DOT wrote a letter to the TRAI wherein it is mentioned in bold letters “provision of mobile service by private basic service operators, is therefore, not permitted”.

It all started from a letter dated 7.4.99 received from COAI on the subject-telephone service using WLL technology. COAI had mentioned that there was

no basis for the provision of limited mobility service by DOT (DOT is predecessor of BSNL) or MTNL through their WLL and consequently no justification for issuing tariffs for the same. They accordingly requested TRAI for intervention in the matter. Three issues are raised: (i) Whether basic operator should be allowed to use WLL for providing limited mobility? (ii) Whether DOT as a service provider should use WLL in its network for limited mobility or not? (iii) Whether as an abundant caution DOT as a licensor should issue clarification to MTNL for inducting WLL in their network though MTNL's licence permits them to use new technology in consultation with DOT. The matter was placed before DOT for its views.

The matter was examined with reference to letter dated 10.9.99 of TRAI regarding tariff reported by MTNL for Cellular Mobile Service Provider (CMSP) using CDMA technology. TRAI also referred to its earlier letter dt. 9.6.99 for comments of DOT on the issues relating to scope of basic and cellular mobile service in the context of proposed introduction of service "WLL with limited mobility" by MTNL. Clarification was also sought by letter dated 27.8.99 on the following points:

Use of any technology other than GSM for providing cellular service by the DOT/MTNL as third operator in the country and implications thereof by the existing licensees.

Scope and definition of cellular mobile service with limited mobility.

Facility that macro cell and micro cell mobile wireless in the local loop reportedly available to DOT/MTNL being extended to other basic service operators.

Possibility of using the same by similar technologies for providing mobility in WLL or cellular service.

The note records:

Accordingly Telecom Commission has decided that:

All new cellular mobile service providers will be technology-wise neutral; however, technology must be digital. The existing licensees of cellular service on their migration to the NTP- 1999 in terms of migration package already offered to them will also be permitted to expand their networks using any other technology or the GSM technology to which they have been bound so far as the existing licenses.

Department of Telecom/MTNL would operate similar services under the same terms and conditions of license as would be applicable to private operators.

In view of the objectives of NTP-1999 till the terms and conditions of new licenses are finalised for which recommendations of TRAI have already been sought, DOT/MTNL would be permitted to operate cellular mobile service under provisional license; terms and conditions as finalised would be applicable to all licensees under NTP-99 including MTNL and DOT. In terms of NTP-1999 the licence fee thus received would be reimbursed to DOT to provide resources for meeting immense rural and social obligations.

It is also noted that as per clause 3.0 of Schedule-B of Part-I*3 and clause 1.7.2.2*4 of Schedule B Part-II and clause 1.7.9.2*5 of the license

*3“3.0 SCOPE OF SERVICE:

SERVICE covers transmission of voice or non-voice message inclusive of ISDN (Integrated Services Digital Network) facilities over LICENSEE's PSTN (Public Switched Telephone Network) in real time only. (Store and forward)/ (Store and retrieve) type of message transmission is not permissible.

SERVICE does not cover broadcasting of any messages voice or non-voice over wire or wireless media.

SERVICE does not cover packet switched data, Telex or Telegraph service.

SERVICE does not cover mobile voice and non voice services, Value Added Service such as Voice-Mail, Audio-Text. E-Mail etc. as defined by TELECOM AUTHORITY from time to time.

agreement for basic service WLL may be used for local loop only and mobile service is not permitted. (emphasis supplied in the note). It is also recorded that TRAI be informed that since all issues had been settled there was no need to hold public consultation on the issues involved. This note is signed by the Member (Production), Member (Services) and Secretary DOT who is Chairman of Telecom Commission. Thereafter letter dated 17.9.1999 was issued to TRAI. When the note came up for approval by the Chairman Telecom Commission, draft of letter dated 17.9.99 was also placed before him for approval. This letter has already been quoted in earlier part of this judgment.

As noted above DOT by its letter dated 23.4.99 to TRAI sought recommendations for the issue of fresh FSP licences. Recommendations of TRAI on the issue of FSPs are dated 31.8.2000. and are received by DOT on the same day. There is no recommendation for WLL (M) or hand held sets as no such recommendations were sought for.

Chairman of National Committee on Confederation of Indian Industry (CII)

wrote letter dated 31.8.2000 to the Secretary DOT who is also Chairman of Telecom Commission. This letter reads as under:

*41.7.2.2 TECHNOLOGY:

All telephone exchanges shall be of the digital switching type compatible with 8 bit A law encoded 2.048 MBPS primary line rate. Exchanges of capacity more than 10,000 lines shall have the necessary hardware and software for supporting No.7 signaling and shall be inherently capable of providing ISDN service for at least 2% of exchange capacity.

All transmission systems shall be of the digital type and shall, in case they are asynchronous, follow or be inherently compatible with 2/8/34/140 MBPS hierarchy as per ITU-Tg.703 recommendations. SDH systems as per ITU-T G.708 recommendations also will be allowed.

If band width compression techniques which reduce the bit rate of a voice channel less than 65 KBPS are used in a transmission system, LICENSEE shall provide conversion equipment for 65 KBPS/Analogue voice channel as the case may be at the interface points with DOT's switching and transmissions systems.

For telephone exchanges of less than 1000 lines, C-DOT technology shall be considered as the first choice. The capacity of the switching processor involved will be determining factor in this regard.

For subscriber loop (local loop) optical fiber and wireless are the preferred technologies. Copper cable technology shall not be permitted, except over the last 500 meters of the loop. In exceptional circumstances in rural telephone systems where the penetration of DOT network is marginal, the LICENSEE may be permitted to lay copper cables.

“Thank you for the courtesy extended to me when I called on you on Friday August 25, 2000.

During our discussion regarding FSP's (Fixed Service Providers) being allowed to issue Handsets (in lieu of the Fixed phone) with limited mobility using WLL technology, you had opined that this should be in order. But in case of any difficulty, we could refer to you for clarification.

I now understand that some of FSP's had prior to announcement of NTP'99 been asked to give an undertaking that they would not issue handsets with limited mobility.

With the announcement of NTP'99 and its objectives of rapidly reaching the rural sector and increasing teledensity, there should be no reason to disallow

such distribution of Handsets.

We would request you to please clarify the current situation so that we may advise our FSP members accordingly”.

On this letter Secretary makes endorsement on 1.9.2000 to DDG (BS) ‘Pl. speak’. Letter dated 2.9.2000 is also received from ABTO addressed to the Secretary-cum-Chairman, Telecom Commission which is marked to Member (P) and then to DDG (BS).

The note after the receipt of recommendations of TRAI dated 31.8.2000 was prepared by DDG (BS) on 3.9.2000. He records that recommendations of the TRAI envisaged deployment of wireless technology for rapid network roll out and convenience to the subscribers. There should be no bar in using handheld sets which should be permitted to be deployed in the

*51.7.9.2

The LICENSEE may provide Value added Services, other than mobile telecommunication and paging services after obtaining a separate license from the LICENSOR.

LICENSEE’s ISDN subscribers may be able to connect to I-net for which LICENSEE/LICENSEE’s subscribers shall pay as per the prescribed I-net tariff.

network of Basic Service Operators. He records that CII and ABTO have also made representations for this and that it could consider for permission only in local areas as has been done in Delhi. Further notings says that this would reduce the investment per line as the cost of hand held instrument is Rs.6000/-against the cost of Rs.15,000/- for fixed wireless instrument and that would make the project viable apart from enabling the subscriber to choose any instrument and facilitate competition. This note of the DDG (BS) goes to the Secretary and then to the Minister of State on 5.9.2000 who records that deployment of hand held instrument should be allowed with immediate effect to the existing licensees in their service area without restriction and that this will lead to a faster roll out even to rural areas and better and cheaper customer services. The note then passes through the Secretary and then Minister and a note was thereafter prepared for Telecom Commission and the matter placed before it. With reference to the observations of TRAI for faster roll out Telecom Commission noticed that TRAI recommendations have envisaged deployment of wireless technology for rapid roll out of the networks. Reference was made to frequency bands stipulated for allocation in respect of WLL operations by FSP and also band allocated to CMSPs as per GSM technology. It was noticed that there was no clash between frequencies of Basic Service Operators and Cellular Operators. It was then noticed

that migration package offered after NTP-99 envisaged multipoly regime for both the operators and NTP 99 also envisaged level playing field for all service providers. Representation of CII and ABTO were referred to and it was pointed out that COAI had opposed mobility to FSPs though there were no representations from COAI. Telecom Commission observed that in view of TRAI's observations that wireless technology was inescapable if quick roll out and connection on demand in congested areas is to be given there should be no bar in using hand held instrument which should be permitted to be deployed in the network of the Basic Service Operators. It was pointed out that cellular operators had agreed to multipoly as per migration package and thereby could not claim protection under NTP as in the case of BSO. Cost of hand held instrument is also noticed i.e. Rs.6000/- for hand held and Rs.15,000/- for fixed wireless instrument.

Telecom Commission, therefore, recommended that it was agreeable for grant of permission of hand held instruments only in local area i.e. SDCA as is being done in Delhi. No Basic Service Operator was to be allocated frequency from GSM band.

These recommendations of Telecom Commission were examined in the DOT. By this time a letter dated 18.9.2000 from ASSOCHAM had also been received which had also proposed full mobility. DOT also noticed that any condition for protection of service sector for any of the operators was not in line with the unconditional acceptance given by them to the migration package. Suggestion of the Minister of State for full mobility in the licensed service area to BSO was also noted. Thus the note which was prepared on 3.10.2000 after receipt of the recommendations of the Telecom Commission stated that keeping in view the subscriber convenience, available fruits of technology, and other facts noted, it was proposed that decision be taken whether TRAI is to be addressed for full mobility within the service area for Basic Service Operators or mobility within local area (SDCA) as recommended by Telecom Commission. The note is again by DDG (BS) and on this Secretary wrote "it is felt that we could recommend to TRAI to allow full mobility to Basic Service Operator in their service area subject to payment of additional licence fee which could be recommended by TRAI for our recommendations". Telecom Commission, however, had recommended full mobility only in local area (SDCA). Secretary finally recorded that there was urgency in seeking reconsidered view of TRAI on the points mentioned in the note since it had been decided that guidelines for Basic Service Operators will be finalised before the end of the current month. Accordingly reference was made to TRAI to reconsider its recommendations. From the notings which we have referred to and which finally culminated in the letter dated 9.10.2000, there is no mention of any recommendation of TRAI which the Government did not accept and which needed reconsideration. Letter of 9.10.2000

from DOT to TRAI with the recommendations of DOT has already been quoted earlier in the judgment.

Reference of 9.10.2000 was bifurcated by TRAI. For WLL separate Consultation paper was issued on 3.11.00. Meanwhile when recommendations on the other part which were received on 31.10.2000, note dated 6.11.2000 recorded that TRAI had sent in its reconsidered opinion and had sought 5 to 6 weeks time for finalising recommendations regarding WLL frequency, charges for spectrum and use of hand-held sets etc. It was proposed that TRAI may be given time of six weeks for finalising the recommendations. This note is dated 6.11.2000. On this Chairman, Telecom Commission recorded that he had required the Chairman, TRAI to send report at the earliest, preferably by the end of this month. Recommendations dated 8.1.2001 were thereafter received from TRAI were examined on 15.1.2001. Note dated 1.1.2001 however, records preparation of draft guidelines. Then various notings considered the desirability of issue of guidelines with or without conditions relating to WLL frequency, as well as area of operation for hand held telephone sets and ultimately it is decided to defer till recommendations are received from the TRAI.

After the recommendations were received on 8.1.2001 a brief note recorded on 15.1.2001 and then draft note for Telecom Commission was prepared. This note for Telecom Commission was discussed by various officers and a revised note for Telecom Commission prepared and on 19.1.2001 note was sent to all the members of Telecom Commission. Note dated 24.1.2001 of DDG(BS) shows that the Telecom Commission granted approval with a certain change. Then in its note dated 25.1.2001 which is approved by the Chairman, Telecom Commission records that "The Commission approved the recommendations of TRAI with a stipulation that in the event this facility of limited mobility is prohibited on any account the concessions being given to the cellular operations will not be applicable during the period". Finally the note is approved by the Minister on the same day i.e. 25.1.2001.

On 25th January, 2001 itself the Press note was issued detailing the guidelines containing as many as 56 such guidelines together with eligibility requirements and licence fee and the telecom circles and the areas covered by them for the purpose of the licences. These all pertain to FSPs. On the same day letters were issued to all the 6 FSPs telling them that basic telephone service licensee may provide hand held telephone sets to their subscribers stipulating certain conditions. It is guideline No.18 which has been objected to and questioned by CMSPs which allows basic service operators to provide mobility to their subscribers with wireless access systems limited within the local area for short distance charging area (SDCA) in which subscriber is registered.

Before we further consider rival contentions of the parties with reference to the recommendations of TRAI and record of the DOT we refer to the two decisions of the Supreme Court in the case of *In Mohinder Singh Gill and & Anr. Vs. The Chief Election Commissioner, New Delhi & Ors.* – (1978) 1 SCC 405 AIR 1978 SC 851. The Constitution Bench quoted with approval the observations made by the Supreme Court in the case of *Commissioner of Police, Bombay vs. Gordhandas Bhanji*- AIR(39) 1952 SC 16 and said as under:

“The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in *Gordhandas Bhanji*:

‘Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself’.

Orders are not like old wine becoming better as they grow older”.

Supreme Court in the case of *Kumari Shrilekha Vidyarthi & Ors. vs. State of U.P. & Ors.* – (1991) 1 SCC 212, considered the power of the Court to examine the issue of arbitrariness by public bodies in contractual fields and observed as under:

“26.... .. It is significant to note that emphasis now is on reviewability of every State action because it stems not from the nature of function, but from the public nature of the body exercising that function; and all powers possessed by a public authority, howsoever conferred, are possessed ‘solely in order that it may use them for the public good’. The only exception limiting the same is to be found in specific cases where such exclusion may be desirable for strong reasons of public policy. This however, does not justify exclusion of reviewability in the contractual field involving the state since it is no longer a mere private activity to be excluded from public view or scrutiny.

Unlike a private party whose acts uninformed by reason and influenced by personal predilections in contractual matters may result in adverse

consequences to it alone without affecting the public interest, any such act of the State or a public body even in this field would adversely affect the public interest. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. This is equally true of all actions even in the field of contract. Thus every holder of a public office is a trustee whose highest duty is to the people of the country and, therefore, every act of the holder of a public office, irrespective of the label classifying the act, is in discharge of public duty meant ultimately for public good. With diversification of State activity in a Welfare State requiring the State to discharge its wide ranging functions even through its several instrumentalities which requires entering into contracts also, it would be unreal and not pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State actions required to be non-arbitrary and justified on the touchstone of Article 14.

It is now too well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us. Arbitrariness is very negation of the rule of law. Satisfaction of this basic test in every State action is the sine qua non to its validity and in this respect, the State cannot claim comparison with a private individual even in the field of contract. This distinction between the State and a private individual, the field of contract has to be borne in the mind.

Conferment of the power together with the discretion which goes with it to enable proper exercise of the power is coupled with the duty to shun arbitrariness in its exercise and to promote the object for which the power is conferred, which undoubtedly is public interest and not individual or private gain, whim or caprice of any individual. All persons entrusted with any such power have to bear in mind its necessary concomitant which alone justifies conferment of power under the rule of law ...”.

The Court said that it has been the emphasis time and again that arbitrariness is an anathema to State action in every sphere and wherever the vice percolates, the Court would not be impeded by technicalities to trace it and strike it down. This is the surest way to ensure the majesty of rule of law guaranteed by the Constitution of India.

Mohinder Singh Gill’s case is authority for the proposition that we have to see the relevancy of the grounds with reference to what was considered by public

authority or the State at the time the impugned order was issued or decision taken. We cannot add new grounds to justify that order or decision. Kumari Shrilekha Vidyarthi case is authority for the proposition that State or public authority cannot take decision in arbitrary manner even in the contractual field.

Interestingly, now the argument of learned Solicitor General is that since the terms of the licence have been amended after decision of the Government dated 25.1.2001 the matter ends at that. This is not the correct approach. You may amend BSOs' licence but what about the CMSPs licence which gets affected and implied term breached? It has not been explained. It is the admitted case that in the licence agreement of BSOs there is no provision for providing mobility using wireless in local loop. Once you provide mobility to FSPs it affects the rights of the CMSPs and this fact has also been recognized both by the Government and TRAI. There is certainly an implied condition in the licence of the CMSPs that their exclusive right to provide cellular mobility will not be disturbed by any other player. As noted earlier this is a valid condition.

Licence Agreement is a contractual document. Contractual right has been acquired by the petitioners for enormous consideration. It is not a matter of largesse. Even after the migration package huge investments have been made. Apart from the fact that the right which the petitioners have acquired cannot be taken away in breach of the terms of the licence they have legitimate expectations that the licence agreement which is solemn document would not be breached. Question of promissory estoppel also arises inasmuch as on the representations of the Government, investments have been made in the telecom sector by the petitioners who cannot be placed back at the original position. Under the licence agreement it is the petitioners who have absolute right to provide mobile cellular service. CMSPs and FSPs are two separate service providers. Separate tenders were invited for both these service providers. Separate licence agreements executed. No one can impinge upon the right of the other howsoever small may be. Both CMSPs and FSPs are operating in different circles/fields. Here the circle/field where FSP was to operate has been brought on to overlap that of CMSPs affecting a portion of their right. To allow mobile service to FSPs howsoever limited is in breach of the licence agreement of CMSPs. NTP-99 and the licence agreement of FSPs was a subject of interpretation by the DOT on number of occasions and this firm decision of the DOT that mobility is not permitted in FSPs licence and handsets not allowed held good. The interpretation of policy is not a policy in itself. To provide mobile service even though limited to FSP no advantage can be derived from migration package which is in the nature of settlement. Petitioners did not give up their exclusive right to provide mobile service, even though they would not object to another player in their

domain and that only after undergoing the process of tender and selection. We may also note that clarification was sought on the tender document and one of the clarifications given by DOT was:

“All VAS (Value Added Service) except Radio Paging and Cellular mobile phone are available on a non-exclusive basis through a licence. The bidder does not have to apply for a licence for VAS at the time of bidding. The LICENSEE may apply for a VAS licence subsequently”.

It is also quite apparent that the Government has not accepted the recommendations of TRAI dated 8.1.2001 in full and that being so the matter had to be sent back to TRAI for reconsideration and not having done so, DOT again violated 5th proviso of Section 11 of TRAI Act.

To answer the question if limited mobility in WLL is permissible to BSOs, we have to see the relevant documents i.e. tender and licence and if there is any ambiguity or clash arises to refer to NTP-99. We have not to understand a document, terms of which are quite explicit, to give it a different meaning by referring to high sounding words like “march of technology”, “fast changing developments in Telecom Sector” or even to refer to document of ITU (International Telecommunication Union) or to relevant advantages of limited mobility in WLL. It was submitted by ABTO that mobility is embedded in the licence agreement when it provided for WLL. It a fallacious argument. If it is so and limited mobility is part of WLL there would not have arisen any question of level playing field. Another fallacious argument of ABTO was that size of the receiving instrument shrank, first from four instruments to three, , then two and then one which is handset and so mobility is automatic. We are not considering the size of the receiving instrument and rather when licence prescribes WLL (fixed) limited or full mobility cannot be allowed. It will not only be in breach of terms of FSP licence but also directly affecting the licence of CMSP and trenching on the field exclusively reserved for them and for which hefty entry fee had been paid by them. “WLL as preferred technology” cannot acquire a concept to grant mobility when there is none in the licence agreement. We cannot give a different colour to this concept, howsoever we may limit mobility. It is difficult to accept the proposition that limited mobility is value addition to WLL service even if the nature and feature of this service are qualitatively different from that of cellular mobile service. A consumer would not know if technology is GSM or CDMA or what is the frequency band in the handset he is using as his concern is mobility.

If any policy change is required then it is for the Government to change NTP 99 and come up with a new policy, the way NTP 99 brought in new policy

replacing earlier policy of 1994. It is not for the Tribunal to devise a new policy. Terms of the licence are not in any way violative of the provisions of the Telecom Regulatory Authority of India Act, 1997, Indian Telegraph Act, 1985 or the Indian Wireless Telegraphy Act, 1933. Government is, therefore, bound by those terms, particularly, when licence in the present case is not a largesse but rather was granted when tender was accepted and entry fee paid. As has been held by the Supreme Court even in the contractual field Government cannot act in an arbitrary manner.

It is difficult to hold that Government has competence or power to amend the terms of the licence in the exercise of its powers under clause 13(ii) of FSP licence or under clause 14(ii) to CMPS agreement. This argument as it does come from the Government appears to be in desperation. These clauses reserve the right to modify at any time the terms and conditions of the licence if in the opinion of the licensor it is necessary and expedient to do so in the interest of general public or for the proper conduct of telegraphs or on security consideration. Stress was laid by Solicitor General on the words “in the interest of general public”. He said there is no difference in the terminology ‘in the interest of general public’ or ‘in public interest’ We need not however, go into this question of any difference in these two terms. However, the fact remains that there is nothing in the record of the Government, or even the recommendations of the TRAI, that terms of the licence need modification or have been modified in the interest of general public. The use of the words ‘quicker roll out’ or WLL in FSP’s licence “as preferred technology” were terms which were already there and there was nothing new for the Government to take shelter under two clauses aforesaid to modify the terms of the FSP licence allowing limited mobility in WLL. Government has to give reasons when exercising powers under these clauses terms of the agreement of CMSPs are violated to their disadvantage. Admittedly, the licences are service specific and cannot trench upon the field of one another.

The present stand of the Government that NTP –99 does not prohibit mobility in wireless service being provided by BSOs, is difficult to comprehend considering the earlier stand of the Government that when FSPs were told specifically that hand held sets shall not be provided and mobility in any form is not allowed. No one has said that earlier stand of the government was wrong. Should we assume that at that time the Department did not understand the scope and intent of NTP-99 or even that the licence does not contain any specific bar to holding handsets and that wisdom dawned upon only now on the Department? From the record of the file shown to us we find that when earlier the stand was conveyed by the Government due consideration had been given, and if we see the letter dated

17.9.99 from DOT to TRAI the decision was communicated after it had been examined by the Director (Regulations), DDG(Regulations), DDG(VAS), Advisor (Operation), Member(S), Member (P) and Chairman, Telecom Commission. Government cannot change its stand overnight even without a whisper of its having considered its earlier stand. Should we take that the Government was totally opaque to those FSPs when it told them not to have limited mobility or to use the handsets in their respective licences. Is it not that injustice had been perpetrated on those service providers earlier and why Government is silent about it?

Solicitor General said the Government had power to change policy and no formalities are required to be followed in order to bring about or give effect to policy changes. The fact, however, remains that the NTP-99 was placed before both the Houses of the Parliament. There is nothing on the record that there was any consideration for change of policy when WLL was allowed with limited mobility. This argument is a contradiction in itself. If we accept this argument in one part it conveys that under NTP-99 and licence agreement limited mobility could not have been allowed and on the second part there has been change in the policy and on that account it has been so allowed. We do not know the system of parliamentary procedure but we thought perhaps courtesy required to apprise the Parliament of the change of policy. In any case, change of policy was not the ground for the Government to allow limited mobility and a new ground cannot be taken to justify the action. Moreover, change of policy cannot be arbitrary which affects the contractual obligations and which obligations were not contrary to any law.

Mr. Vahanvati had referred to a report of the Hindustan Times dated 22.9.2000 wherein it was reported that on 21.9.2000 Telecom Commission decided to allow Basic Service Operators to offer WLL based mobility within SDCA of 20-25 Kms. at a tariff of Rs.1.20/3 minutes. Thus it is obvious and as rightly asserted by Mr. Vahanvati that a plan had already been set in motion to grant WLL mobility and provide handsets to Basic Service Operators. Representations of CII and ABTO were used as a peg to hang on the hat for getting "reconsidered" opinion of TRAI on its recommendation when, as stated above, there were none. In letter of Vijai Kapur there is a telling statement imputed to the Secretary where the letter records: "During our discussion regarding FSP's (Fixed Service Providers) being allowed to issue Handsets (in lieu of the Fixed phone) with limited mobility using WLL technology, you had opined that this should be in order". There is no repudiation to this statement imputed to the Secretary anywhere nor the report appearing in the Hindustan Times contradicted. In our view the note which was processed by DDG (BS) dated 3.9.2000 was motivated and did

not represent the facts correctly and was recorded only after the receipt of the representations of CII and ABTO.

It is the stand of the Government that cellular mobile service and WLL service are qualitatively different because (i) they operate on different frequency, both had agreed for multipoly regimes, (iii) while FSPs are to operate in SDCA (local area), whole circle is opened to CMSPs, (iv) GSM band is not for WLL and (v) while the handsets will cost Rs.6,000/- against the cost of Rs.15,000/- for fixed wireless instrument. The cost of Rs.6,000/- and Rs.15,000/- which the note dated 3.10.200 put in from nowhere, has even not been accepted by TRAI in its recommendations. As noted above, when a consumer is given handset he is not concerned with what type of frequency is used and how two frequencies are different. He is only concerned with the mobility. We have said elsewhere that this stand that both agreed for multipoly and therefore could enter the field of one another has no basis. If we refer to the letter of DOT to TRAI seeking recommendation for entry of new FSP and 4th CMSP it is abundantly clear that multipoly has been agreed to by both CMSP and FSP in their respective areas. This argument of multipoly appears to be rather naïve coming from the Government and ABTO.

Petitioners also alleged that recommendations were sent by TRAI with undue haste and with the same undue haste accepted by Telecom Commission and then by the Government. If we refer to letter of 31.10.2000 of Chairman, TRAI to Secretary, DOT where he told the Government that TRAI never made any recommendations on the issue of WLL service by BSOs and wrote that "TRAI is conscious about the timeframe within which this decision needs to be taken and shall, therefore, endeavour to complete the process and submit its recommendations to the Government, as early as possible. It is estimated that it should be possible to submit the relative recommendations in about 5-6 weeks from now". We feel that the reason why the Chairman, TRAI was so apologetic about the time frame was obviously because of pressure by DOT. Recommendations were forwarded to the Government on 8.1.2001 and were processed in the Department on 15.1.2001. Meanwhile record showed that DOT had been very keen for early receipt of the recommendation and in fact earlier a note says that on 6.11.2000 Secretary recorded that he had required the Chairman, TRAI to send the report at the earliest, preferable at the end of this month. Before the recommendations were examined by the DOT there is a note dated 1.1.2001 which records the guidelines had been prepared and the recommendations of the TRAI awaited. However, after the receipt of recommendations a note was prepared for Telecom Commission on 19.1.2001. On 24.1.2001 DDG (BS) records that Telecom Commission granted its approval on that day accepting recommendations of TRAI but with certain variations. On 25.1.2001 recommendations of the

Telecom Commission in turn were accepted by the Government and guidelines which are impugned were issued. Along with guidelines, letters were issued to all the existing FSPs telling them that the Government has decided that the Basic Telephone Service licensee may provide hand held telephone sets to its subscribers with wireless access system subject to the condition that mobility with the usage of these hand held telephone sets shall be restricted with the local area in which the subscriber is registered and further there would be no separate entry fee payable for allocation and usage of spectrum in a service area for deployment of wireless access system.

We may now refer to as to how the things transpired at TRAI after Consultation Paper was issued on 3.11.2000. TRAI held Open House discussion at Mumbai on 13.11.2000, at Chennai on 14.11.2000, at Calcutta on 15.11.2000 at Delhi on 24.11.2000. Pandemonium prevailed at Open House at Delhi. It is the complaint of COAI that they were not given opportunity to present their views In the circumstances of the case they were the most affected party when the recommendations went against them. FSPs did not lose anything. It was in the fitness of things they should have been given proper opportunity to represent their case. COAI was not given hearing in spite of their various representations. Even the inputs received by the TRAI from the expert panel were not made available to COAI for them to give their response to the same. Solicitor General referred to the decision of the Supreme Court in the case to contend that personal hearing was not required and rules of natural justice should satisfy if written representations were made to the authority. That may be so in the facts of a particular case but here there have been Open House hearing and opportunity had been given to various persons to present their views and there is no reason why on one date representatives of the petitioners could not have been given a hearing. We are unable to understand the urgency of the matter that even a day could not be spared by TRAI. Perhaps TRAI was to meet a deadline as DOT was pressurizing TRAI to send its recommendations. Solicitor General said law required recommendations to be sent within a fixed period of time. But this time limit prescribed could only be directory. DOT wanted the reconsidered recommendation of TRAI within 15 days of its letter dated 9.10.2000. That would be 5th proviso to Section 11 of TRAI Act. We have seen above that 5th proviso could not be invoked and even TRAI said so in its Chairman's letter dated 3.11.2000 to Secretary, DOT. If we examine the past record of TRAI when DOT sought recommendation for new FSPs in April, 1999, these were given in August, 2000. Similarly recommendations sought for 4th CMSP licence, were given by TRAI in December, 2000. What was all this hurry by TRAI and then by DOT? It was because recommendation of TRAI was a foregone conclusion as the record of the DOT and the TRAI would show. Clause 18 was already forming part of the

guidelines, before even the recommendations were received by the DOT from TRAI. Recommendations of TRAI appeared to be a mere formality for guidelines dated 25.1.2001 to be put in operation.

Apart from the fact that TRAI did not address itself squarely to the question if NTP-99 or the licence agreement allowed limited mobility in WLL, it did not examine the question properly of the call charges and in its haste sent in incomplete recommendations. It has not been possible for us to deduce from the recommendations of the TRAI as to how TRAI arrived at the figure of Rs.1.20 for three minutes call charges. TRAI is a regulatory body. It was the duty of TRAI to foresee the state of things to come in a very near future. It had been pointed by petitioners that tariff of Rs.1.20 for three minutes was even below the cost. Before sending such a recommendation TRAI should have gone into rental and interconnection charges. Only half baked recommendations were sent. Today the position is that call charge is Rs.3.60 apart from rental of Rs.200/-. There is not much difference between the charges of CMSP and FSP, it is alleged.

TRAI was wrong in treating the provisions of limited mobility in WLL as a service within the ambit of BSP licence. It was altogether a new service. After examining the NTP-99 and tender and licence documents it was Government's considered decision that mobility is not provided in BSO licence and BSOs were prohibited from allowing their subscribers of the use of handheld sets. It was also the view of TRAI that mobility is not permitted in BSO's licence. Yet it recommended it is permissible for consideration which was against NTP-99 and licence of BSO. TRAI failed in its role as an expert independent body for a while and its interpretation of the NTP-99 and the licence agreement does not appear to be rational or logical. What cannot be done directly, cannot be done indirectly. By providing mobility to FSP the provisions of the licence have been clearly violated which affects the right of the CMSPs. The provision with regard to WLL and frequency in the FSP licence was only for the purpose of technology. It could not be misused to do away the prohibition. Moreover since TRAI rushed through its recommendations it has not properly considered the effect of its recommendations for providing limited mobility to FSP in SDCA with regard to cost, tariffs and impact on CMSPs business apart from its failure to examine the legality of the issue.

It is contended by counsel for the respondents that there has been tremendous growth both in cellular mobile service and WLL (M). But then this growth in WLL (M) certainly affects the cellular mobile and what we find is that the effort of the FSPs has been to provide service in the metro and big cities and there is not much activities in rural areas. During the course of arguments, Mr. Sanjay Hegde, learned counsel for the Central Government, has produced National Fundamental Plans issued in December, 1993 by DOT which contained National

SDCA Code allotment. Delhi, Calcutta (Kolkata), Chennai (Madras) and Mumbai (Bombay) have been shown as separate SDCAs. Big cities are also separate SDCAs though whole of the District of that city may not be one SDCA. We were told that CMSPs licence for Delhi metro is for Delhi, Gurgaon, Faridabad and Ghaziabad and all these are four SDCAs. But then whole of the State of Delhi comprising a population of over 10 million in one SDCA. We were also told that Bombay is divided into two SDCAs. But the National SDCA Code allotment does not show that. May be Greater Bombay is a separate SDCA. All the District Head Quarters in all the States comprise separate SDCAs. It is pointed out that principal business of CMSPs is in metros and big cities and also very few subscribers of theirs use roaming facilities in their mobile handsets. That way WLL (M) services by FSPs greatly cuts into business of CMSPs even if WLL is confined to SDCAs. TRAI in its recommendations says that CMSPs are likely to encounter some loss in the market but proper considerations have not been bestowed on the different sizes of areas of SDCAs. TRAI did not go into the economics of the impact. Tariff proposed has been found to be based on no evidence. Even if loss to CMSPs is minimum that would make grant of limited mobility in WLL to FSPs invalid, being in breach of contractual terms.

Since Government had a pre-determined mind to allow mobility to WLL in SDCA it took no time to accept the recommendations of the TRAI which it expected to be in line with its pre-determined decision. The haste with which TRAI sent its recommendations cannot be explained otherwise. According to TRAI the matter of WLL(M) to FSPs was pending for a long time. Not in any case after 17.9.99. It has altogether ignored earlier decision of the Government prohibiting mobility and handsets and proceeded on a wrong presumption that because of migration package CMSPs could not object if FSPs are allowed mobility. A very short period of time has shown how wrong TRAI was and its recommendations are flawed. Petitioners alleged that TRAI based its recommendation of tariff @ Rs.1.20 for three minutes at the highest fixed line rate purely on the basis of the offer made by FSPs and TRAI never discussed the issue of call charges or tariff at any stage or shared the information it possessed during consultation process and while TRAI had no information on the cost, it still announced that tariff for WLL(M) will be cost based. Petitioner also objected to the TRAI holding close door meeting during open consultation process with the experts of whose expertise petitioners did not have any knowledge. In its hurry to send the recommendation no economic or financial analysis was done as to the impact of its recommendations on consumers, CMSPs and the Government in terms of tariff and entry fee/spectrum entry fee.

We had to take extensive notes from the files of DOT as we wanted to know as to why there was sudden change of thinking in DOT after 3.8.2000. Answer

remained elusive for a while. Moreover, there were serious allegations of extraneous consideration. The issue regarding use of hand sets and limited mobility in WLL was considered in depth by DOT and thereafter letter dated 17.9.99 was issued. It records the scope of basic and cellular mobile services; scope and definition of cellular mobile services with limited mobility; facility of macro cell and micro cell mobile wireless in the local loop reportedly available to DOT(BSNL)/MTNL being extended to Basic Service Operators and possibility of using the same or similar technologies for providing mobility in WLL. As we have recorded earlier before issue of this letter the note had the approval of Member (Production), Member (Services) and the Secretary who is also the Chairman, Telecom Commission. We wanted to find out the answer what led the department to change its views within a month as on 3.8.2000 DOT reaffirmed its earlier decision when by letter dated 3.8.2000 to ECL Communications it stipulated that mobile hand set shall not be provided to the customers for wireless in local loop services. We have not been able to find any clear answer or justification for this change of views. Learned Solicitor General tried to get around by saying that the issue of limited mobility through wireless in local loop was long pending and though the earlier view was that use of handheld sets will encroach upon the restrictions in BSO licence and now with the march of technology it became possible and after the recommendations of TRAI licences of BSOs have been amended. Solicitor General is unfortunately not correct in his submissions. That issue of limited mobility through wireless in local loop was pending for long time was so stated by TRAI in its letter and by decision of the Government conveyed by their letter dated 17.9.99 the issue stood concluded. It was also submitted that a subscriber should not be denied the fruits of march of technology. No one can possibly argue against the introduction of advanced technology. But that has to be done as per the procedure prescribed. It is stated by the learned Solicitor General that technology was in nascent stage in 1995. But then what about 1997, 1998, 1999 and August 2000 when handsets are prohibited and mobility in WLL barred by DOT? Technology was very much there at those times. There is no answer to that and now what happened for this sudden upsurge for introduction of use of handsets and WLL mobility? Again there is no answer. Whole decision making process and its implementation are vitiated.

With reference to NTP-94 which we have examined above, clauses 8,9, and 10 provided for Value Added Services and Basic Services. Value Added Services is a name given to eight services for CMSPs. For cellular mobile service it is specifically stated that a policy of selection is being followed in granting licences through a system of tendering. Criteria had also been laid for selection of Cellular Mobile Telephone Operators. As we pointed earlier Value Added Services (VAS)

particularly radio paging and cellular mobile telephone are not added features to basic service and are quite distinct. At the same time when we refer to the tender floated for fixed telephone service it clearly states that the service does not cover mobile voice and non-voice service, value added services such as voice mail, audio text and e-mail etc. In the tender separate frequency spectrum allocation has been provided for wireless in local loop. Licence for CMTS describes cellular mobile telephone service, cellular telecommunication system, frequency band for the equipment and what 'handover' means. Then when we look at the licence for Fixed Telephone Service (FTS) we find clauses 3.0, 1.7.2.2 (v), 1.7.2.4 and 1.7.9.2 provided the scope of service of FTS (FSP). These provisions leave no one in doubt that mobile telecommunication and paging services are not provided to Fixed Service Providers. Clause 1.7.9.2 clearly states that the licensee (FSP licence holder) may provide value added service, other than mobile telecommunication and paging services after obtaining a separate licence from the licensor.. It has always been so understood throughout and that is the reason while approving commercial code of FSPs use of hand sets in WLL was barred and so also mobility.

To restate the sequence of events decision of DOT which was communicated by its letter dated 17.9.99 was taken after due deliberation. Decision was communicated to TRAI. As stated above, it was TRAI which had earlier written letters dated 9.6.99 and 27.8.99 on the basis of which reply dated 17.9.99 was sent by DOT. In the letter dated 9.6.99 from TRAI to DOT, it was pointed out that the aspect of providing limited mobility services through wireless in local loop was a long pending issue between COAI and DOT. Even if such an issue was pending it was resolved after due considerations by DOT. It must be taken note of that when DOT stipulated while approving the commercial code of one of the FSPs on 3.8.2000 that mobile hand sets shall not be provided for wireless in local loop services, NTP-99 had already been announced effective from 1.4.99 and also by that DOT had sought recommendations from TRAI for new FSPs and 4th CMSP on 23.4.99. Migration package had already come in place before 3.8.2000. In fact every thing was in place. NTP-99 recognizes convergence and at the same time stipulated that the new policy frame work would look at the telecom service sector as provided therein. Role of three separate access providers namely Cellular Mobile Service Providers, Fixed Service Providers and Cable Service Providers was defined. CMSPs were permitted to provide mobile telephone services while Fixed Service Providers were permitted freely to establish 'last mile' linkages. For WLL the policy provided:

“As in the case for cellular, for WLL also, availability of appropriate frequency spectrum as required is essential not only for providing optimal bandwidth to every operator but also for entry of additional operators. It is proposed to

review the spectrum utilisation from time to time keeping in view the emerging scenario of spectrum availability, optimal use of spectrum, requirements of market, competition and other interest of public.

The WLL frequency shall be awarded to the FSPs requiring the same, based on the payment of an additional one time fee over and above the FSP entry fee. The basis for determining the entry fee and the basis for assigning WLL frequency shall be recommended by the TRAI. All FSP operators utilising WLL shall pay a licence fee in the form of a revenue share for spectrum utilization. This percentage of revenue share shall be over and above the percentage payable for the FSP licence. It is proposed that the appropriate level of entry fee and percentage of revenue share for WLL for different service areas of operation will be recommended by TRAI in a time-bound manner, keeping in view the objectives of the New Telecom Policy”.

It was hereafter, it is apparent, that some other different plan was afoot in DOT to provide limited mobility though in local loop.

Migration package was accepted by both CMSPs and FSPs. Hereafter, CMSPs came under multipoly regime and they gave up duopoly regime. That was within their own service area. When DOT had sought recommendations for 4th CMSP, TRAI issued Consultation Papers on 14.12.99. Reference was made to NTP-99 and it was mentioned that CMSP would be granted separate licence for its service area and apart from the two private operators already licensed, DOT(Now BSNL)/MTNL would be licensed to be the third operator in each service area, in case they want to enter in a time bound manner. Separate Consultation Papers were similarly issued for FSPs when DOT sought recommendations on 23.4.99 for issue of fresh licence for FSPs. It was mentioned therein that Fixed Service Providers (FSPs) shall be granted separate licence on non-exclusive basis for each service area of operation and further that FSP shall be free to provide, in each service area of operation, all types of fixed service and FSP shall be freely permitted to establish ‘last mile’ linkages to provide fixed service. Mention was also made of WLL frequency as per NTP-99. As regards scope of service it was mentioned that FSP licence does not cover mobile voice and non voice services, value added services, such as voice mail, audio text, e-mail etc. and that separate licences are required for providing any value added service. Licence for FSP also specifically provides that existing basic service licence prohibits mobility of the customers terminals or telephone set and that similarly mobile service providers is debarred from giving fixed service. In the process of Consultation Papers, while discussing alternatives to copper based local loop TRAI also made a point of mobility in WLL.

Recommendation of the TRAI was received by DOT on issue of fresh licence

for FSP on 31.8.2000. TRAI did not make any recommendations for WLL limited mobility or otherwise or use of hand sets by FSPs. DOT had also not asked for any such recommendation. By letter dated 9.10.2000 DOT sent back the recommendations to TRAI for reconsideration and one of the recommendations for reconsideration was allowing hand held sets mobility to WLL subscribers of fixed service. This could only be done if the Central Government having considered the recommendations of the TRAI on that point had come to a prima facie conclusion that such recommendation could not be accepted or needed modification. It was not the case here. There were no recommendations of TRAI; there was no prima facie opinion of the Central Government and there was no question of any prima facie conclusion by the Central Government not to accept recommendation or that the recommendations needing modification. There was, therefore, no power of the Central Government to refer back the recommendations to TRAI for its reconsideration. Here the Central Government, therefore exercised a jurisdiction which it had none. TRAI did take note of this fact and yet did not return the letter dated 9.10.2000 of the DOT and started process for reconsideration and acted in an illegal manner. There has been clear violation of 5th proviso to Section 11 of TRAI Act. DOT sought inappropriately to take advantage of the Consultation Papers dated 12.6.2000 issued by TRAI where there was passing reference of mobility but no recommendations to the effect by TRAI. We may note that during the course of hearing we asked the counsel for the parties including Union of India if the Government is generally a part of the consultation process and Consultation Papers are also sent to the Government. The answer was in the negative. May be informally the Government does obtain a copy of the Consultation Paper.

The question then certainly arises how did DOT make out a case of reconsideration on the question of allowing mobility to WLL subscribers of fixed service and ask TRAI to determine the extent of mobility, entry fee etc.

As noted above, the recommendation of the TRAI in pursuance of letter of the DOT dated 23.4.99 seeking recommendation on issue of fresh licences for FSP is received by the DOT on 31.8.2000. On the same day letter from CII is received and Secretary DOT makes an endorsement for DDG (BS) 'Pl. speak'. On 2.9.2000 a letter is received from ABTO which is also marked to DDG (BS). It is then the note dated 3.9.2000 of DDG (BS) starts and the note is with reference to recommendations dated 31.8.2000 of TRAI. It is difficult to understand how a note relating to use of hand held instrument by BSOs could at all be initiated when there was nothing in the recommendations of TRAI in that respect and the issue of hand held sets and mobility in WLL had already been decided by DOT and that was the decision till 3.8.2000 which held the field and at least till the time the note of DDG (BS) was written. DDG (BS) does not specifically

point out earlier decision of DOT on hand held sets and limited mobility. Note of DDG (BS) was thereafter put up before the Secretary and Member (Finance) and thereafter Minister of State on 5.9.2000 who recorded that “Further as the note points out, deployment of hand held instrument should be allowed with immediate effect to the existing licensees in their service area without restriction. This will lead to a faster roll out even to rural areas and better and cheaper customer service”. After final approval of the Minister, a note was prepared for the Telecom Commission.

Meeting of Telecom Commission was held on 21.9.2000 and its recommendations were processed in the DOT. The facts that separate frequency bands have been stipulated for allocation in respect of WLL by the existing basic telephone service providers, migration package offered after NTP 99 envisaged multipoly regime for basic as well as cellular operators which was accepted by all the operators; NTP-99 also envisaged level playing field for all service providers.; for rapid network roll out and convenience to subscriber, there should be no bar using the hand held instruments which should be permitted to be deployed in the network of BSO; CII and ABTO also having made representations though opposed by COAI; cellular operators had agreed to multipoly as per migration package thereby could not claim protection under NTP-1999 as is the case of the basic service operators (i.e it was now multipoly for both CMSP and FSP); cost of hand held instrument is Rs.6,000/- as against cost of Rs. 15,000/ for fixed wireless instrument were all referred to. It was noted that keeping this in view Telecom Commission recommended that it was agreeable for grant of permission of WLL (M) only in required area i.e. SDCA as being done in Delhi. It was noted “ this is to be on wireless local loop platform which means that numbering plan of local area is to be followed at inter base station controller/ manager authentication is not permitted. No basic service operator is to be allocated frequency from GSM band.” Telecom Commission also recommended that the matter may be referred to TRAI. While processing the recommendations in the DOT it was pointed out that the agreement did not bar specifically deployment of hand held subscribers sets and that later on in a clarification the permission for use of subscriber’s hand held set was not granted as it was felt that this might amount to mobile service for which separate license was required and frequency band was different. Then it was commented that “further, it may be worthwhile to mention that today’s subscriber does not want to be tied down by fixed cord of telephone instrument”. It is noted that agreement for basic service provides for cordless telephones and WLL technology but there is no mention of TEC specification for WLL system including terminals as there was no specifications of TEC at that time. The intention and thrust of private service was to introduce new technology to provide affordable world class communications to subscribers.

Cost of hand held instrument of Rs.6,000/- as against Rs.15,000/- was noted. Recommendations of ABTO, CII and ASSOCHAM for full mobility noted. It was then recorded that “it is worthwhile to mention that spectrum charges for use of frequency are based on same formula applicable for basic service operator as well as cellular mobile service operators, thus the logic of COAI does not hold good”. Agreement to operate in multipoly regime was referred to. Note of MOS (C) suggesting full mobility referred to. The note was considered by the Secretary on 3.10.2000 who recorded his observations and said that there was urgency in seeking reconsidered view of TRAI. On 6.11.2000 Secretary also records that he had requested Chairman, TRAI to send the report at the earliest. Thereafter letter dated 9.10.2000 is sent to TRAI.

It appears rather strange as to how the case has been made out for grant of limited mobility and use of hand sets for FSPs. There was nothing new what was not known earlier when the note was prepared. NTP-99, tender and licence documents provided for separate frequency bands for WLL operators and CMSPs. Migration package where CMSPs agreed to multipoly did not mean that CMSPs gave up their right to be the exclusive access providers for cellular mobile service. Both DOT and TRAI always treated CMSPs and FSPs as access providers in their respective areas. When FSPs earlier to recommendations dated 31.8.2000 of TRAI requested or desired use of hand held sets and also provision for limited mobility, could it be said that the DOT was unaware at that time that for rapid network roll out and convenience to subscribers it was required. At the time when the note was prepared there were representations of CII and ABTO and ASSOCHAM. COAI was not told of their representations and again surprisingly representations by CII and ABTO have been used without reference to COAI who were going to be greatly prejudiced. About the cost of hand held instruments as Rs.6000/- as against cost of Rs.15,000/- for fixed wireless instrument even had not been accepted by TRAI. Then it is stated that the agreement did not bar specifically deployment of hand held subscribers set and later on in clarification the permission for use of subscribers hand held set was not granted as it was felt that that might amount the mobile service for which separate licence was required and frequency band was different. To say the least, such observation is most inappropriate when earlier upto the level of Chairman, Telecom Commission the matter had been considered thoroughly with reference to NTP-99, tender and licence documents. It was the decision of the Government. There is no reference in the note to the communications sent to various FSPs much less to the letter dated 17.9.99 from DOT to TRAI. It is a case of suppression of documents from the Telecom Commission and ultimately as we have seen from the report of GOT-IT itself as well. Then reference is made to march of technology as if knowledge of advancement of technology dawned upon the DOT only in the

beginning of September which was not there a month earlier. Letter dated 18.9.2000 from ASSOCHAM to Chairman, Telecom Commission also pointed out discrimination between one set of existing Basic Service Operators and the new entrants in basic service. Then it is pointed out that both from the point of removing possible discrimination as well as from the point of ensuring maximum utilization of invested physical capital, basic operators need to be allowed mobile service based on CDMA technology. These two letters from ABTO and ASSOCHAM were in fact with reference to difference in level playing field of existing FSPs and new FSPs to whom licences were to be granted on the recommendations dated 31.8.2000 of TRAI. These letters were picked up to start a different note on an issue which did not form part of the recommendations. DOT in its note says hand held sets were not specifically barred, but these are impliedly barred because it gives mobility and trenches upon the area occupied by CMSPs. These facts were not adverted to by DOT.

When WLL is preferred technology for last mile connectivity it has to be allocated frequency. In simple words 'WLL is a system that connects subscriber to the Telephone Exchange [(PSTN) Public Switched Telephone Network] on wireless (using radio signals) as substitute for copper for part of connections (last mile between subscriber and the PSTN) WLL can be fixed access or mobile. International Engineering Consortium describes WLL is a system that connects subscribers to the PSTN (Public Switched Telephone Network) using radio signals as a substitute for copper for all or part of the connection between the subscriber and the switch. This includes cordless access systems, proprietary fixed radio access, and fixed cellular systems. In the book "Global Telecommunications Law and Practice" - Sweet & Maxwell - General Editor and Collin D. Long, WLL means "wireless connection of a telephone in a house or office to a fixed telephone network".

'Last mile' connectivity is described in Newton's Telecom Dictionary – (P.505):

Last Mile Connectivity:

"Not to be taken literally. 'Last Mile' is an imprecise term that typically means the link – usually twisted pair – between an end-user and the telephone company central office – local, long distance or Internet. Of course, it does not mean a 'mile', since that 'mile could be less than a more or several miles. The term has entered the language referring to the problems of your communications make it that last mile. Often that last mile runs over old, limited bandwidth copper wire that has been in the ground for eons and is supplied by a sleepy phone company who doesn't have any competition and not much incentive to perform and hasn't improved the quality of the cable

in the loop. The vast majority of local loops are less than 12,000 feet in length – a little over two miles. Generally provisioned with twisted pair cable plant intended to support vice grade analogue service, the ‘last mile’ is the source of such difficulty for high-speed data services. (Newton’s Telecom Dictionary – P.505)”.

TRAI in its recommendations accepted the stand of DOT and recommended Basic Service Operators be allowed to offer WLL with limited mobility within the local area i.e. short distance charging area (SDCA). The Hindustan Times in its issue of 22.9.2000 reported decision of the Government taken on 21.9.2000 to allow BSOs to offer WLL based limited mobility within SDCA at a tariff of Rs.1.20 for 3 minutes. DOT gets the recommendations from TRAI on the same lines. It is not denied that the report of the Hindustan Times was incorrect or Telecom Commission did not take the decision.

Last mile linkage is figurative term. TRAI could not define its own definition to support the case of the Government and give a definition which is contrary to what is universally understood.

The term last mile connectivity or linkage is used to provide linkage where there is no possibility or there is difficulty to lay copper line or optical fibre lines or these are expensive or where the area is inaccessible. It could be 5 Kms. and it could be more but the principle to be applicable is that the area is congested or inaccessible. TRAI says it should be SDCA. As already noticed, Faridabad, Gurgaon, Ghaziabad come in Delhi metro but Delhi itself is SDCA which is the whole State of Delhi with population of over 10 million, Calcutta metro is one SDCA, TRAI did not look into this angle if whole of Delhi State is SDCA will it not harm the interest of CMSPs if limited mobility in WLL is given to FSPs. TRAI is certainly an expert body but we fail to appreciate what expertness was involved in giving definition to last mile as co-terminus local area (SDCA) on the same line as the case recommended by the Government. “Local Area” is also defined in the Indian Telegraph Rules and is quoted above. This is Rule 2(w) and was inserted w.e.f. 15.8.98. We have seen in earlier part of this order the definition of ‘SDCA’ in the Indian Telegraph Rules which definition was introduced w.e.f. 15.6.1992 and when we examine this definition with that of “telegraph authority” as given in the Indian Telegraph Act (also quoted) it becomes quite apparent how fragile SDCA can be and how dicey it is to link SDCA to ‘last mile connectivity’.

TRAI in its recommendations which it sent on 8.1.2001 said that it considered four main questions namely: (i) whether WLL with mobility should be permitted; if it is permitted , what should be the extent, (iii) likely economic consequences of the mobility so granted and their impact on the main stake holders and (iv) In case of the likely consequences of the grant of mobility are adverse to any of

the stake holders to what extent such mitigation. It would be seen the approach itself was faulty. It posed a wrong question and got wrong answer. The first and foremost question should have been if the WLL is permissible at all. You cannot give correct answer when you start with a question whether WLL with mobility should be permitted.

We have to go by the record. We cannot set up a new case for the Government when that is not reflected in its record. WLL (M) is certainly new service for which second proviso to Section 11 mandates that recommendation of TRAI should have been called as provided under sub clauses (i) and (ii) of clause (a) of sub section (1) to Section 11 of the TRAI Act. This mandate of law has been violated by the Government in the Department of Telecommunications. Too much stress was laid on affordability, teledensity and reach to the rural areas. Today's scenario shows that affordability is a myth and speedy roll out in rural areas is a bogey. Uptill September, 1999 FSPs were required to provide 42856 VPTs and they succeeded in providing only 12 VPTs This was a dismal performance and instead of taking action against them in terms of the licence Government has rewarded them by allowing them limited mobility and use of handsets. Why did the Government do this? Answer is not far to seek.

It is pointed out that it must be the beneficiaries for whose sake Government in overnight changed its views and independent regulator like TRAI also gave its recommendations depriving the CMSPs who are to be greatly affected by the decision. Record of the Department shows that it was hurrying TRAI to send its recommendations as if it was to beat some deadline. That apart, strange it does appear that clause 18 was already provided in the guidelines before the recommendations of TRAI were received as if DOT knew the state of things to come. In this view of the matter we cannot brush aside the argument of the petitioners that TRAI fell in line with what DOT required. DOT suppressed its earlier decisions which prohibited mobility in any form or use of handset and then overturned the same without any reason. How can a well considered decision of the Government could be ignored or overturned , we are unable to comprehend.

Mr. Vahanvati strongly urged that the decision to allow limited mobility in wireless local loop and allowing handsets to the subscribers of FSPs was taken with extraneous considerations. Solicitor General said that such a plea cannot be advanced. Firstly, he said, it was not taken specifically and secondly there is no material on record to justify such an allegation. On the first objection Solicitor General does not appear to be quite right. In our order dated 8.4.2003 deciding the question of privilege we had recorded that allegations of extraneous considerations or mala fide had been made and this was also so understood by the Government as it was mentioned in the note of arguments filed by DOT earlier in these proceedings. In E.P. Royappa's case, relied upon by the learned

Solicitor General , Supreme Court has laid that the burden of establishing mala fides is very heavy on the person who alleges it and that the allegation of mala fides are often more easily made than proved and the very seriousness of such allegations demands proof of high order of credibility. In the case before it the Court said that on the basis of the record it had not been possible for it to say that the onus of establishing mala fides had been discharged by the petitioners. Court, however, said that there were circumstances which create suspicion but suspicion cannot take the place of proof. But then when the grounds which are taken into consideration by DOT as well as TRAI for grant of limited mobility in wireless local loop and allowing handsets to the subscribers of FSPs are not germane to the issue and are irrelevant, fallacious and misleading and it has to be held that the authorities were actuated by ulterior motives to grant favour to FSPs. A well considered decision of the Government was overturned without even bat of eyelid and the speed with which the impugned decision was taken cannot be explained otherwise than that it was because of extraneous considerations. The decision and the implementation thereof stand vitiated. The decision to grant limited mobility etc. was taken in September, 2000 itself as reported in the Hindustan Times (Delhi edition) and going to TRAI was only a ritual which was in contravention of 5th proviso to Section 11 of TRAI Act. Judicial discipline restrains us from using strong language but the whole thing proceeded on specious pleas to grant benefit to FSPs. Look at the track record of FSPs when against target of 42856 VPTs only 12 VPTs had been provided till September, 1999. Instead of taking action for breach of terms of the licence even to the extent of revoking the licence, Government rewarded FSPs by passing the impugned guidelines. These FSPs could certainly use WLL (fixed) technology to reach inaccessible areas or where there is difficult to lay wires to increase teledensity especially in rural areas. Mr. Vahanvati said if we see the whole gamut of the task undertaken by the DOT and TRAI the beneficiaries are FSPs and he pointed accusing finger to the big players. It was pointed out even now the track record of FSPs is no better. Tata Tele Services installed 1314 VPTs till 31.10.2002, while it was required to install 9635 VPTs. Similarly Reliance Infocomm installed 502 VPTs instead of 8635 VPTs till 31.10.2002. Their whole effort was towards metropolitan cities and other big cities. Rural area is a forgotten lot. We have already seen tremendous increase in tariff of FSPs which belies the stand of TRAI and Government that it would be Rs.1.20 for three minutes call. It does, therefore appear to us that the considerations which led the Government to pass the impugned decision were not the result of bona fide exercise of power and were motivated by extraneous considerations to confer undue benefit on the FSPs.

We regret we are unable to agree with the report of GOT-IT in spite of its

constitution of profound persons. But for this it is DOT which is to be blamed as relevant record was suppressed from GOT-IT. Even TRAI failed in its legal obligations and gave faulty recommendations.

We would, therefore, hold the issues 1,2,3,4, 6 and 7 in favour of the petitioners. Since it has been held that grant of limited mobility and use of hand sets is not legal, the question of considering level playing field would not arise. It is, therefore, not necessary for us to answer issue No.5.

The decision of the Government granting limited mobility in wireless local loop and allowing handsets to the subscribers of FSPs as contained in guidelines 25.1.2001, is set aside. Recommendations dated 8.1.2001 of the TRAI are also set aside to the extent aforesaid. These petitions are accordingly allowed.

During the pendency of the petitions, on an interim application of the petitioners seeking relief it was ordered on 29.1.2001 as under:

“In the meantime, any license granted will abide by the result of this petition. If any license is granted, it will contain a clause that the license will be revoked, if the decision goes in favour of the petitioners in this case. Mr. H.N. Salve, Solicitor General of India, appearing on behalf of the Union of India has suggested this interim order”.

We would, therefore, direct that FSPs licence to the extent these were modified incorporating the decision of the Central Government dated 25.1.2001 shall stand revoked. Petitioners are entitled to costs.

Before we conclude we express our deep appreciation to the learned counsel (in order of appearance) Mr. C.S. Vaidyanathan, Senior Avocate; Mr. Goolam E. Vahanvati, Senior Advocate; Mr. A. Sundaram, Senior Advocate; Mr. Kirit N. Raval, Solicitor General; Mr. Jaideep Gupta, Senior Advocate; Mr. Sanjay R. Hegde, Advocate; Dr. A.M. Singhvi, Senior Advocate; Mr. Ashok Desai, Senior Advocate; Mr. Rudreshwar Singh, Advocate, Mr. Gopal Jain, Advocate and all the instructing Advocates and last but not the least Mr. Manjul Bajpai, Mr. R.N. Karanjawala and Mr. Ramji Srinivasan for their erudite submissions which made the case enlightening and instructive.

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(D.P.Wadhwa)
Chairperson

