

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED 4th July, 2011

PETITION NO. 299 OF 2010

Tata Teleservices Ltd. & Anr. ... Petitioners
Versus
Union of India & Ors. ... Respondents

PETITION NO. 437 OF 2010

Idea Cellular Ltd. ... Petitioner
Versus
Union of India & Ors. ... Respondents

A N D

**PETITION NO. 113 OF 2011
(M.A. No. 82 of 2011)**

Unitech Wireless (Tamil Nadu) Pvt. Ltd. ... Petitioner
Versus
Union of India & Ors. ... Respondents

BEFORE :

HON'BLE MR. S.B. SINHA, CHAIRPERSON

HON'BLE MR. G.D. GAIHA, MEMBER

HON'BLE MR. P.K. RASTOGI, MEMBER

PETITION NO. 299 OF 2010

For Petitioners : Mr.Ramji Srinivasan, Sr. Advocate
Mr.Mansoor Ali Shoket, Advocate
Mr.Nitin Kala, Advocate
Ms. Vibha Dhawan, Advocate

For Respondent Nos.1 & 2 : Mr. A.S. Chandhiok, ASG
Mr. Ruchir Mishra, Advocate

For Respondent Nos. 3 & 8 : Mr.Kirtiman Singh, Advocate

For Respondent No.4 : Mr.C.S. Vaidyanathan, Sr. Advocate
Mr.Manjul Bajpai, Advocate

For Respondent No.5 : Mr.Meet Malhotra, Sr. Advocate
Mr.Ravi S.S. Chauhan, Advocate
Mr.Ranjan Mukherjee, Advocate

For Respondent Nos. 6, 7 & 10 : Mr.Mahesh Agarwal, Advocate
Ms.Shikha Sarin, Advocate

PETITION NO. 437 OF 2010

For Petitioner : Mr.C.S. Vaidyanathan, Sr. Advocate
Mr.Manjul Bajpai, Advocate

For Respondent Nos. 1 & 2 : Mr. A.S. Chandhiok, ASG
Mr.Ruchir Mishra, Advocate

For Respondent No.3 : Mr.Mahesh Agarwal, Advocate
Ms.Shikha Sarin, Advocate

For Respondent No.4 : Mr.Kirtiman Singh, Advocate

For Respondent No.6 : Mr.Meet Malhotra, Sr. Advocate
Mr.Ravi S.S. Chauhan, Advocate
Mr.Ranjan Mukherjee, Advocate

For Respondent No.7 : Mr.Ramji Srinivasan, Sr. Advocate
Mr.Mansoor Ali Shoket, Advocate
Mr.Nitin Kala, Advocate
Mr. Vibha Dhawan, Advocate

PETITION NO.113 OF 2011

For Petitioner : Mr.Meet Malhotra, Sr. Advocate
Mr.Ravi S.S. Chauhan, Advocate
Mr.Ranjan Mukherjee, Advocate

For Respondent Nos. 1 & 2 : Mr. A.S. Chandhiok, ASG
Mr.Ruchir Mishra, Advocate

For Respondent No.3 : Mr.Ramji Srinivasan, Sr. Advocate
Mr.Mansoor Ali Shoket, Advocate
Mr.Nitin Kala, Advocate

Ms.Vibha Dhawan, Advocate

For Respondent No.4 : Mr. Kirtiman Singh, Advocate
For Respondent No.5 : Mr.C.S. Vaidyanathan, Sr. Advocate
Mr.Manjul Bajpai, Advocate

For Respondent No.6 : Mr.Mahesh Agarwal, Advocate
Ms.Shikha Sarin, Advocate

For Respondent No.10 : Mr.Dayan Krishnan, Advocate
Mr.Gautam Narayan, Advocate
Mr.Amit Gupta, Advocate
Mr.Nakhil A. Menon, Advocate
Mr.Aman Singh, Advocate

J U D G M E N T

S.B. SINHA

INTRODUCTION

The Petitioners herein are licensees; the licences having been granted in terms of Section 4 of Indian Telegraph Act, 1885 (the Act).

The 1st Respondent in each of these petitions is the licensor. The 2nd Respondent is a Wing of the Department of Telecom (DoT). It allocates Spectrum to the licensees.

Inter se priority amongst the licensees before us in the matter of allocation of spectrum in the context of the policy decision of the Union of India dated 17.10.2007 and 10.01.2008 is in question in these petitions.

Brief Factual Background

2. Tata Tele Services Limited (TTSL) was operating on CDMA technology. It was granted an UAS license, having been permitted to run its operations in wireless technology for wireless access with effect from 14.11.2003. It was an existing licensee.

Idea Cellular Ltd. (Idea) and Unitech Wireless (Tamil Nadu) Pvt. Ltd. (Unitech), the other two petitioners and several others however, applied for grant of new licences in terms of the provisions of the Act in 2006/2007.

3. On or about 19.10.2007, the Respondent No.1 issued a press release declaring that the licensees who had been operating either on CDMA technology or GSM technology would be entitled to use the alternate technology. It was notified that the spectrum in alternate technology shall be allocated in the applicable frequency subject to availability and payment of the fees prescribed therefor.

4. The criteria for allocation of spectrum as declared in the said press release were:-

- 1. Applicant must be an existing licensee; and*
- 2. Fees for using the alternate technology are to be paid*

5. TTSL, pursuant to or in furtherance of the said policy decision of respondent No.1, filed an application for grant of 'in principle approval' for using alternate technology in the following terms :-

“With reference to your press release of today, we request you to urgently grant us in principle approval to use GSM technology under our existing UAS licensees in the following circles :

- 1. Delhi*
- 2. UP-East*
- 3. UP – West*
- 4. Haryana*
- 5. Punjab*
- 6. Himachal Pradesh*
- 7. Rajasthan*
- 8. Gujarat*
- 9. Madhya Pradesh*
- 10. Karnataka*
- 11. Kerala*
- 12. Tamil Nadu*
- 13. Chennai*
- 14. Andhra Pradesh*
- 15. Bihar*
- 16. Orissa*
- 17. Kolkata*
- 18. West Bengal*

We would like to make the required payments as soon as you grant us the approval.”

6. TTSL contends that having regard to the aforementioned policy decision, the ‘in principle approval’ should have been granted on the date of filing of the said application itself, but for reasons best known to respondent Nos. 1 & 2, the same was granted after 83 days i.e. only on 10.01.2008.

7. On 10.01.2008, the Union of India issued another Press Release containing its revised policy with regard to the priority to be granted to the applicants for new licences and the applications filed by the existing licensees to operate on alternate technology.

Earlier Proceeding

8. Indisputably, the Cellular Operators Association of India and a few operators questioned the legality and/or validity of the said policy decision dated 10.01.2008 before this tribunal by filing a petition on or about 23.10.2007 which was marked as Petition No. 286 of 2007. However, therein no interim order of stay was passed.

A writ petition was filed by the said Association, but even the High Court of Delhi refused to pass any order of stay.

9. Spice Communications (P) Ltd. (hereinafter referred to as 'the Spice'), said to be the predecessor in interest of 'Idea' as a GSM operator impleaded itself as a co-petitioner with the said Association in the said petition. It however, disassociated itself from the array of petitioners therein by issuing a letter to the DoT, stating interalia :-

“We joined the abovenoted petitioner as one of the parties in our capacity as a member of COAI, and would like to clarify our position that we have no objection to the issuance of the in-principle approval by DOT for cross-over spectrum allotment. Our key focus area is issuance of LOI to us in respect of our applications submitted in August 2008 for 20 circles.

However, we now find that since the COAI petition has confined its focus to the policy for cross over spectrum allotment to which we have no objection, we have taken a view to dis-associate ourselves from COAI Petition.

We would request you to please consider our aforesaid application and issue the LOIs as per the priority schedule on first come first served basis.”

10. Idea Cellular Ltd. (Idea), as also ‘the Spice’ also filed two independent petitions before this Tribunal which were marked as Petition No. 20 of 2008 and Petition No. 23/2008 respectively, inter alia questioning the said policy decision dated 10th January 2008.

They filed applications for withdrawal of the said petitions, wherefor no reason was assigned.

It, however, prayed for grant of leave to file separate petition(s) which was allowed by an order dated 22.01.2009, observing:-

“Counsel for the petitioner submits that for the present, the cause of action in this Petition does not survive. Therefore, he seeks liberty to withdraw the petition. However, he prays that, if need be, liberty be granted to the petitioner to file a fresh petition. This petition is disposed of accordingly with liberty to file a fresh petition, if need be.”

11. The Respondent No.1, in the said Petition No. 286 of 2008 filed an affidavit affirmed by one Rajesh Kumar Gupta, its Assistant Director General wherein the backdrop of events relating to allocation of spectrum, constitution of a committee, its recommendations etc as also the decision of the Central Government in respect thereof fixing priority for various categories. It was stated:

“B) On the second issue with regard to priority for the allotment of Spectrum, it is submitted that an impression was created on the part of the Petitioners, that pursuant to the ‘in-principle approvals’ issued on 18 October 2007, the persons who had made payment thereunder would get a priority over the existing operators’ request for additional Spectrum. Such an impression is not correct. It was pointed out that there are at present several applications for allocations of Spectrum which are pending, having been received on different dates from different existing operators. Such applications pertain to all the 23 service areas. These applications will be decided on the basis of the norms that will be finalized after receipt of the Committee Report.

The second category pertains to UAS licences issued in the month of December 2006 who have not been allotted initial start-up spectrum. These are in relation to 22 service areas. The effective dates of these licences vary from 5 December 2006 to 14 December 2006. This category will be allocated start-up Spectrum after the first category is dealt with. Thereafter, the companies to which ‘in principle approval’ to use GSM technology under the existing UASL, has been issued on 18 October 2007 will be considered for grant of start up Spectrum.

C) *Turning to the third issue namely, the grant of permission for use of Dual Technology, it is submitted that this is a matter of a policy decision which has been taken in larger public interest and having regard to the interest of consumers who will be benefited by the increased competition. The Petitioners have no right to oppose or challenge this policy decision.”*

12. The criteria for allocation of spectrum in terms thereof, was thus, divided in three categories, namely

1. *Original GSM operators,*

2. *Licensed GSM operators, who had been awaiting allocation of spectrum*

3. Dual Technology Operators like Reliance Communications.

13. By way of example, we may notice that in the first category of licensees, the existing GSM players like ‘Bharti Airtel’ and ‘Vodafone’ would fall; whereas in the second category ‘Idea’ would.

14. Indisputably, the private Respondents herein, two of whom are petitioners before us viz. ‘Idea’ and ‘Unitech’, had applied for grant of licence and they were issued Letters of Intent on 10.01.2008. On the same day, admittedly, the respective petitioners herein deposited the requisite amount, be it “Entry Fee” or the amount equal thereto. TTSL deposited a sum of Rs.

5000 and odd crores towards the amount equal to entry fee as prescribed for operating on the GSM technology.

15. It also applied for amendment of its license, which was also allowed.

16. 'TTSL' filed an application for grant of spectrum on 04.03.2008 yet again for 20 different circles.

17. According to TTSL, however, it had, in fact, filed applications for allocation of spectrum way back on 19.10. 2007.

18. The said letter dated 04.03.2008 refers to twenty applications filed on 10th January 2008, which according to the TTSL had been issued on that date and sent to DoT but the same are said to have been misplaced.

However, there is no serious dispute that TTSL had filed those applications.

19. Indisputably, about 121/122 new applicants were also granted LOIs, pursuant to their respective applications for grant of new licences including the other petitioners and private respondents herein, who were granted UASL licenses during the period February 2008 and March 2008.

20. The fact that the existing licensees were to be given priorities in terms of the new policy as contained in the Press-Release dated 10.01.2008, would be evident from an affidavit of the first respondent in the said Petition No. 286 of 2007 on 18.08.2008 wherein TTSL's name appears in the Table III in respect of six circles.

21. It was, however, placed in Table V, in respect of Bihar, Delhi, Haryana, Himachal Pradesh, Kolkata, Madhya Pradesh, Maharashtra, Uttar Pradesh, Uttar Pradesh (W) and West Bengal circles being at serial numbers 10, 16, 21, 27, 32, 42, 46, 52, 78, 83 and 88, in which category other applicants, who were yet to be allocated the spectrum, were also placed.

22. This Tribunal disposed of the said Petition No. 286 of 2007 by an elaborate judgment dated 31.03.2009. We would refer thereto and the effect thereof a little later.

The Present Proceedings

23. According to 'TTSL' despite its legal entitlement as per the policy decision of the Central Government to be treated at par with the other existing licensees, viz. Reliance Communications, 'Shyam' and 'HFCL', it has been discriminated against in the matter of allocation of spectrum, as some

of the respondents received special treatment although they were not entitled to any priority in relation thereto.

24. This petition was filed by 'TTSL' claiming, inter alia, for the following reliefs :-

- “(a) Declare and hold that the date of application of entitlement for spectrum allocation in respect of the Petitioner is 19.10.2007 and direct DoT to allocate start up GSM spectrum to the Petitioner in Delhi circle and 39 districts in 9 circles.*
- (b) In the alternative, in case the Hon. Tribunal ignores the delay of 83 days in granting the in-principle approval by DoT, declare and hold that the date of application for spectrum allocation in respect of the Petitioner is 10.01.2008 priority for allocation should be established from said date and direct DoT to allocate start up GSM spectrum to the Petitioner in Delhi circle and 39 districts in 9 circles.*
- (c) In the alternative/without prejudice to prayer to (a) and (b) direct the Respondent to treat Petitioner as No.1 for allocation of start up GSM spectrum to the Petitioner in Delhi circle and 39 districts in 9 circles.*
- (d) Without prejudice to prayer (a), (b) and (c) treat the Petitioner as No.1 in 39 districts in 9 circles and No.2 i.e.*

after Videocon Telecommunications in Delhi circle for allocation of start-up GSM spectrum.”

25. TTSL, according to it, despite its legal entitlement to be allocated spectrum on a priority basis, is yet to receive spectrum in Delhi and 39 other districts in nine circles.

Response of DoT

26. DoT in its affidavit affirmed in response to TTSL's petition stated as under:-

“Hon’ble TDSAT in its judgment dated 31st March 2009 in Petition No. 286 of 2007 has held that UASL is an existing license and for cross over technologies, it does not require any fresh license.”

27. Having regard to the decision of this Tribunal dated 31.03.2009, it was stated:-

“8. In the light of the observations above and keeping in view the policy of the Department, the case of the Petitioner is re-examined and it is submitted that the Petitioner is a dual technology operator and having an existing licence. The Petitioner also deposited the requisite fee on 10.1.2008 and would be eligible for consideration for re-determination of his seniority as on date of deposit of fees.

9. After determination of the seniority as stated above the Petitioner’s application for amendment of UASL and application for allotment of spectrum shall be considered as

if it is made immediately after 10.1.2008 (though made on 5.3.2008 for allotment of spectrum).

10. *The allocation of spectrum shall however be made subject to availability and on its repositioning for the purpose of allocation of initial 4.4 + 4.4 MHz.”*

Petitions of ‘IDEA’ and ‘UNITECH’

28. ‘Idea’ has filed Petition No. 437 of 2010 inter alia questioning the validity of the said policy decision dated 10.01.2008 on the premise that the stand of DoT in TTSL’s case would render the same unconstitutional. It, furthermore questions the claim of TTSL of the right to be allocated spectrum on a priority basis.

‘Unitech’ has filed an independent petition being Petition No.113 of 2011 wherein also TTSL’s claim of priority as also that of ‘Idea’ has been questioned.

29. In their petitions ‘Idea’ and ‘Unitech’ have prayed inter-alia for the following reliefs respectively:-

“(Petition No. 437/10)

- “(a) Strike down the DoT’s impugned Press Release dated 10.01.2008 to the extent it changes the policy of ‘first come first served’ basis to ‘first pay first served’ basis;*
- (b) Hold that the Petitioner’s priority for grant of license/spectrum is first i.e. from 31.08.2008 for Delhi Service Area;*

- (c) *Direct the Respondent DoT to treat the Petitioner's priority as Number One i.e. from 31.08.2008 for Delhi Service Area;*
- (d) *Direct the Respondent DoT to allot start-up 4.4 MHz spectrum to the Petitioner for Delhi Service Area forthwith;*
- (e) *Direct the Respondent DoT not to allocate any start-up spectrum to any Operator i.e. LOI holders of 10.01.2008 before the allocation of spectrum is made to the Petitioner for Delhi Service Area;*
- (f) *Direct the Respondent DoT not to allocate any start-up spectrum to any Operator i.e. in-principle approval holders of 10.01.2008 before the allocation of spectrum is made to the Petitioner for Delhi Service Area;*
- (g) *Direct the Respondent DoT not to allocate any additional spectrum to any Operator i.e. in-principle approval holders of 18.10.2007/ 19.10.2007 before the allocation of spectrum is made to the Petitioner for Delhi Service Area;*
- (h) *In the alternative, direct the Respondent DoT to refund to the Petitioner the sum of Rs.170.7 crores together with interest thereon @ 18% per annum computed from the date of payment by the Petitioner to DoT till the date of refund of the said amount with interest by DoT to the Petitioner;*
- (i) *Hold that DoT's new decision contained in DoT's Affidavit of December 2010 in Petition No. 299 of 2010 to treat TTSL's application for allotment of spectrum as if it is made immediately after 10.01.2008, though made on 05.03.2008 as not only violative of its own first come first served policy but also unfair, unjust, unreasonable, violative of principles of natural justice, violative of Petitioner's rights under Article 14, 19(1)(g) and 21 of the Constitution and otherwise illegal and strike it down;*
- (j) *Pass ad-interim/interim/ex-parte orders in terms of the above prayers."*

“(Petition No. 113/11)”

- “i) quash the stand of the DoT as disclosed in the short affidavit dated 07.12.2010 filed by respondent no.1 in Petition No. 299 of 2010 (Annexure P-7 herein) as being arbitrary, whimsical, non-reasoned, and non-transparent;*
- ii) direct the respondent no.1 follow the priority/seniority for grant of spectrum as per the “Last Table” given in its affidavit dated 18.08.2008 filed in Petition No. 286 of 2007;*
- iii) pass ad-interim/ex-parte order(s) restraining the respondent no.1 from any defrayment of the available spectrum in all the circles or the concerned circles till the final disposal of this petition.”*

Reply to the TTSL’s Petition

30. We would consider the reply filed by DoT at an appropriate stage. The reply filed by ‘Unitech’ is being considered as the lead reply, as most of the private operators have adopted the same, the relevant portions whereof are as under:-

“6. That, the respondent No.1 had, in the early 1990’s, opened up the telecom sector for private participation so as to induct capital and technology to meet the objectives achieving higher tele-density and other objectives of the NTP 94. In furtherance of that policy, the sector was gradually opened up and by the year 1990’s. 40 licences had been given for the 4th cellular operators in 20 circles. Licences granted upto September 2004 may be referred to as the “First Licenses”. Thereafter, in 2006 licenses were given to Dishnet Wireless, Aircel Ltd., Idea and Others (“second licensees”) and towards last quarter of 2007 a policy

decision was taken by the respondent No.1 to permit the then existing UASL holders to apply for and take spectrum in the other stream than was being used by operators till that time for provision of mobile telephony i.e. UASL operators giving service using GSM technology were permitted to apply for and take CDMA spectrum and vice-versa. These set of operators may be referred to as the "Crossover Licensees". The copy of the press release dated 19.10.2007 issued by the DoT in respect of crossover licensees is annexed with the petition as Annexure P-2.

7. In January 2008, the DoT gave letters of Intent (LoI) with a view to issue fresh UAS Licenses to another set of operators (including the answering respondent) and these operators may, hereafter, be referred to as the "new licensees". The answering respondent got Letter of Intent (LoI) on 10.01.2008 even though it had applied for a UASL on 24th September 2007, under the UASL guidelines dated 14th December 2005. The petitioner were also on 10.01.2008 issued "in principle approval" for crossover spectrum. The said approval dated 10.01.2008 is annexed with the petition as Annexure P-9. The said letter inter alia starts "it may please be noted that date of receipt of payments of above mentioned required fee shall determined the date of priority for allocation of spectrum". The said letter also spoke of carrying out necessary amendments to the UAS License Agreement for allocation and use of spectrum.

11. The above said case was being heard by the Hon. TDSAT and Delhi High Court whilst the "new licensees" including the answering respondent were completing formalities, as aforementioned, after the issuance of LOI's on 10.01.2008. The question of the method and manner the Union of India intended to deal with claims to spectrum that various licensees were entitled to, was raised during pending of the aforesaid case (Petition No.286 of 2007 'the cross over case'). In that petition (286 of

2007), the Union of India filed two affidavits purporting to explain its stand regarding the seniority/priority in respect of the grant of the spectrum intra and inter category. These affidavits were dated 13.11.2007 (Annexure P-8) and 18.08.2008 (at page 277 to 289). These are, to the best of the answering respondent's knowledge, the only written adumbration of the DoT's policy regarding the order of allocation of Spectrum to Licensees.

12. The affidavit dated 18.08.2008 (at pages 277 to 289) was directed to be filed by this Hon. Tribunal vide an order dated 29.7.2008 whereby Union of India (DoT) was directed to explain the latest position regarding the Government's stand on the policy relating to allocation of the spectrum. A copy of the order dated 29.07.2008 in Petition No. 286 of 2007 is annexed hereto and is marked as Annexure-5/1."

'Idea' has not filed any reply in TTSL's petition. It's contention was that its petition may be treated to be its reply to the said petition.

31. The contentions raised in the said two petitions shortly stated are as under:-

- (a) They, having filed applications for grant of new license much prior to TTSL, in terms of the existing policy decision of DoT as contained in the 'Guidelines' issued by it, are entitled to priorities in the matter of allocation of spectrum particularly when they were also granted LOIs on 10.01.2008, deposited their entry fees and also applied for allocation of spectrum on the same day;

- (b) TTSL in respect of six circles had wrongly been placed in Category-III and it should have been placed in Category V;
- (c) Category V contains the list of priority on the basis of the dates on which new licenses were granted/existing licenses were amended as also the respective dates of applications filed by the applicants for allocation of spectrum;
- (d) The new licensees having acquired a right in terms of the earlier policy decision, the alterations made therein by reason of the purported policy decision dated 10.01.2008 is illegal.

32. The respondent No.1, in the case of 'Unitech' filed a reply reiterating its earlier position.

33. Videocon, although, has not filed a separate petition, in its reply, contended :-

- (1) Admittedly even in terms of the policy decision dated 10.01.2008 the amount of entry fee having been deposited prior to TTSL, it was entitled to priority over it; more so when the same had been admitted in its petition clearly and unequivocally;
- (2) The doctrines of 'Promissory Estoppel' and 'Legitimate Expectation' should be applied in the instant case in its favour.
- (3) TTSL was wrongly placed in Category III in respect of six circles;

(4) This Tribunal should not unsettle the settled position as TTSL has approached this Tribunal after a period of about two years and that too when the policy decision of the DoT has been fully given effect to.

M.As filed by Respondent No.1

34. The Union of India filed Misc. Applications marked as M.A. Nos. 80, 81, 82 of 2011 wherein inter alia a prayer was made for adjournment of the proceedings sine die contending that the Supreme Court of India is in seisin of a Public Interest Litigation which covers the subject matter of present dispute.

This Tribunal by an order dated 08.03.2011 asked the parties to obtain an order of clarification from the Apex Court in this behalf.

We do not know whether Union of India filed any such application for clarification, but no order of stay and/or clarification issued by the Supreme Court of India, if any, has been brought to our notice.

35. We may incidentally mention that the Supreme Court of India, by an order dated 16.03.2011 clarified that this Tribunal may go ahead with the dispute between the parties thereto which involves the orders passed by the DoT relating to grant of 3G Spectrum in favour of Idea Cellular Ltd. for the Punjab circle.

Submissions :-

36. Mr. Ramji Srinivasan, learned senior counsel appearing on behalf of TTSL would urge :-

- (a) TTSL, having applied for grant of spectrum as far as back on 19.10.2007, and the Delhi High Court as also this Tribunal having held that 'expression of its willingness to operate on alternate technology as also payment of fees were the only criteria' for grant of allocation of additional spectrum, should have been allocated the requisite frequency on the day on which it had applied for grant of 'in principle approval', being an 'existing licensee'.
- (b) The Respondent No.1 having disclosed its policy decision in the affidavit filed by it in the aforementioned Petition No. 286 of 2007, could not have allocated any spectrum to the 'new licensees' specified in the fourth and fifth categories over TTSL, who was entitled to be placed in Category III.
- (c) Even assuming that the date of issuance of LoI to the new licensees who were 121 or 122 in number and grant of 'in principle approval' to TTSL being the same and all of them became entitled to allocation of spectrum, the petitioner should have been given priority in relation thereto.
- (d) An amendment to the license was not necessary so far as TTSL is concerned, as has been held by this Tribunal in its judgment dated 31st March, 2011.

- (e) In any event, TTSL having been shown to be falling in Category III in respect of six circles, it could not have been placed in category V in respect of other circles below the private operators including 'Idea' and 'Unitech' as they were not entitled to any priority.
- (f) Even assuming, that for the purpose of allocation of 'spectrum', 10.01.2008 was to be treated as the cut-off date, TTSL could not have been relegated to a later date for the purpose of grant of spectrum.
- (g) The Respondent No.1, being a 'State' within the meaning of Article 12 of the Constitution of India, must be held to have acted wholly illegally and unjustifiably in so far as it acted contrary to and/or inconsistent with its own policy decision.
- (h) The action on the part of the Respondent No.1 in treating the private operators differently, TTSL must be held to have been discriminated against as un-equals could not have been treated as equals.
- (i) The UAS license agreement, being pertaining to use of any of the technologies; option to adopt a technology was for the purpose of allocation of spectrum at the initial stage and in the event the licensee opted for use of another technology and applied for allocation of additional spectrum, the existing licensees subject to availability and/or payment of the due charges levied therefor, became entitled thereto without any amendment of the license agreement.

(j) From a perusal of the judgement of this tribunal passed in Petition No. 286 of 2008, it would be evident that submissions made by the existing licensees in that behalf having been upheld, the right for allocation of additional spectrum accrued in favour of TTSL when it obtained the 'in principle approval' as opposed to the grant of new licence so far as other operators are concerned.

(k) TTSL's alternative prayer, as contained in prayer (D) of the petition being subject to grant of the reliefs as contained in prayers (A) to (C) thereof, the same does not in any manner mitigate against its contention that it had a priority in respect of grant of allocation of spectrum.

(l) As TTSL does not intend to deprive any other allottee of any spectrum that has been already granted to them, keeping in view the passage of time any future allocation of spectrum should be effected on the basis of the principles evolved by respondent No.1 itself.

37. Mr A S Chandio, learned Additional Solicitor General appearing on behalf of Union of India, submitted :-

(i) The holders of existing licenses formed a separate class and in view of the fact that the policy decision dated 18.10.2007 was altered in

terms of the policy decision dated 10.01.2008, the existing licensees were to be given priority on the basis of deposit of the amount equivalent to the entry fee for the new licensees and not from the date of original applications.

(ii) The 'in principle approval' granted in favour of TTSL in terms of its application dated 19.10.2007 would clearly go to show that for the purpose of grant of priority, the date of deposit of the prescribed fee only was to be considered.

(iii) The judgment of this Tribunal dated 31st March 2009 passed in Petition No 286 of 2008 being clear and explicit, whereby and whereunder the contention of the petitioner therein namely Cellular Operators Association of India and Others that every license holder was required to apply for and obtain allocation of additional spectrum by the Wireless Planning And Coordination Wing of DoT having been negated and furthermore this Tribunal having held that for the purpose of obtaining spectrum so far as the crossover licensees are concerned, the provisions contained in UAS license were sufficient and enabled them to apply for grant of additional spectrum and private respondents therein including 'Idea', 'Spice' as well as the Union of India and they having not preferred any appeal thereagainst before the Supreme Court of India, are bound thereby and in that context only, the affidavit filed by DoT in the case of TTSL should be considered.

(iv) The new applicants, in whose favour the 'Letters of Intent' were issued, would be governed by the policy decision dated 10.01.2008,

whereas the 'existing licensees' would be governed by the policy decision dated 19.10.2007.

- (v) In the affidavit dated 18.08. 2008, TTSL had rightly been placed in Table III and Table V merely contained a list of the operators who were entitled to allocation of spectrum, and not a priority list.

The other service operators namely Reliance Communications, Shyam Telecom and HFCL had been granted spectrum as the same was available in October 2007 but the Union of India had to change its policy decision keeping in view the rise in the demand thereof.

- (vi) The contention of 'IDEA' and 'Unitech' raised in their respective petitions that 'in principle approval' granted to 'TTSL' and the 'LOIs' to the new applicants stand on the same footing is not correct in view of the fact that whereas 'TTSL' merely changed from one technology to another on the basis of an existing license, the others were not even born on 10.01.2008 and, thus, the distinction between two categories of applicants is apparent.

38. Mr Vaidyanathan, learned senior counsel appearing on behalf of the 'IDEA', on the other hand, urged:-

- (i) The principles for grant of allocation of spectrum between TTSL and other operators must be determined by this Tribunal and only because it does not intend to displace the private respondents

herein, the same itself cannot be a ground for granting the alternative prayers in its favour.

(ii) TTSL having not raised any objection in the earlier round of litigation as regards the date from which the private operators became entitled to allocation of spectrum, it is estopped and precluded from raising any plea contrary thereto and inconsistent therewith in these proceedings.

(iii) The Government of India, must be held to have taken a policy decision contrary to the well settled principle of law in so far as it having laid down a condition that licences would be granted within a period of 30 days from the date of filing of the application therefor, and 'IDEA' having been filed the same in the year 2006, it could not have been granted the licence in March 2008 and in that view of the matter, TTSL cannot claim any right of allocation of spectrum with effect from 10 January 2008 as has been contended or otherwise.

(iv) From a perusal of the order of the Supreme Court of India passed in C.A. No. 10660 of 2010 arising out of the order of the Division Bench of the Delhi High Court dated 16.12.2010, it would appear that Respondent No.1 committed a serious illegality in communicating the 'in principle approval' granting permission to the existing licensees to use dual technology one day prior to the press release, and in that view of the matter, the entire process must be held to be wholly illegal and is, thus, liable to be set aside.

- (v) From a perusal of the said order dated 16.12.2010 passed by the Supreme Court of India, it would be evident that the policy decision with regard to dual technology could not have been adopted in a manner in which it was sought to be done.
- (vi) The entire question of issuance of 'in principle approval' being under investigation of the Central Bureau of Investigation, in the event it is held and/or ultimately found that entire action on the part of the authorities of Union of India in showing favour to the CDMA operators in the matter of grant of cross-over license was for external consideration, TTSL must be held to be not entitled to any benefit thereunder.
- (vii) The affidavit of Union of India dated 13.11.2007 was affirmed before this Tribunal at a point in time when no licence was granted and as such, the status of the new entrants vis-à-vis rights of those of the existing licensees having not been crystallised as on 18.10.2007, the same must be held to have not been in question.
- (vii) Keeping in view the existing policy decision adopted by the Government of India with regard to entertaining the applications for grant of new licences and the guidelines issued having fixed the criteria therefor, the doctrine of 'legitimate expectation' should be invoked in favour of respondents and not in favour of TTSL.
- (ix) The press release dated 10 January 2008 cannot be held to prevail over the existing guidelines nor by reason thereof the legal right

vested in the applicants of new licences should be permitted to be taken away.

(x) From the materials bought on record, it would appear that in the matter of grant of priority with reference to the date on which the amendment in the licence was carried out, it would be evident that TTSL was behind 'Swan' and 'Datacom', and in that view of the matter TTSL and/or DoT must be held to have misread the judgement of this Tribunal, in as much as it was not held therein that no amendment of the licence was necessary.

(xi) Although in the present petition, TTSL has questioned the contents of the affidavit dated 18.08.2007, no reason has been assigned as to why the same was not challenged earlier as it could have raised such a contention. Alternatively as 'Idea' was not a party in its capacity as a new licensee in Delhi, the same was not binding on it.

(xii) So far as the second affidavit of the DoT dated 18.08.2008 is concerned, evidently it has failed and/or neglected to consider the cases of the applicants who had applied for grant of new licences in the years 2006 and 2007.

(xiii) The DoT cannot base its entire case on the judgement of this Tribunal having regard to the fact that it has not evolved any new policy nor any fresh decision has been taken in the meantime.

In any event, judgement of this Tribunal dated 30th March 2009 must be held to have been displaced by the order of the Supreme Court of India passed in C.A. No. 10660 of 2010. (CPIL Vs. UoI reported in (2011) 1 SCC 560)

- (xiv) The affidavit of Union of India is contrary to or inconsistent with the judgement, particularly in view of the fact that assuming that by reason of the provisions of the UASL license, dual technology was permitted but not only therefor every applicant had to apply for a separate licence for grant of spectrum and get their license amended but also in fact an application for grant of separate wireless licence as also amendment of the licence had been filed.
- (xv) The order passed by the High Court of Delhi being against an order refusing to pass an interim Order in favour of COAI would not constitute a binding precedent.

39. Mr Meet Malhotra, learned Senior counsel appearing on behalf of the 'Unitech' would urge :-

- (a) The press releases dated 19.10.2007 and 10.01.2008 did not confer any right of priority on TTSL.

- (b) TTSL, keeping in view the facts and circumstances of this case, must be held to have correctly been put in Category V by the DoT in the earlier proceeding.
- (c) DoT cannot be permitted to take recourse to approbation and reprobation at the same time, especially in view of the fact that Government should act in a transparent manner and for good reasons. It cannot be permitted to change its stand over and over again to the detriment of the parties who had acted on the basis thereof and/or likely to be affected by the changes in the policy decision without assigning any reason therefor.
- (d) Having regard to the fact that TTSL could not have approached the WPC without holding a valid license permitting to operate on dual technology, its purported application for grant of spectrum without amendment of the licence (whether the date of application be treated to be 10th January, 2008 or 6th March, 2008 being immaterial) was premature.
- (e) The hierarchy of allocation of spectrum having clearly been set out and formulated way back on 18.08.2008, TTSL could not have slept over its right for more than two years and approach this Tribunal when the same has been worked out.
- (f) The action on the part of TTSL must be held to be hit by the doctrine of 'Estoppel' and 'Acquiescence'.

- (g) So far as 'Idea' is concerned, it cannot be permitted to question the correctness or otherwise of its position in Table IV and/or Table V at this point of time, particularly when it had earlier filed an application before this tribunal and withdrew the same.
- (h) Even assuming that this Tribunal should decide the principles so far as claim of priority inter-se amongst the applicants are concerned, in the peculiar facts and circumstances of this case, in the interest of justice, status quo as prevailing in August 2008 should be allowed to continue as the same has been fully acted upon, assuming that it was not a faultless one.

40. Mr. Dayan Krishnan, Learned Counsel appearing for M/s. Videocon Ltd., submitted :-

- (i) TTSL, is bound by its own pleadings and cannot be permitted to raise any contention contrary thereto or inconsistent therewith;
- (ii) Videocon, keeping in view the prayer made by TTSL, admittedly is entitled to allocation of the spectrum before it;
- (iii) For all intent and purport, the Letters of Intent were issued by the Respondent No.1 accepting the proposal of the applicants in regard to allocation of spectrum and Respondent No.7 having complied with the conditions thereof, i.e. deposited the entry fee on 10th January 2008 ahead of TTSL, it was entitled to priority in the matter of allocation of spectrum over the other licensees.

- (iv) Keeping in view the past practice as also the fact that the respondent No.1 accepted the recommendations of the Telecom Regulatory Authority of India, Respondent No.7 had a 'Legitimate Expectation' to obtain the benefit(s) contemplated thereby, which was substantive in nature namely grant of spectrum.
- (v) 'TTSL' as also 'Idea' having not approached this Tribunal within a reasonable time and having allowed Respondent No.7 and others to invest a huge amount and to set up their networks at Delhi, the present petition should be dismissed invoking the principles of 'Estoppel' and 'Acquiescence'.
- (vi) The inter-se priority amongst the contenders of allocation of spectrum was required to be determined from the dates of grant of license and/or amendment thereof respectively and not from 10.01.2008.
- (vii) The contention of the counsel for the 'Unitech' that 'TTSL' may form a subcategory within Category III as stated in the affidavit of Union of India filed on 18th August 2008 is not correct in as much as only those three operators who had filed applications for permission to operate also on GSM technology deposited the amount of entry fee and got their licences amended prior to

19.10.2007, namely 'Reliance Communication', 'Shyam Telecom' and 'HFCL' fall within the same.

- (viii) The contention of 'Idea' that priority should be determined on the basis of the date(s) of application as envisaged in 'the Guidelines' as well as the 'Press Release' dated 19.10.2007 should not be accepted having regard to the subsequent 'Press Release' dated 10th January 2008 in terms whereof the priority was to be determined only on the basis of the date of deposit of the entry fee and no other.
- (ix) The press release dated 19.10.2007 did not confer any right on 'TTSL' as in terms thereof only the other 'Existing Licensees' namely 'Reliance', 'Shyam' and 'HFCL' were to be given priority who had applied prior thereto meaning thereby 18.10.2007; whereas it had applied therefor only on 19.10.2007.
- (x) The 'Press Release' dated 19.10.2007 itself would clearly show that in relation to the aforementioned three operators, a decision had been taken to grant permission and in fact as only 'Reliance' had paid the amount before the said date, neither by reason thereof nor by reason of the 'Press Release' dated 10.01.2008 any right on TTSL was conferred only because it had applied for grant of allocation of spectrum and/or deposited the amount on that date or otherwise.

(xi) The 'in principle approval' was merely a permission to apply which for all intent and purport should be treated as on equal footing with 'Letter of Intent' in terms whereof, the conditions laid down therein were required to be complied with.

(xii) From a perusal of Clause 43.5.1 of the UAS Licence, it would appear that in the new policy decision, the word 'or' has been substituted by the word 'and'.

41. Although no oral argument was advanced, a brief note of submissions had been filed on behalf of the 'Loop Telecom Ltd.' and 'Reliance Communication Ltd.' wherein it was urged as under :-

1. The policy of allotment and/or allocation of spectrum on the basis of the priority of application is just and fair
2. The 'in-principle approval' granted in favour of the 'Reliance Communication' having been challenged before this Tribunal in Petition No. 286 of 2010 and no interim relief having been granted whereagainst a Writ Petition was filed which was also dismissed by a detailed judgement of the Delhi High Court dated 22.08.2008 and furthermore this Tribunal having accepted the right of the existing licensees to operate on dual technology and dismissed the COAI's Petition, no relief can be granted in favour of the Petitioners and against the said operators.

Questions

42. The principal questions which arise for consideration in these petitions are:-

(I) Whether in the peculiar facts and circumstances of this case, the policy decision dated 10.01.2008 adopted by Respondent No.1 herein is illegal and 'TTSL' has derived any legal right to obtain any benefit thereunder?

(a) Whether 'in-principle approval' granted in favour of 'TTSL' for all intent and purport should be treated to be akin to a 'Letter of Intent'?

(b) If such a criteria in the matter of allotment of spectrum is adopted, how the priority should be granted i.e. on the basis of:

- i. Dates of the applications filed by parties;*
- ii. Date of deposit of the requisite amount;*
- iii. Dates on which the new licences/amended licenses have been issued.*

(II) Whether Petition No. 437 of 2010 filed by 'Idea' questioning the validity of the said policy decision is maintainable?

(III) Whether in view of the delay on their part, any relief should be granted either in favour of 'TTSL' or 'IDEA' or 'Unitech'?

- (IV) Whether status quo as on 18.08.2008 should be directed to be maintained in public interest as well as by way of adjustment of equities between the parties?
- (V) What principles should be followed for grant of available spectrum?
- (VI) Whether 'TTSL' is estopped and precluded from raising any contention as has been raised in this petition as it did not question the respective dates set out in Table V although it had every opportunity to do so?
- (VII) Whether the judgement of this Tribunal in Petition No. 286 of 2008 can be resorted for the purpose of evolving the principles regarding allocation of spectrum or otherwise?
- (VIII) What would be the effect of the order of the Supreme Court of India dated 16.12.2010 passed in CPILO Vs. UoI (reported in SCC 2011 (1) SCC 560)?

Effect of the order dated 16.12.2010 of the Supreme Court of India

43. Before us, Mr Vaidyanathan, contended that keeping in view the order of the Supreme Court of India dated 16.12.2010 {CPILO Vs. Union of India 2011 (1) SCC 560}, the judgement of this Tribunal dated 30th March 2009 cannot be given effect to both in law as well as on fact.

44. The Supreme Court of India, in the aforementioned matter was dealing with an appeal from an order of the Division Bench of the High Court of Delhi, whereby it dismissed a Public Interest Litigation praying for a direction to the Union of India to get the investigation into various illegalities/irregularities committed by DoT (Commonly known as the 2G Scam) by the Central Bureau of Investigation.

While considering the said question, the Supreme Court of India noted some facts ultimately to hold that the High Court committed an error in refusing to entertain the Public Interest Litigation. We do not know the source thereof. It might have been as stated in the Special Leave Petition or summarised from other records.

The judgement of this Tribunal dated 31.03.2009, however, is pending appeal before the Supreme Court of India. The said appeal is yet to be heard. No stay of the operation of the said judgement, we understand, has been granted by the Apex Court.

45. The said appeal involves the question as to whether any policy decision could be adopted by the Union of India permitting use of dual technology in favour of a UAS licensee who were using CDMA technology vis-a-vis licenses granted in favour of licensees using GSM technology. This Tribunal therein was concerned with the legality and/or validity of the said policy decision and not with any criminal misconduct on the part of the authorities of DoT.

46. In fact, validity or otherwise of any policy decision on the ground of malafide or criminal conduct of the authorities of the DoT in collusion and conspiracy with some of the existing licence holders were not in question therein. It is also not so in the present petition. In the event, if any accused named in the F.I.R. recorded by the Central Bureau of Investigation is found guilty of commission of any offence in the matter of formulation of any policy decisions, undoubtedly, the consequences ensuing thereunder shall follow.

But, in our considered opinion, the same has nothing to do with the constitutionality and/or legality of the policy decision.

47. The Apex Court in its order dated 16.12.2010 had no occasion to deal with judgment of this Tribunal dated 31.3.2009. The same, we are informed at the bar is to be heard out separately. If the judgment of this Tribunal which is pending appeal is set aside, the consequences thereof may have to be considered afresh by an appropriate forum.

But herein we are concerned only with the effect of the policy decisions vis-a-vis the different stands taken by the parties herein.

48. If the submission of Mr. Vaidyanathan is accepted, the same would result in the stay of all the proceedings before this Tribunal which relate to 2G or 3G spectrum with which the Supreme Court of India was not concerned in the aforementioned matter.

49. It is preposterous to argue that this Tribunal should wait indefinitely till the criminal cases come to an end.

50. The logical corollary of such an eventuality would be that allocation of precious spectrum would remain at a standstill and thereby not only the public interest would suffer, but also a serious setback in the growth of telecom industry would thereby be caused. No stake holder would make fresh investments if the spectrum is not allocated. Moreover, the purpose for which even spectrum released by the Defense Ministry for better utilisation thereof by the stakeholders of telecommunication, shall be frustrated.

This bitter fight amongst the stake holders has started only because spectrum is now available for distribution.

51. According to DoT, the spectrum available for distribution to the licensees in various circles is as under:-

(i)	Delhi	11.6 MHz
(ii)	Mumbai	5 MHz
(iii)	Kolkata	23 MHz
(iv)	Maharashtra	6 MHz
(v)	Gujarat	4.4 MHz
(vi)	Andhra Pradesh	15 MHz
(vii)	Karnataka	11.8 MHz
(viii)	Chennai	25.4 MHz

(ix)	Kerala	28 MHz
(x)	Punjab	1.4 MHz
(xi)	Haryana	4.4 MHz
(xii)	Uttar Pradesh (West)	8.2 MHz
(xiii)	Rajasthan	3.2 MHz
(xiv)	Madhya Pradesh	18 MHz
(xv)	West Bengal	4 MHz
(xvi)	Himachal Pradesh	6.4 MHz
(xvii)	Orissa	18 MHz
(xviii)	Assam	3.8 MHz
(xix)	North East	7 MHz
(xx)	J&K	6.4 MHz

No spectrum is available for allocation in the circles of Bihar and Uttar Pradesh (East).

We in these matters also do not intend to deal with the question of malice of fact on the part of the authorities of the DoT as the same is pending before a competent Court of law i.e. the Criminal Courts as well as before the Supreme Court of India.

52. If that be the position, we fail to understand why 'Idea' itself has filed a petition before this Tribunal. We also fail to understand as to why, in that event 'Idea' and other operators objected to the prayer made by the Union of India for stay of the proceedings before this Tribunal sine die.

We, therefore, are of the opinion that the contentions raised by Mr Vaidyanathan in this behalf should be rejected.

RE: Application of the Policy decisions – The Factual Backdrop

53. We have noticed heretofore the basic fact of the matter.

The Union of India, for one reason or the other, had been following the 'First-Come First-Serve' principle.

In the year 2006 'Idea' applied for a new license. Other cellular operators also applied for grant of a license.

The relevant dates and other details thereof, which are not disputed may be noticed:-

“UNITECH

<i>Application for UASL for Pan India</i>	<i>24th Sept. 2007</i>
<i>Issuance of LOI for Pan India</i>	<i>10-Jan-2008</i>
<i>Submission of Entry Fees</i>	<i>10-Jan-2008</i>
<i>Compliance to LOI for Pan India</i>	<i>10-Jan-2008</i>
<i>Signing of UAS Licence for Pan India</i>	<i>28/29-Feb-2008</i>
<i>Submission of Date of application for GSM Spectrum</i>	<i>29-Feb/03-Mar-2008</i>
<i>Allocation of start-up GSM spectrum</i>	<i>22-Apr-2008 to 9-Jan-09</i>

TATA

<i>Press Release for dual technology</i>	<i>19-Oct-2007</i>
<i>Application for Dual Tech for Pan India (except AS, NE & J&K)</i>	<i>19-Oct-2007</i>

<i>Issuance of In principle Approval</i>	<i>10-Jan-2008</i>
<i>Submission of Entry Fees</i>	<i>10-Jan-2008</i>
<i>Amendment to UAS Licence</i>	<i>4-Mar--2008</i>
<i>Submission Date of application for GSM</i>	<i>5-Mar-2008</i>
<i>Allocation of start-up GSM spectrum</i>	<i>22-Apr-2008 to 9-Mar-09</i>
<u>Reliance</u>	
<i>Application for Dual Tech</i>	<i>6-Feb-2006</i>
<i>Issuance of In Principle Approval</i>	<i>18-Oct-2007</i>
<i>Payment of Entry Fees</i>	<i>19-Oct-2007</i>
<i>Amendment to UAS Licence</i>	<i>6-Dec-2007</i>
<i>Allocation of start-up GSM spectrum</i>	<i>10/11-Jan-2008</i>
<u>HFCL</u>	
<i>Application for Dual Tech (Punjab Circle)</i>	<i>11-Jul-2006</i>
<i>Issuance of In Principle Approval</i>	<i>18-Oct-2007</i>
<i>Payment of Entry Fees</i>	<i>12-Dec-2007</i>
<i>Amendment to UAS Licence</i>	<i>15-Jan-2008</i>
<i>Submission Date of application for GSM Spectrum</i>	<i>17-Jan-2008</i>
<i>Allocation of start-up GSM spectrum</i>	<i>10-Sep-2008</i>
<u>SHYAM</u>	
<i>Application for Dual Tech (Punjab Circle)</i>	<i>7-Aug-2006</i>
<i>Issuance of In Principle Approval</i>	<i>18-Oct-2007</i>
<i>Payment of Entry Fees</i>	<i>12-Dec-2007</i>
<i>Amendment to UAS Licence</i>	<i>15-Jan-2008</i>
<i>Submission Date of application for GSM Spectrum</i>	<i>17-Jan-2008</i>
<i>Allocation of start-up GSM spectrum</i>	<i>23-Dec-2008</i>

54. In terms of the policy decision, which was prevalent at the relevant point of time, the first application filed for grant of license was to be processed first. A policy decision was adopted in the month of October 2007 so as to enable the said UASL operators who at the initial stage opted for

one technology or the other to file applications for the use of another technology.

Another 'Press Release' was issued on 10.01.2008 whereby a new principle i.e. in stead and in place of 'first come first served', 'first pay and first served' principle was evolved.

55. The validity of the said policy decision was the subject matter of Petition No. 286 of 2007 before this Tribunal, culminating in the judgment and order dated 31.03.2009.

We would consider the effect of the said order at an appropriate stage.

56. The said policy decision dated 19.10.2007 was adopted pursuant to the recommendations made by the TRAI on the asking of the DoT. We would notice the relevant portions thereof a little later :-

57. Nobody raised any protest thereagainst on the said date or immediately thereafter.

Not only TTSL but also 'Idea' and others deposited the entire amount as demanded by it on 10th January 2008.

58. Whereas 'TTSL' also filed an application for amendment of its license on 10th January 2008 itself, its licenses are said to have been amended on or about 4th March 2008 and on the next day again a fresh application for allocation of additional Spectrum was filed and/or reminders to its applications dated 10.01.2008 were issued.

Apprehension of GSM Operators and Response of DoT

59. Before, however, we consider the respective submissions of learned counsel for the parties, it must be placed on record that evidently by its affidavits, apprehension of the COAI and others, who had filed the said Petition No. 286 of 2007, was sought to be allayed by the Union of India, by way of an Affidavit dated 18.08.2008, stating as under :-

“(C) On 13.11.07 an affidavit was filed before this Hon’ble Tribunal to place on record and confirm the Statement made by the Solicitor General at the hearing on 12.11.07. In the affidavit it was pointed out that, with regard to the priority for allotment of spectrum there were three categories. The first category was in respect of pending applications for allocation of spectrum to existing operators. It was stated that such applications “will be decided on the basis of the norms that will be finalized after receipt of the Committee Report.” In respect of the third category, it was stated “Thereafter, the companies to which ‘in principle approval’ to use GSM technology under the existing UASL., has been issued on 18 October 2007 will be considered for grant of start-up Spectrum”. I submit that this pattern has been adhered to in subsequent allocations of spectrum, which have been made in various service areas. There have been no complaints in regard to the manner of allocation of spectrum which has been allocated as and when available. It is understood that some of the licensees who have been allotted spectrum subsequent to the filing of this petition are in the process of rolling out their services which are expected to commence shortly.”

60. Paragraph 'M' of the said affidavit dealt with the current position on policy as regards allocation of spectrum as per order dated 17.01.2008 of WPC Wing of the DoT in regard to the interim criteria for allotment of GSM and CDMA spectrum.

Table I provided for the subscriber base criteria for allocation of GSM spectrum, whereas Table II provided for the subscriber base criteria of allocation of CDMA Spectrum.

So far as other Tables are concerned, DoT stated:-

“The status of allocation of CDMA spectrum and GSM Spectrum after 23.10.2007 is set out in tabular form hereafter. The status in respect of the three categories of applicants set out in paragraph C of this affidavit are separately set out in the first three tables. The fourth table comprises of new licensees of 2008 who have been allotted spectrum. The last table comprises of new licensees of 2008 who have not been allotted spectrum.”

61. In terms of the said purported policy decision, Category I contained the names of those existing GSM allottees who had applied for additional/initial GSM spectrum from 23.10.2007 to 31.07.2008.

Category II consisted of those licensees who had applied for initial GSM Spectrum allotted to UASL licensees of 2006.

We are concerned herein with the cases of those, who were the existing licensees and placed in Category III.

SI Nos. 1 to 14 thereof related to Reliance Communications

SI Nos. 15 to 20 related to TTSL containing the extent of Spectrum allotted to it in six circles being as under:

Allotment of Initial GSM spectrum for Dual Technology				
S. No.	Service Area	Operator	Date of allotment of initial Spectrum	Amount of initial spectrum (MHz)
15.	Tamil Nadu	Tata Teleservices Ltd.	22.04.08	4.4+4.4
16.	Chennai		22.04.08	4.4+4.4
17.	Orissa		24.04.08	4.4+4.4
18.	Kerala		15..05.08	4.4+4.4
19.	AP		27.05.08	4.4+4.4
20.	Karnataka		30.05.08	4.4+4.4

62. It may, however also be placed on record that whereas the latter had applied for 6.6 + 6.6 MHz of Spectrum in its application dated 10th January 2008, it was merely granted 4.4 + 4.4 MHz Spectrum as was done in the case of the former.

63. Table IV consisted of the names of those operators, in whose favour initial GSM spectrum was allotted as the new UASL licensees. The said allocations were said to have been made in terms of the affidavit filed before this Tribunal on 13.11.2007.

In its reply, DoT furthermore stated that while following the criteria for allocation of spectrum as notified on 17.01.2008 but having regard to the fact that a Committee had been constituted in June 2008, appropriate

decision in public interest was taken only when the recommendations therefor were received.

64. Table V consisted of those new licensees, who were awaiting GSM spectrum allocation as on 31st July 2008.

Diverse Contentions in the Present Proceeding

65. For the purpose of considering the respective contentions of the parties, we may notice the same in brief.

1. TTSL says that it has wrongly been put in Category V and it ought to have been put in Category III having regard to the policy decision/press releases dated 19.10.2007 and 10.01.2008.
2. The contention of 'Idea' is that even if 10.01.2008 is considered as the cut-off date for the purpose of determination of priority, the dates of respective applications filed in terms of the earlier policy decision should be the determinative factor.
3. The contentions of 'Unitech' and 'Videocon', are :-
 - (i) Table V should be considered to be dealing with cases not only of those applicants, who had been awaiting GSM Spectrum allocation i.e. not only the new licensees but also the licensees whose licenses were required to be amended.
 - (ii) DoT also acted on the same basis as would be evident from the fact that even HFCL Infotech Ltd. and Shyam Telecom Ltd., who admittedly filed applications for operating on GSM Spectrum

prior to 19.10.2007, were shown at Serial No. 67 and 72 thereof.

- (iii) As all parties including TTSL have acted on the basis of the said arrangement, they are estopped and precluded from raising any other contention.

Affidavits of DoT

66. We have noticed heretofore how different categories of licensees were placed in different tables appended to the affidavit of the DoT dated 18.08.2008.

67. Four affidavits filed by the DoT, two in Petition No. 286 of 2007 being dated 13.11.2007 and 18.08.2008, one filed on 07.12.2010 in Petition No. 299 of 2010 and another in Petition No. 437 of 2010 on 01.04.2010 have been referred to by learned counsel appearing for the private respondents to contend that it had taken different stands at different stages of the said proceedings and/or in the present proceedings.

We do not think so.

We may notice only the relevant portions of the said affidavits.

In the affidavit dated 13.11.2007, the DoT came out with statements seeking to allay the fears of the GSM licensees that in terms of its policy decision dated 19.10.2007 and 10.01.2008, they would be deprived of allocation of spectrum which would have otherwise been allocated to them and/or were likely to be allocated on a preferential basis.

68. From a bare perusal of paragraph 'b' of the affidavit dated 13.11.2007, it would appear that therein the DoT had been dealing with the

matters relating to allocation of spectrum contending that priority shall be given to those who fall in the first and second categories and those who fall in the third category would be considered for allocation of start-up spectrum.

The stand of the DoT was made clear and explicit in its affidavit dated 18.08.2008. It gave the chronology of Granting of New UAS Licensees/Dual Technology Permission which we have noticed heretobefore.

69. Paragraph 'M' dealt with the position as was existing on the date the policy regarding allocation of spectrum was adopted, whereas Paragraph 'N' provided for status of allocation of spectrum, Clause 1 whereof refers to the Tables contained therein.

It reads as under:

“The status of allocation of CDMA spectrum and GSM Spectrum after 23.10.2007 is set out in tabular form hereafter. The status in respect of the three categories of applicants set out in paragraph C of this affidavit are separately set out in the first three tables. The fourth table comprises of new licensees of 2008 who have been allotted spectrum. The last table comprises of new licensees of 2008 who have not been allotted spectrum.”

70. We have, however, noticed heretobefore that in fact the existing licensees also figured therein.

It is in the aforementioned situation that the statements were made before this Tribunal that the allotment of GSM spectrum to new licensees of

2008 as on 31.07.2008 have been done and would be done in terms of its policy decision dated 17.01.2008.

71. Category V, therefore, consisted of those in whose favour any spectrum was yet to be allotted (circle-wise).

It, ex-facie, was not a priority list as no norm or criteria was followed in placing the licensees against different circles.

What apparently has been done was to show the names of the licensees vis-à-vis the dates of applications for grant of spectrum purporting to rely on or on the basis of the record (which were presumably available with the Department).

72. By way of example, the name of 'Shyam' and 'Loop Telecom' which are said to have applied for grant of spectrum on 07.03.2008 have been shown above S-Tel Ltd., an existing licensee who had applied for allocation of Spectrum on 05.03.2008; whereas the names of 'Idea' and 'Datacom Solutions Pvt. Ltd.' who although had applied on 28.02.2008 and 27.02.2008 respectively, find place below the same.

73. The DoT, in its affidavit dated 07.12.2010 filed in the case of TTSL, relying on or on the basis of Clause 43 of the UAS licence and in particular Clause 43.5 thereof inter-alia opined that TTSL was entitled to priority in the matter of allocation of spectrum keeping in view the fact that it was an existing licensee.

We may notice the relevant paragraphs of the said affidavit :-

- “5. *It is further clarified that press release permitting to then existing UAS licensee to use alternate technology was issued on 19.10.2007, much prior to press release dated 10.01.2008, therefore, the category of licensee which came into existence pursuant to press release dated 10.01.2008, are not at all comparable or identical with cross over licensee govern by press release dated 19.10.2007.*
6. *So far as the question of allotment is concerned, it is submitted that grant of license and holding a valid license is condition precedent to allotment of spectrum. For allotment of spectrum, another license namely, wireless operating license (WLL) is required, as has been provided under clause 43 of UAS license agreement. Clause 43.5 reads as under :-*
- 43.5 : Subject to availability and as per Guidelines issued from time to time, the spectrum allocation and frequency bands will be as follows :*
- 43.5 (i) For wireless operations in SUBSCRIBER access network, the frequencies shall be assigned by WPC Wing of Department of Telecom from the frequency bands earmarked in the applicable National Frequency Allocation Plan and in coordination with various users. Initially a cumulative maximum of up to 4.4 MHz + 4.4 MHz shall be allocated in the case of TDMA based systems @ 200 KHz per carrier or 30 KHz per carrier or a maximum of 2.5 MHz+2.5 MHz shall be allocated in the case of CDMA based systems @ 1.25*

MHz per carrier, on case by case basis subject to availability.

7. *From the aforesaid clause 43.5, it is evident that petitioner cannot claim right or any priority for allocation of spectrum in terms of the UAS license agreement and furthermore in absence of any stipulation or condition in UAS license agreement the contention of petitioner that it be allocated spectrum on priority are misleading and tantamount the breach of the agreement.*
10. *Every UAS licensee, having taken license, is required to make an application accompanying by valid UAS license to WPC Wing of DOT for allocation of spectrum.”*

74. It, however, in its reply filed in Petition No 437 of 2010 (Idea's Petition) and in Petition No 113 of 2011 (Unitech's Petition) reiterated its stand in its affidavit dated 18.08.2008 so far as it relied upon the 'Tables' appended thereto.

The relevant paragraphs of the affidavit dated 01.04.2011 are as under :-

- “12. *Every UAS licensee, having taken license, is required to make an application accompanying by valid UAS license to WPC Wing of DOT for allocation of spectrum.*
16. *Without prejudice to above submissions and reserving liberty to file a detailed reply, it is*

submitted that petition is liable to be dismissed, inter-alia, on the following grounds:

- i. New licensees who are the beneficiaries of the press release dated 10.01.2008 cannot claim anything beyond the terms of their licenses.*
- ii. Press release does not say or mentions anything about priority or provide for any mechanism for determining priority for allocation of spectrum, therefore, the contention of so called confusion in the policy is misconceived.*
- iii. Press release dated 10.01.2008 is distinct and different from press release dated 19.10.2007, and are applicable to different set of UAS licensee.*
- iv. Press release dated 19.10.2007 relates to cross over licensee who were permitted to use alternate technology, this press release has nothing to do with new licensee i.e. petitioner, therefore, the case of cross over licensee and new licensee are governed by their respective press release and are dissimilar set of licensee.*
- v. Allocation of spectrum, amongst the other terms, is subject to obtaining of WOL and availability of spectrum, and the date of application to WPC accompanied by a valid license is irrelevant for entitlement of spectrum.”*

75. Spectrum is a scarce commodity. Priority of allocation of Spectrum amongst the licensees, therefore, is of great significance to the operators who are yet to commence their operations either in the metropolitan cities or in various districts of different circles vis-à-vis their expansion programme of the existing licensees.

For the aforementioned purpose, the history relating to policy for grant of licence assumes some significance.

The telecom services were principally based on three technologies:

- i. *Basic Services with Limited Mobility,*
- ii. *GSM technology, and*
- iii. *CDMA technology.*

76. The Union of India brought into effect the UASL regime in terms whereof those who had offered to opt for grant of UASL licenses were allotted such licenses with effect from 14.11.2003. Such licenses were granted in the first lot in September, 2004 and the second in December, 2006.

A press release was issued on 19.10.2007 containing the policy decision of the Union of India, upon taking into consideration the permissibility of UAS licensees to use alternate technologies, the relevant portions whereof read as under:

“In order to further enhance the penetration of access services for rapid expansion of tele-density, it has also been decided that the existing private UAS Licensees may be permitted to expand their existing networks by using alternate wireless technology i.e. the present UAS Licensee who is using GSM technology for wireless access may be permitted to use CDMA technology and vice-versa.

The spectrum for the alternate technology, CDMA or GSM (as the case may be) shall be allocated in the applicable frequency band subject to availability after payment of prescribed fee. Allocation of spectrum for the alternate technology may be done to private UAS Licensees on payment of prescribed fee, which will be an amount equal to the amount prescribed as entry fee for getting a new UAS licence in the same service area. The existing UAS Licensees, who have already applied for allocation of spectrum for the alternate technology shall also be considered for allocation of spectrum to alternate technology from the date of payment of prescribed fee. BSNL and MTNL being incumbent operators shall be permitted usage of alternative technology and allocated spectrum for the alternate technology without paying the prescribed fee. For the purpose of payment of licence fee and spectrum charges, the stream wise revenue of different technologies shall be considered.”

77. In view the changes in the policy to grant more licenses, various new telecom companies entered into the field and applied for grant of new licenses.

78. The entire process of consideration of applications for grant of new licenses was to be in four different stages. According to Respondents, at every stage, the policy of first-come first-served basis was to be applied.

79. The press release dated 10.01.2008 containing the policy decision reads as under:-

“In the light of the Unified Access Services License (UASL) guidelines issued on 14th December 2005 by the department regarding number of licenses in a Service Area, a reference was made to TRAI on

13-4.2007. The TRAI on 28.08.2007 recommended that no cap be placed on the number of access service providers in any service area. The Government accepted the recommendation of the TRAI. Hon'ble Prime Minister also emphasized on increased competition while inaugurating India Telecom 2007. Accordingly, DOT had decided to issue LOI to all the eligible applicants on the date of application who applied up-to 25.-9-2007.

UAS license authorizes licensee to rollout telecom access services using any digital technology which includes wire-line and/or wireless (GSM and/or CDMA) services. They can also provide Internet Telephony, Internet Services and Broadband services. UAS license in broader terms is an umbrella license W.P.(C) No.363/2008 Page 18 of 22 and does not automatically authorize UAS licensees usages has to obtain another license i.e. Wireless Operating License which is granted on first- come-first serve basis subject to availability of spectrum in particular service area.

DOT has been implementing a policy of First-cum-First Served for grant of UAS licenses under which initially an application which is received first will be processed first and thereafter if found eligible will be granted LOI and then who so ever complied with the conditions of LOI first will be granted UAS license.”

80. On the same day, that is, on 10.01.2008 another Press Release was issued which reads as under:

“Sub :UASL applicants to depute their authorized representative to collect responses of DOT on 10.1.2008

The applicant companies who have submitted applications to DOT for grant of UAS licences in various service areas on or

before 25.9.2007 are requested to depute their Authorised signatory/Company Secretary/authorized representative with authority letter to collect response(s) of DOT. They are requested to bring the company's rubber stamp for receiving these documents to collect letters from DOT in response to their UASL applications. Only one representative of the Company/group-Company will be allowed. Similarly, the companies who have applied for usage of dual technology spectrum are also requested to collect the DOT's response.

All above are requested to assemble at 3.30 pm on 10.1.2008 at Committee Room, 2nd Floor, Sanchar Bhawan, New Delhi. The companies which fail to report before 4.30 P.M. on 10.01.2008, the responses of DOT will be dispatched by post.

All eligible LOI holders for UASL may submit compliance to DOT to the terms of LOIs within the prescribed period during the office hours i.e. 9.00 A.M. to 5.30 P.M. on working days.”

81. It is on the aforementioned factual matrix, we may also notice the 'in principle approval' granted to TTSL so as to enable it to use GSM technology under the existing licenses pursuant to its request made on 19th October 2007 under the existing UAS license.

It was stated:

“In pursuance to your request dated 19th October, 2007 for allocation of spectrum to use GSM technology also in addition to the CDMA technology being used under the existing UAS Licence(s) for the above mentioned Service Area(s) the undersigned is directed to convey that TRAI's recommendations, inter-alia, for usage of alternate technology and thus allocation of dual spectrum has been accepted and therefore, In Principle-Approval is hereby conveyed on behalf of the President of India,

to use GSM technology (in addition to CDMA technology being used by the company) under the existing UAS licence(s) for the service area(s) mentioned in the Annexure of this letter, on non-exclusive basis.

2. The company shall, within a period of 15 days from the date of this letter, make payment of non-refundable fee equal to the same amount of prescribed entry fee, in addition to the entry fee already paid for the licence issued for service areas mentioned in the Annexure of this letter, which has been paid by existing licensees using the GSM technology or which would be paid by a new UAS licensee in each service area(s) mentioned in the Annexure.

The fee shall be in the form of Demand Draft/Pay Order from a Scheduled Bank payable at New Delhi issued in the name of Pay & Accounts Officer (Headquarters) DOT. It may please be noted that date of receipt of payment of above mentioned required fee shall determine the date of priority for allocation of spectrum.

3. It may be noted that the payment of fee, as stipulated above, is solely for the purpose of grant of permission to use GSM technology also in addition to the CDMA technology being used under the existing UAS licence(s) issued to the company under Section 4(2) of the Indian Telegraph Act, 1885 and shall not confer any right on the Licensee for allocation of radio-spectrum for operating wireless access services or establishing back-bone radio-links. Spectrum shall be allocated as per existing policy/guidelines, as amended from time to time, subject to its availability.

4. The company shall meet the roll-out obligations and other stipulations of the UAS licence(s).

5. *Separate revenue streams shall be maintained as per prescribed proforma by DoT for different technologies (GSM/CDMA) for calculation of licence fee and spectrum charges.*

6. *At the time of further allotment of spectrum in either GSM or CDMA technology, allotment will be subject to the existing policy/guidelines as amended from time to time, subject to availability and condition that in case the eligibility of the licensee for allocated spectrum in other technology falls below the criterion set for spectrum allotment in the specified technology for the last consecutive six months then corresponding chunk of spectrum in that technology will be surrendered by the licensee before any further allotment of spectrum is considered.*

7. *The effective date of existing UAS licence(s) and other terms & conditions shall remain unchanged.*

8. *Necessary amendment of UAS Licence Agreement for allocation and use of spectrum in alternate (CDMA/GSM) technology shall be issued separately after payment of fee as indicated in para 2 above.*

9. *The company may convey its unequivocal and unconditional acceptance of this offer within seven days from the date of this letter.*

Encl : As above.

The annexure appended thereto enumerated the names of circles, category thereof and the amount of fee payable therefor.

In Principle Approval vis-a-vis LoIs

82. It would be apt if the ‘in principle approval’ granted to TTSL on 10th January, 2008 is noticed at the first instance.

However, another fee, being equivalent to the entry fee was required to be deposited which is *stricto sensu* not entry fee as TTSL was an ‘existing licensee’.

- (i) It postulated that the date of receipt of payment of the required fee shall determine the date of priority for allocation of Spectrum.
- (ii) The ‘in principle approval’, therefore, conveys as to what would be the ‘appropriate priority’ to be granted to the existing licensees.

83. Priority was to be granted to the existing licensees and spectrum was to be allocated immediately after 10.01.2008 by using a legal fiction, as would appear from the affidavit of DoT in the case of ‘TTSL’.

We may also notice the ‘Letters of Intent’ granted to the new licensees.

84. The LoI was subject to compliance of UASL guidelines dated 14.12.2007. The LoI holders were to pay ‘entry fees’ specified therein. It was to submit the performance guarantee and other conditions laid down therein.

Paragraph 3 of the said LoI reads as under:

“3. Further, the grant of License shall be subject to the condition that “No single Company/ Legal person, either directly or through its associates, shall have substantial equity holding in more than one LICENSEE Company in the same service area for the Access Services namely Basic, Cellular or Unified Access services. ‘Substantial equity’

herein will mean 'an equity of 10% or more'. A promoter Company/ Legal person cannot have stakes in more than one LICENSEE Company for the same service area." A certificate in this regard, from the Company Secretary of the applicant is to be furnished before signing of the Licence Agreement."

85. No assurance was given to the LoI holders that they would be granted any priority.

86. It is, therefore, difficult for us to hold that the LoIs granted to the licensees and the 'in principle approval' granted to TTSL would stand on the same footing.

There cannot furthermore be any doubt or dispute that both the categories were required to fulfil certain obligations/conditions. Subject, however, to the fulfilment of such conditions, one category, namely the existing licensees were given priorities whereas the new licensees were yet to enter into the field.

Status of the LoI holders

87. The Supreme Court of India in *Dresser Rand S.A. v. Bindal Agro Chem Ltd.*, reported in 2006 (1) SCC 751, has held that subject to certain exceptions, a letter of intent does not create any binding relationship.

88. We must however, notice, that the said decision has been distinguished by Singhvi, J; speaking for a Division Bench of the Supreme

Court of India in *State of U. P. v. Combined Chemicals Co. (P) Ltd.* in 2011 (2) SCC 151, stating:-

“22. A careful reading of the abovenoted judgment shows that the letters of intent issued on behalf of the respondent were never intended to be treated as a binding contract between the parties. There was no indication in the letters of intent about acceptance of the offer made by the appellant. Therefore, this Court held that no agreement was executed between the parties for purchase of the goods.

23. Reverting to the present case, we find that the bid given by the respondent was unequivocally accepted by the competent authority and the letter of acceptance was issued for and on behalf of the Governor by treating it to be a contract. Thus, there was substantial compliance with Article 299 of the Constitution. The execution of formal agreement was optional and was not sine qua non for supply of the goods by the respondent. In our view, if the acceptance letter is read along with other documents in the light of the conduct of the parties, it becomes clear that an agreement was executed between the competent authority and the respondent.”

89. Our attention was also drawn to the well known treatise of ‘Chitty on Contract’, which merely states that LoI would lead to a presumption of the formation of a contract where the language thereof does not negative the contractual intentions.

90. In a given case, apart from the fact that the LoI holders were also required to comply with certain conditions, it is possible for the licensor, bearing in mind a particular fact situation not to part with its

privilege by granting licence in terms of the proviso appended to Section 4 of the Indian Telegraph Act, 1885. An existing licensee shall, however, stand on entirely different footings.

91. There exists a clear distinguishing feature between an existing licensee and the new licensees.

Whereas in the case of an existing licensee, the jural relationship had already come into being and in terms of the provisions of the licence, it is entitled to use either or both of CDMA and GSM technology subject of course to the compliance of certain formalities as recommended by TRAI and accepted by DoT, but so far as the new licensees are concerned, the jural relationship would not come into being unless a licence is granted.

92. Grant of licence although cannot be refused on whims and caprices. Some play in the joint must, however be allowed in favour of the licensor. Grant of licence can be refused despite deposit of the entry fee, if a fundamental flaw is found in the application. Even the LoI can be revoked.

93. If that is the legal position, it must be held that the existing licensees would stand on a different footing vis-à-vis the new licensees.

We, therefore, do not see any reason as to why Respondent No.1 could not have granted priority to the existing licensees vis-à-vis the new licensees.

94. If, on the aforementioned backdrop, the contents of Tables appended to the affidavit of the DoT dated 18.8.2008 are considered, the logical conclusion would be that whereas Tables I to IV deal with allocation of spectrum to those licensees who have been allotted Spectrum in seriatim, Table V merely denotes those cases where no allocation of spectrum could be made.

95. Thus, who would be granted priority, is apparent from different Tables vis-à-vis the new licensees. All the affidavits affirmed on behalf of DoT must be read in the context of each other. They deserve a harmonious reading. We must make an attempt to give effect to all parts of the said affidavits. They have to be read reasonably. Effective meaning thereto should be given. We have noticed heretofore that TTSL in respect of six circles were placed in Category III. It's placement in Category III had not been challenged either in Petition No. 286 of 2008 or in the present petitions.

Amendment of Licence

96. Was amendment of license necessary? It was, but the submission that 'TTSL' and other erstwhile CDMA operators despite being 'existing licensees', and having also been placed in Category V, the words 'new licensees' should be read with the word 'Amended Licensees' or 'licensees whose licenses have been amended', cannot be accepted.

97. Submissions have been made that for the purpose of allocation of Spectrum, not only a separate licensee was required, but the licensee was required to be a valid one.

98. Submissions have also been made that the Regulator had recommended that the licenses be amended, which recommendation was accepted by the Union of India as would be evident not only from the policy decision dated 10.01.2008 but also from various other recommendations.

99. In this connection, it would be of some significance to notice that this Tribunal in the aforementioned judgement dated 30.03.2009 in no uncertain terms held that the existing licensee had a right to switch over to the other technology and apply for additional spectrum. It would not be proper for us to assume that they were mere high sounding words. No doubt, before allocation of appropriate quantity of spectrum, necessary formalities were required to be complied with but the same would, in our opinion, not mean that fresh license and amendment in license were to be put on the same pedestal.

We would, however, proceed to consider that we have to determine the question of priority independently.

100. It is true that the TRAI in its recommendations stated that having regard to the provisions contained in Clause 45 of the licence, the same should be amended so as to permit an UASL Licensee to work on alternate technologies. It is also true that in Clause 8 of the 'in principle

approval' granted by the DoT, it was specifically stipulated that the licence would be amended. It is equally true that 'TTSL' accepted the said offer unequivocally.

101. There is also no controversy that 'Reliance', 'Shyam' and other 'existing licensees' before obtaining allocation of spectrum, got their licences amended.

The nature of amendment may be noticed:-

"18.1(A) One Time non-refundable prescribed Fee of Rs.103.01 Crore has been paid by the LICENSEE for use of GSM technology in addition to CDMA technology.

18.3.1 The LICENSEE shall pay spectrum charges in addition to the Licence Fees on revenue share basis as notified separately from time to time by the WPC Wing. The segregated revenue in the format of statement of revenue and license fee of license agreement, in the prescribed proforma as revised from time to time, is required to be furnished by the licensee to determine the stream-wise spectrum charges for GSM and CDMA. However, while calculating 'AGR' for limited purpose of levying spectrum charges based on revenue share, revenue from wireline subscribers shall not be taken into account.

43.5 (i) For wireless operations in SUBSCRIBER access network, the frequencies shall be assigned by WPC Wing of Department of Telecom from the frequency bands earmarked in the applicable National Frequency Allocation Plan and in coordination with various users. Initially a cumulative maximum of upto 4.4 MHz + 4.4

MHz shall be allocated in the area of TDMA based system (@ 200 KHz per carrier or 30 KHz per carrier and maximum of 2.5 MHz+2.5 MHz shall be allocated in the case of CDMA based systems @ 1.25 MHz per carrier), on case by case basis subject to availability. While efforts would be made to make available larger chunk to the extent feasible, the frequencies assigned may not be contiguous and may not be the same in all cases or within the whole Service Area. For making available appropriate frequency spectrum for roll out of services under the licence, the type(s) of Systems to be deployed are to be indicated.

43.5(ii) Additional spectrum beyond the above stipulation may also be considered for allocation after ensuring optimal and efficient utilization of the already allocated spectrum taking into account all types of traffic and guidelines/criteria prescribed from time to time. However, spectrum not more than 5+5 MHz in respect of CDMA system and 6.2 + 6.2 MHz in respect of TDMA based system shall be allocated to the Licensee. The spectrum shall be allocated in 822-844 MHz paired with 869-889, 890-915 MHz paired with 935-960 MHz, 1710-1785 MHz paired with 1805-1800 MHz.

43.5(iii) In the event, a dedicated carrier for micro-cellular architecture based system is assigned in 1880-1900 MHz band, the spectrum not more than 3.75 + 3.75 MHz in respect of CDMA system and 4.4 +4.4 MHz in respect of TDMA system shall be assigned to the licensee.”

Clause 2 of the said letter dated 04.3.2008 reads as under :-

“The above amendments should be read with this office letter No.20-100/2007/Spectrum/AS-I dated 10.01.2008 regarding in-principle approval to use GSM technology under the existing UAS Licence. All other terms and conditions of the license agreement including amendments and instructions issued from time to time shall remain unchanged.”

102. By reason of the said amendment, inter-alia, the word ‘or’ has been substituted by the word ‘and’ so as to enable the licensee to operate both on GSM and CDMA technologies. However, it is of some significance that this Tribunal in its judgment dated 31.3.2009 categorically noticed having regard to the submissions made by the learned counsel appearing for the TRAI that some discussions contained in its recommendations were based on general perception only.

If that be so, the recommendations of the TRAI must be considered in the context, in which it has been made.

The TRAI spoke of level playing field.

It recommended for imposition of fee which would stricto sensu be not an entry fee, but an amount equivalent thereto. Such a provision was proposed not for any other purpose but only to see that a CDMA operator does not obtain an undue advantage on the fiscal side over a GSM operator or vice versa. The recommendations of the TRAI did not speak of any priority to be granted in the matter of allocation of spectrum to either the existing licensees or inter-se amongst the new licensees. In fact, the DoT was asked to lay down the policy decision with regard to the fixation of inter-se

seniority amongst the existing licensees. Formulation of a policy decision is the prerogative of the licensor. The Regulator may not have, in terms of Section 11 of the Act, any role to play with regard thereto.

103. This Tribunal does not say that keeping in view the recommendations made by the Regulator, which has been adopted by the Central Government, no amendment in the licence was at all required. We, for this purpose, would assume that a mere observation to that effect was made by this Tribunal in its judgment dated 31.3.2009 in Petition No. 286 of 2008 and the same does not create a binding precedent.

But, the question is what would be the effect thereof?

104. Indisputably, the said policy decision was adopted relying on or on the basis of the recommendations made by Telecom Regulatory Authority of India dated 28th August 2007.

105. Paragraphs 4.27, 4.6, 4.7, 4.8, 4.9, 4.10, 4.11, 4.12, 4.13, 4.15, 4.16, 4.19, 4.20, 4.24, 4.26 of the said recommendations are significant.

We may notice relevant portions thereof in brief, being:

(1) change over is permitted in view of the concept of technology neutrality

(2) the licenses were to provide for the details of the technology to be deployed

(3) frequencies were to be designed for the designated bands prescribed in National Frequency Allocation Plan, 2002

(4) Clause 43.5 of UAS license lays down an allocative principle of GSM or CDMA technology depending on the choice of the licensee.

(5) Applicant Company pays the specified entry fee and then exercises its technology choice. Licensees, therefore, have a freedom to choose either of the technologies.

WPC grants authorisation on the technology choice of the licensee

(6) allotment of additional frequency is based on the optimal use of existing allotment

(7) license does not contemplate more than one technology choice. Spectrum allocation is also technology specific

(8) freedom exercised once, becomes the basis for offering telecom services and building of the edifice.

(9) a licensee under the existing licence conditions cannot run and operate on two independent networks.

(10) Continuity of technology in providing telecom services is the foundation of UAS license conditions as also allocation of spectrum.

106. The TRAI, in its recommendations considered the comments of the stakeholders as also technological developments throughout the

globe vis-a-vis the necessity to encourage competition amongst the commercial entrepreneurs.

It furthermore looked to the rules and regulations prevailing in some other countries and making them available in Indian scenario.

107. Some of its recommendation are as under:

“4.29 For such licensees who are seeking to change in favour of multiple technology in providing mobile access under the UASL framework and within the spectrum bands specified in the UASL, the Authority recommends levy of a specified amount of fee which should be, at least, equal to the entry fee for UAS licence. Further, for purposes of assessment of market power in the context of competition analysis in the market, the combined market share arising out of service provision through both the technologies will be taken into account and obligations if any to be imposed on such dominant operators as and when necessary in future will be done with reference to combined market power of such licensees.

4.33 The approach outlined here is new, liberal, innovative and recognizes the market related developments in the context of technology

4.34 Another linked issue is the inter se priority for spectrum allocation. As the existing licensee becomes eligible for allocation of additional spectrum specific to the new technology, such a licensee has to be treated like any other existing licensee in the queue and the inter se priority of allocation should be based on the criteria that may be

determined by the Department of Telecommunications for the existing licensee.”

108. Indisputably, ‘TTSL’, ‘Idea’, ‘Videocon’ and some others deposited the fees equivalent to the entry fee of the GSM operators and/or the entry fee required to be deposited by the new licensees.

Effect of Table IV and V in the light of the judgment dated 31.03.2009

109. Petition No. 286 of 2007 was filed by the COAI and others only on an apprehension that they would be deprived of the allotment of Spectrum as new GSM operators would be joining the band.

In the said petition, however, the new licensees were not impleaded, as no objection was raised with regard to the policy decision of Union of India to grant new licences who intend to operate on GSM technology. ‘Idea’, ‘Spice’ as also ‘TTSL’ were impleaded as parties therein.

So were ‘Reliance’ and other CDMA operators.

110. It may be true that in the said Petition, this Tribunal was not concerned with the question of priority inter-se amongst the operators whether they were existing licensees or new licensees. Had such an issue been involved therein, the question of filing these petitions by some of the operators would not have arisen.

This Tribunal, however, while determining the question as to whether UAS License conferred on the existing licensees the right to switchover to other technologies, went into the said question.

111. We may notice some of the relevant findings of this Tribunal leading to diversity of submissions thereupon :-

“But a reading of the entire clause shows that it is meant for the initial allocation. In fact, the entire clause proceeds on the assumption that service providers would seek initial and additional spectrum in a given band. This does not mean that there is a prohibition on seeking spectrum in other bands. The licence is essentially a permission to provide Cellular services to the consumers. In what band it is provided is not really relevant. So long as technology is an approved technology, the service provider is free to provide such service. It is true that the assignment of spectrum is subject to its availability and also the guidelines that are prescribed from time to time. But this, per se, does not prohibit the use of dual technology. We are of the opinion that the two issues are different and must be kept distinct. We accordingly hold that a reading of the NTP 99 document and the license conditions reveals that the concept of that technology is not a new concept and that this is contained in the above documents.

65. *Therefore, going by the above interpretation, it is clear that the NTP document as well as the Press Note and the UAS licence conditions should be taken as an unambiguous exposition of the policy laid down, which is one of technology neutrality.*

68. *In our view, it is in drawing this conclusion that the Consultation Paper went wrong. The clauses referred to in the Consultation Paper deal with spectrum. As indicated by us above, there is no specific prohibition on provision of more than one technology by license.*

69. There is no change in so far as spectrum is concerned between the date prior to migration and the date immediately after migration. Nowhere is there any stipulation that the once spectrum is allocated in a band, the licensee is barred from introducing any other technology. It would have been useful if this had been carefully analysed by TRAI and brought out clearly so as to avoid any confusion.

70. In the entire licence agreement it is only stated that the licensee shall provide the details of technology proposed to be deployed for operation of the service. Accordingly, the growth path of the licensee is confined to the technology chosen at the early stage. This clearly gives the impression that the TRAI itself is stating that there can only be one technology and which remains the one chosen in the initial stages. During the course of hearing, however, the learned counsel for TRAI, Mr. Saket Singh mentioned that what is stated in the Recommendations upto Para 4.16 is only the common belief or perception which the Authority has outlined. Unfortunately this was not brought out explicitly in the Recommendations. If the intention of TRAI is to bring out in these paragraphs the common belief and state that this is not the correct interpretation, it should have stated so very clearly. For, what follows from Para 4.17 onwards is different from what was narrated upto para 4.16. We are therefore of the view that in analyzing this issue. TRAI did not exhibit the required degree of care and has itself given the impression that what was being done is something that was new. This was avoidable.

71. The learned counsel for Petitioner laid emphasis on Para 4 of the Press Release which states that “it has also been decided that the existing private UAS Licensees may be permitted to expand their existing networks by using alternate wireless

technology i.e. the present UAS Licensee who is using GSM technology for wireless access may be permitted to use CDMA technology and vice versa. He sought to lay emphasis on the word 'permitted' to state that it is a case of fresh licence or an amendment to the existing licence. This is taking a too technical view of the matter. Firstly, a Press Release is only meant to give information to the public and is not a legal document. Secondly, it is common knowledge that administrative use of language is different from legal use of the language. For these reasons, we reject the contentions of the learned counsel for Petitioner and hold that in taking the decisions reflected in the letter dated 18.10.2007 or the Press Release dated 19.10.2007, no impropriety was committed by the DOT regarding impropriety of decision-making.

114. We hold that there is thus nothing in either the NTP-99 document or the licence conditions on the correspondence/orders to support the contention of the Petitioners that they have a vested right up to 15 MHz. We hold that the Petitioners do not have any vested right to receive GSM spectrum beyond 6.2 MHz.”

Guidelines dated 14.12.2005 for Unified Access Service License

112. The guidelines issued by DOT are in two parts; namely how and in what manner the applicants would file the applications and how the same would be dealt with.

113. Para 12 deals with scope of the Licence. Para 13 of the guidelines states that a non refundable fee based on LoI will have to be paid

by the applicant before signing the licence agreement, in addition whereto, however, by reason of Clause 14 the licence, the licensee was also liable to pay the licence fee at the rate prescribed therein or adjusted gross revenue stipulated for the categories of the areas mentioned therein

114. Strong reliance has been placed by Mr. Vaidyanathan on paragraph 23 of the said guidelines, which reads as under :-

“23. The application shall be decided, so far as applicable, within 30 days of the submission of the application and the applicant company shall be informed accordingly. In case the applicant is found to be eligible for grant of licence for UNIFIED ACCESS Service a Letter of Intent (LOI) will be issued. The applicant shall be required to deposit Entry Fee and submit Bank Guarantees/other documents and sign the licence agreement within a period as mentioned in the letter (LOI) from the date of issue of the letter (LOI) failing which the offer of grant of licence shall stand withdrawn at the expiry of permitted period.”

115. Indisputably, the licences are governed by provisions of the Indian Telegraph Act, 1885, Indian Wireless Telegraphy Act, 1933 and Telecom Regulatory Authority of India Act, 1997, as modified and prescribed from time to time.

116. At that point of time, in terms of paragraph 32 of the said guidelines, a licensee was to provide details of their technology proposed to be deployed for operation of the service.

117. The license granted was to remain valid for 20 years.

It is divided in several parts, namely General Conditions, Commercial Conditions, Financial Conditions, Technical Conditions, Operational Conditions, Security Conditions and Frequency Authorization.

118. So far as technical conditions are concerned, the same are contained in Part IV.

We may notice the following Clauses:-

“23.5 The frequencies shall be assigned by WPC from the designated bands prescribed in National Frequency Allocation Plan – 2002 (NFAP-2002) as amended from time to time. Based on usage, jurisdiction and availability, spectrum may be considered for assignment, on case by case basis. The frequencies assigned may not be contiguous and may not be same in all cases, while efforts would be made to make available larger chunks to the extent feasible. The detailed guidelines for allocation of frequency spectrum and charges thereof etc. would be separately issued from time to time.”

119. Part VII deals with ‘Frequency Authorization’.

We may notice that Clause 43.1 provided that such authorisation by WPC wing of DoT of the Licenses shall be governed by normal rules, procedures and guidelines and will be subject to completion of necessary formalities therein.

Clause 43.5 which is of some importance read thus:

“43.5 Subject to availability and as per Guidelines issued from time to time, the spectrum allocation and frequency bands will be as follows :-

43.5(iv) The Licensor has right to modify and/or amend the procedure of allocation of spectrum including quantum of spectrum at any point of time without assigning any reason.”

120. It is on the basis of the said clause only that the regulator recommended for amendment of license.

The Policy Decisions of the Respondent

121. So far as the policy decisions dated 19.10.2007 and 10.01.2008 are concerned, we may at the outset notice that the dual technology policy was framed by Respondent No.1. Prior thereto the TRAI made its recommendations on or about 28.08.2007, pursuant to the request made by DoT in that behalf by its letter dated 13.04.2007 on the use of the combination of technologies CDMA/GSM or any other under “same license”.

122. The TRAI made an attempt to make a forward looking analysis in the context of ongoing convergence, which was mandatorily required to be technology neutral having regard to the types of dynamic changes, that may be based for the future delivery of service on different technologies. It is in that context it was opined that grant of permission should be based upon

amendment of the license issued to the service providers on payment of a sum equivalent to stipulated entry fee so as to bring out a level playing field.

123. So far as allocation of Spectrum for the purpose of offering access services to such licensees without any separate fee for spectrum is concerned, the TRAI noticed that the Spectrum follows the grant of license subject to availability.

It considered the systems adopted in other parts of the world, to opine:-

“The cellular mobile telecom service licenses were permitted first only in 900 MHz band. The initial CMTS licence was amended by an order dated 01.10.1999 of DoT and the license was made technology neutral. Before the amendment, it was mandatory for the licensees to use the GSM technology.”

124. This goes to show that the holders of the license, irrespective of technology used by them, could have crossed over to the other technologies which would mean that even the operators using GSM technology could have started operating on CDMA technology, being UAS Licensee.

It noticed that the Public Sector Undertaking was not to pay any fees when they migrated to UASL Regime.

125. It is in the aforementioned context, recommendations were made for levy of specified amount of fee which, according to the TRAI, at

least should be equal to the entry fee payable by the new licensees for UAS licence.

126. The TRAI also considered another linked issue being the criteria related to inter-se priority which was to be determined by the DoT. The question was as to whether if the licensee wished to provide plurality of the technologies, whether it should be given additional Spectrum equivalent to initial spectrum allowed in that licensee for that technology. The TRAI recommended therefor.

The said recommendations were accepted by the DoT. However, a part of its recommendations was criticised by the Tribunal in its judgement dated 31.03.2009

Validity of the Policy Issue

127. We have no doubt in our mind that that the formulation of the policy decision is essentially the prerogative of the State.

Subject to determination of the question as to whether such a policy decision is ultra vires Article 14 of the Constitution of India and/or a larger policy and/or any other statute governing the field, there cannot be any doubt or dispute whatsoever that the 'State' does have a prerogative to amend and alter the policy.

128. Recently in State of H.P. and Others Vs. Himachal Pradesh Nizi Vyavsayik Prishikshan reported in 2011 (4) SCALE 801, Sathasivam, J. speaking for a Division Bench of the Supreme Court of India stated the law

thus :-

“12. With regard to the importance of human resources, especially manpower requirement in various professional and technical fields, the Government is free to frame its policy, alter or modify the same as to the needs of the society. In such matters, the Courts cannot interfere lightly as if the Government is unaware of the situation.”

129. For effecting a change and/or alteration in the policy decision, no reason need be assigned. If and when, the validity thereof is questioned, the State can show sufficient reasons in support thereof only to demonstrate that the alterations/amendments in the said policy decision were made within the constitutional/legal parameters.

130. Similarly, it is also open to the ‘State’ to raise a contention before the appropriate forum where the policy decision is sought to be challenged that the alteration/modification was necessitated because of change in the circumstances.

131. It is also a trite law that unless alteration/amendment of the policy decision result in depriving one of the parties from any vested/accrued right, the policy decision per-se cannot be challenged unless it is found to be either unconstitutional or otherwise illegal.

132. There cannot also be any doubt or dispute that a party aggrieved by any change in the policy decision is entitled to raise the question of discrimination. It may also raise a contention that the policy

decision had not been taken by an appropriate authority within the meaning of the provisions of Article 77 (3) or Article 166 (3) of the Constitution of India.

133. The principal contention of 'Idea' and 'Unitech' only is that they are sought to be discriminated against by the first respondent vis-a-vis 'TTSL'.

134. We would consider the question of discrimination a little later but suffice it to say that in the event it is found that 'TTSL' on the one hand, being an 'existing licensee' and others falling within the category of 'new licensee' stand on two different footings and/or form different classes, Article 14 of the Constitution of India cannot be invoked.

(See *Prem Chand Som Chand Shah v. Union of India* reported in (1991) 2 SCC 48)

TDSAT Judgment in Petition No. 286 of 2008

135. The interpretation of the aforementioned policy decision dated 19.10.2007 vis-à-vis policy decision dated 10.01.2008 fell for consideration of this Tribunal in the aforementioned Petition. From the policy decisions adopted by DoT, a definite pattern has emerged, the nexus thereof being greater competition and technology neutrality. It had used the words "technologies" i.e. 'wireless' and/or 'wire line technologies'. The existing networks were permitted to make expansions for the said purpose. It was to be allocated Spectrum in alternate technology from the date of payment of the prescribed fee; the other condition being subject to availability. The

prescribed fee was to be an amount equal to the amount prescribed as entry fee for getting a new UAS license in the same service area. Before the said policy was announced, some operators had already applied for the change over Reliance made payment on 18.10.2007; whereas Shyam Telecom which was mainly operating in the State of Rajasthan and HFCL which was mainly operating in the State of Punjab deposited the amount on or about 12.12.2007. On those applications and payments made, a decision had been taken by the DoT to allocate them some Spectrum.

Finality of the judgment dated 31.3.2009

136. The learned Additional Solicitor General, in our opinion, was correct in contending that 'Idea' and other operators, who were parties in the earlier round of litigation, cannot question the correctness of the aforementioned judgment dated 31.3.2009 having not preferred any appeal thereagainst. Evidently, only the Cellular Operators Association of India has preferred an appeal before the Supreme Court of India.

Neither 'Spice', which was the predecessor in interest of 'Idea', nor itself had preferred any appeal thereagainst, nor any appeal has been filed by 'Unitech' 'Videocon' or any other private respondent.

137. Both Union of India and the private respondents, so long as the matter is not determined by the Supreme Court of India, must be held to be bound thereby. If that be so, the findings of this Tribunal, which are relevant for our purpose, cannot be permitted to be re-opened at the

instance of the private operators to that extent, keeping in view the fact that parties have not questioned the correctness of the said judgment and, thus, must be held to be bound thereby.

Reading of a Judgment

138. A judgment, it is well settled should not be read as a statute.

See "Goan Real Estate & Construction Ltd. v. Union of India " 2010 (5) SCC 388 @ 397, "State of Karnataka v. C. Lalitha" 2006 (2) SCC 747 @ Para 23 @ Page 755, "Sarat Chandra Mishra v. State of Orissa" 2006 (1) SCC 638 @ Para 13, "State of Haryana v. M.P. Mohla" 2007 (1) SCC 457.

How should we read the judgement of this Tribunal is the question. Should we read it only in the context of the issues raised therein or consider the findings which are relevant for our purpose also?

139. It is also well known that the judgment, for the purpose of culling out the ratio, must be read in its entirety.

*See HFCL Infotel Ltd., Punjab v. Bharat Sanchar Nigam Limited
Petition No. 119 of 2008 disposed of on 15th January 2010*

140. It is also well settled that the ratio of a decision is what is decided and not what can logically be deduced therefrom.

*See Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector
& ETIO, 2007 (5) SCC 447 Para 155*

141. The judgement of this Tribunal is pending consideration before the Supreme Court of India in Appeal.

No order of stay, however, has been granted.

It is, therefore, operative. How far, however, the same is binding on us would be considered a little latter.

142. The judgement dated 31.03.2009, if read in its entirety, would clearly demonstrate that the validity and/or the legality of the policy decision of the Union of India has been upheld.

143. We may proceed on the basis that the contentions raised herein had not been raised in that petition. Subject, however, to our findings on the interpretation of the policy decisions and/or alterations made thereby, the question of classification vis-à-vis the affidavits filed by DoT in that proceedings as also in these proceedings if otherwise can be upheld, we see no reason as to why the principles enunciated therein should not be followed being otherwise binding on us.

144. We are of the opinion that no ground has been made out to hold that the ultimate conclusion arrived at therein is unsustainable. We would, even for that purpose, have to consider as to the issues raised therein in the light of the respective submissions made by learned counsel for the parties in this behalf.

We are, thus, of the opinion that the findings arrived at in the said

judgment are binding on us to the extent they are relevant.

Policy Decisions – Rules of Interpretation

145. We have no hesitation to hold that the Press Releases dated 19.10.2007 and 10.01.2008 constituted policy decisions. In fact, for all intent and purport it is not in issue.

146. If the authority/jurisdiction of the DoT and/or the appropriate Department of the Union of India to formulate the said policy decision was not in issue, only because parties now feel that they would not get any priority over the others shall not make any real difference. Hardship, one way or the other, cannot by itself be a ground to ignore a policy decision which is otherwise valid.

147. In this case, however, it is not necessary to go into the said contention, as interpreted either way hardship would be caused at least to one of the parties hereto.

A court of law while interpreting a policy decision ordinarily is not concerned with the consequences, but the legality or validity thereof.

Admittedly, the tenor of both the press releases is different. Concedingly, the word 'or' in clause 43.5.1 of the licence had been substituted by the word 'and'.

148. Whereas by reason of the policy decision dated 19.10.2007, a

right is sought to be conferred on the existing UAS licensees to expand their existing network, in terms of the policy decision dated 10th January 2008, all the applicants, who had applied for grant of new licenses, were bought within the purview of a different type of first-come first-served policy.

149. A clear departure was made even in the matter of first-come first-served policy, as by reason of Press Release dated 10th January, 2008 the applicants were to be allocated Spectrum not on the basis of the respective dates of application, but they were to be granted LoIs, if found eligible therefor and subject to compliance of the conditions thereof spectrum was to be granted to the UAS Licenses on the basis of date of deposit of the entry fee.

150. The Central Government issued guidelines for grant of new licensees. In terms of the guidelines, the applicants became entitled to consideration for allocation of spectrum only after grant of licence. The amendment of licence, so far as TTSL is concerned, although was made on 04.3.2008, it related back to 10.01.2008. That is what DoT said in its affidavit. We are of the considered view that the said stand of the DoT is not without any substance.

151. Before us, the conditions of licence have been placed. As noticed heretobefore in terms of Clause 43 of the licence, grant of authorisation and WPC licence would be governed by the normal rules/procedures and guidelines, and would be subject to completion of necessary formalities

therein. The effective date for a new licensee would be the date, as mentioned in the licence itself.

We have noticed the clauses as amended.

152. The amendment, is required to be considered with the 'in principle approval' granted in favour of the 'TTSL'. Para 2 thereof categorically states that the date of priority of allocation of spectrum shall be determined from the date of receipt of payment of the required fees.

By reason of Clause 3 (a) of the said policy decision, no right was conferred for operating Wireless Access Service for establishing Backbone Radio Links, which is different from GSM spectrum.

153. In the aforementioned context, the affidavit affirmed on behalf of the DoT must be taken into consideration.

154. The existing licensee, even if assumed, could not have used the GSM technology unless its licence was amended, its status cannot be equated with that of a new licensee.

Once a licence is granted, the licensee can make investments; it can create network, it can lay cables and acquire other infrastructure. It can carry on its spread work.

155. A new licensee, on the other hand, cannot carry out any operation whatsoever which is required for working on telegraph. It cannot start its business at all. It will have to meet roll out obligations. (It may be that even existing licensees may have their roll out obligations, but it is not necessary to dilate on the same.) It will have to furnish the bank guarantees and other performance guarantees. Even for some good or valid reasons, the LoI can be revoked and the licence may not ultimately be granted.

156. Only because the guidelines provided for disposal of the other applications within a period of 30 days, the same by itself did not confer any indefeasible right. It was a directory provision and not an imperative one. **{See Siveshwar Prasad Sinha Vs. The District Magistrate reported in AIR 1966 Patna 144 Paras 7, 8 and 9; Neo Sports v. Sun Direct reported in (2011) 2 CompLJ 177 (TDSAT) and Balwant Singh and Others Vs. Anand Kumar Sharma 2003 (3) SCC 433 Para 7}**

157. Ordinarily, a right would accrue on the basis of the policy decision as existing on the date of grant of licence and not on the basis of an earlier policy decision which was prevailing on the date of filing of the petition. The guidelines which are broad in nature stricto sensu did not confer any right of priority far less any vested or accrued right.

(See State of Kerala Vs. B. Six Holidays Resorts Pvt. Ltd. & Other {2010 (5) SCC 186, and Municipal Corporation of Shimla Vs. Prem Lata Sood {2007 (11) SCC 40 at 54}

158. On the other hand, so far as an existing licensee is concerned, a legal fiction has been created to the effect that the spectrum shall be allocated immediately after 10.01.2008, by using the word “as if”. That is how the DoT interprets its own policy decisions. That is how it intended to give effect thereto. If it is right in its contention, there cannot be any doubt or dispute that the existing licensees were to be treated and in fact, has been treated to be forming a separate class. When the licensor created a legal fiction, it must be given its full effect.

It was so held in *East End Dwelling Co. Ltd. Vs. Finsbury Borough Council* {1951 Vol. II All England Reporter page 487:1952 A.C. Pg. 7}.

159. *East End Dwelling (Supra)* has been followed by the Supreme Court of India in a number of decisions.

160. The logical corollary thereof would be that whereas in the case of ‘existing licensees’, amendment in the licence subject to just exceptions would be a mere formality, it would not be so in the case of the new licensees.

We may, notice that the Supreme Court of India in several decisions has held that in certain situations, issuance of licence may be a ministerial Act.

161. In *Edukanti Kistamma v. S. Venkatarreddy*, (2010) 1 SCC 756, the Apex Court held :-

“23. Undisputedly, the grant of a right or a permit/licence under any statutory provision requires determination of rights and entitlement of the parties. Once such a right is determined, the issuance of the order on the basis of such determination remains a ministerial act.”

162. In the cases of Court auction governed by Order XXI Rule 65 and Order XXI Rule 92 of the Code of Civil Procedure, the Supreme Court of India has held that grant of certificate of sale may in certain situations be of mere formality.

In *Sagar Mahila Vidyalaya, Sagar v. Pandit Sadashiv Rao Harshe*, reported in (1991) 3 SCC 588, at page 598 it is stated as under:

“The issue of sale certificate under Order XXI Rule 94 CPC in favour of the auction purchaser though mandatory but the granting of certificate is a ministerial act and not judicial.”

(See also *Mithailal Dalsangar Singh v. Annabai Devram Kini*, (2003) 10 SCC 691)

163. Mr Dayan Krishnan urged that applying the said principle, the admitted fact being that the predecessor in interest of ‘Videocon’ had deposited the entry fee prior to ‘TTSL’, it would be entitled to priority over it. We are afraid that such a contention cannot be accepted in view of the distinctive features noticed by us heretofore between an ‘existing licensee’ and a ‘new licensee’.

164. Mr. Ramji Srinivasan has placed before us a chart to show how the allocation of GSM spectrum was made. We need not to go into the aforementioned question having regard to our finding that the existing licensees form a separate class vis-a-vis the 'new licensees'. TTSL did not derive any right on 19.10.2007 but the same was crystallised only on 10.01.2008; subject of course to the compliance of the requisite formalities.

The rights of the 'new licensees' were, however, subject to certain conditions, which unless fulfilled and unless culminates into issuance of a license, no right accrued in their favour.

165. We have arrived at the aforementioned conclusion keeping in view the fact that an alteration in a policy decision is permissible in law. If in the facts and circumstances of the case by reason thereof, the existing licensees had been given priority over the new licensees, the same would not per se be illegal or unconstitutional. Before a vested right is claimed, it is obligatory to show that a legal right existed in terms of the policy decision or the condition precedent, if any, were fulfilled for obtaining such a right.

Policy decisions – Re:- Existing Licensees, New Licensees

166. Let us now consider the question whether any priority could be granted to existing licensees.

Reliance has been placed by Mr. Dayan Krishnan on a decision of the Supreme Court of India in Radha Krishna Panda Vs. State of Orissa reported in 1969 (1) SCC 414 in this behalf.

In that case, all except those who were the existing grantees were debarred from participating in the auction of tendu leaves which was an annual affair. No new scheme was made. The Government made an offer to the existing contractors alone that only they would be entitled to take part in the bids for purchase of tendu leaves. The right to participate in tender process was, thus, restricted to those who had been operating from before.

167. The Supreme Court of India considered the said policy decision in the light of the constitutional question as to whether the said scheme was violative of fundamental right of the petitioners therein under Article 19(1) (g) as also Article 14 of the Constitution of India, as by reason thereof a monopoly had been created in favour of the existing contractors. It was found to be violative of the said constitutional provisions, stating :-

“18. The classification based on the circumstance that certain existing contractors had carried out their obligations in the previous year regularly and to the satisfaction of the Government is not based on any real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved i.e. effective execution of the monopoly in the public interest. Exclusion of all persons interested in the trade, who were not in the previous year licensees is ex facie arbitrary, it had no direct relation to the object of preventing exploitation of pluckers and growers of Kendu leaves, nor had it any just or reasonable relation to the securing of the full benefit from the trade to the State.

168. Indian Telegraph Act, 1885, makes an exception to the ordinary law of distribution of largess.

The Central Government in terms of the provisions of Section 4 thereof could exercise its right of monopoly to operate/work telegraph. It, by reason of its policy decision, did not say that the scheme of monopoly or duopoly shall be applied. It has enlarged the scope of grant of licence. 'Multipoly' has given way to 'monopoly' or 'duopoly'. The Public Sector Undertakings, namely 'BSNL' and 'MTNL' are also required to compete with the private operators.

169. A new policy decision has been taken to allow (which otherwise according to this Tribunal even was permissible) the existing licensees to work on alternative technologies. We, therefore, find it difficult to accept the submission that the decision of the Apex Court in 'Panda' (Supra) has any application to the fact of the present case.

Equality Issue

170. There is another aspect of the matter, which cannot also be lost sight of. If the policy decision of the Central Government by reason of the judgment of this Tribunal has been found to be valid and even if it held that the Central Government in the past has violated its own policy decision, the same should not be permitted to be continued.

171. If 'Unitech' or 'Videocon' has derived some benefits by reason of an illegality committed by the Central Government, the same should not be allowed to be perpetuated.

There are high authorities for the aforementioned proposition of law.
(See for example *Fuljit Kaur v. State of Punjab* 2010 (11) SCC 455 para 11 & 12)

172. Equalities, as is well known, cannot be claimed on the basis of any illegality. **(See *V. Purushotham Rao v. Union of India* 2001 (10) SCC 305 para 23).**

173. The concept of Equality is furthermore a positive concept.
(See "*Haryana SEB v. Gulshan Lal*" 2009 (12) SCC 231 para 33, 34, 35 and "*Punjab National Bank v. Astamija Dash*" 2008 (14) SCC 370 Para 45)

174. The policy decision of the Central Government provides for competition. It provides for a level playing field. No doubt, the concept of level playing field in its application shall attract not only the provisions of Article 14 of the Constitution of India but also a citizen's fundamental right to carry on business as adumbrated in Article 19 thereof.

175. In these cases, 'Idea' or 'Unitech' did not question the validity of the policy decision in the light of fundamental right of their shareholders to invoke the provisions of Article 19(1)(g) of the Constitution of India. It has

only invoked Article 14 on the premise that the 'existing licensees' ought to have been treated at par with the 'new licensees'.

176. Article 14 of the Constitution of India provides for the concept of 'Equality'.

By reason of the said provisions subject to certain exceptions, the persons similarly situated i.e. equals only ought to be treated equally. (See Haryana State Electricity Board Vs. Gulshan Lal (2009 (12) SCC 231 and Union of India Vs. Murli Dhar Menon (2009 (9) SCC 304 at 308)

177. It is also a well settled principle of law that un-equals cannot be treated equally.

178. We, in this judgment, have found that the 'existing licensees' form a different class vis-a-vis the 'new licensees'. They, therefore, cannot be treated to be equally with the new licensees.

179. In U.P. Power Corporation Vs. Ayodhya Prasad Mishra – 2008 (10) SCC 139, it has been held :-

“40. It is well settled that equals cannot be treated unequally. But it is equally well settled that unequals cannot be treated equally. Treating of unequals as equals would as well offend the doctrine of equality enshrined in Articles 14 and 16 of the Constitution. The High Court was, therefore, right in holding that Executive Engineers placed in Category I must get priority and

preference for promotion to the post of Superintendent Engineer over Executive Engineers found in Category II.”

(See also Coimbatore District Cooperative Bank & Employees Association – 2007 (4) SCC 609 at 682)

180. The policy decision of the Central Government, therefore, must be applied keeping in view the aforementioned constitutional principle. It cannot be applied in vacuum.

The effect of a licence agreement is either contractual or statutory.

181. The licence is granted by the Central Government in exercise of its power conferred on it by the proviso appended to Section 4 of the Indian Telegraph Act, 1885.

No statutory rules in that behalf, however, have been prescribed. The licence is not to be granted in a particular form. Conditions of licence are not governed by the provisions of the Indian Telegraph Act, 1885.

Thus, only because an enabling provision has been made permitting the Central Government to part with its privilege, the same by itself, in our opinion, cannot make the agreement to be a statutory one, although the source of the power is a statute.

182. We are, however, *stricto sensu*, not concerned with any term of the licence.

It is not a case where 'Idea' or 'Unitech' has questioned the legality of the provisions of licence as ultra vires the Constitution or any other law for the time being in force.

183. Indisputably, the terms of the contract would be governed by licence agreement.

In *Bharat Sanchar Nigam Ltd. Vs. BPL Mobile Cellular Ltd.* reported in 2008 (13) SCC 597, the Supreme Court of India opined as under :-

“35. DoT of the Government of India had the monopoly of providing telecommunication services. The Telegraph Act was enacted for the said purpose. The rights and liabilities of the parties have been laid down under the Act as also the Rules framed thereunder. A contract may be entered into, subject to the provisions of a statute or the rules framed thereunder. The contract, itself, may refer to the statutory provisions or refer to the same by way of incorporation by reference. A contract qua contract, however, must be consensual. It must meet the statutory requirements and reasons under the provisions of the Contract Act. When a contract is entered into by and between the parties, what is determinative is enforcement of the terms and conditions to be governed by the contract, subject, of course, to the application of the statute and statutory provisions. Whereas a statutory contract would be governed by a statute, other contracts would not.”

184. This aspect of the matter, to some extent, has been considered by this Tribunal in *BPL Mobile Cellular Ltd. v. DoT* reported in 2010 (1) CompLJ 628 (TDSAT) and other cases wherein a question arose as to

whether a clause providing for 150% payment on the outstanding amount of license fee is penal in nature.

185. Whether the licence agreement in question is contractual or statutory in nature, may not detain us long inasmuch as it is now not in controversy that the Central Government exercises its power in the matter even for the purpose of entering into the contract with the licensees in terms of the licence agreement having regard to the provisions contained in the proviso appended to Section 4 of the Act.

186. The contention of 'Idea' is that a policy could not be altered which was consistently being followed and in doing that the Union of India had acted wholly arbitrarily and thus the same is violative of Article 14 of the Constitution of India.

187. In our opinion, however, it is one thing to say that the Union of India cannot alter its policy decision at all which might have been continuing for some time but it is another thing to say that the altered policy would be bad in law and/or unconstitutional only on the said premise.

Validity of the Policy

188. It is one thing to say that the policy decision and/or the changes effected therein is unconstitutional or unfair or an arbitrary one but it is another thing to say that the policy decision, once made, cannot be

altered at all. There cannot be, in our considered opinion, any such proposition of law.

189. If a licence is to be granted, the same would be subject to payment of consideration. What would be the consideration or how the application for grant of licence shall be processed, would be a matter of policy. A policy decision may be laid down both by Legislature as well as Executive Government. Only because at one point of time one procedure was adopted, probably keeping in view the scenario as was prevailing thence, it would be incorrect to contend that the same is binding on the Central Government for all time to come. It would also not be correct to contend that any procedure laid down shall, by itself constitute a promise, which can never be altered; even in a situation where public interest demands it.

190. It may or may not be correct, as has been submitted by the learned Additional Solicitor General that in the month of October, 2007 there was no dearth of Spectrum as Mr Vaidyanathan would contend that the said contention had no factual basis. It is not necessary for us to go into the aforementioned controversy as enough materials to decide the controversy between the parties, have been placed before us by the parties hereto.

191. But, for the purpose of judging the constitutionality aspect vis-à-vis the power and privilege of the Union of India to alter its policy, we have no doubt in our minds that such power exists in it. It may be that such a

power has been exercised to favour a party or is otherwise malafide. But abuse of the process and/or allegations of malafide must be specifically pleaded and established. Neither any specific pleadings in this behalf have been raised nor any material has been placed before us, on the basis whereof this Tribunal can come to a definite conclusion that there has been an abuse of process and/or the action on the part of Union of India was otherwise *malafide* either on fact or in law.

192. In fact, this Tribunal is not the appropriate Forum for considering the criminality or misconduct of the authorities concerned as the matter is pending investigation by the Central Bureau of Investigation and/or the Supreme Court of India which is monitoring the investigation.

We are, in these matters concerned with a civil dispute. The said issue is pending consideration before the Supreme Court of India in a Public Interest Litigation. We are, thus, not concerned with the larger issue.

193. We are only concerned with decision of the Central Government vis-à-vis the priority in the matter of allocation of spectrum in the light of the judgment of this Tribunal dated 31.3.2009.

Moreover, it would be highly improper for this Tribunal to make any observation one way or the other, which we have been called upon to do by some counsel appearing on behalf of the respondents in view of the fact that the same would be prejudicial to one or the other party thereto.

It may not, in our view, be appropriate to make any observation, whatsoever, which may prejudice either the prosecution or the accused in the criminal proceeding.

Promissory Estoppel - Issue

194. By reason of the impugned policy decision, no promise can be said to have been made. The policy decision, as far as 'Idea' and 'Unitech' are concerned, admittedly came into being after the applications were filed. If applications for grant of licence had been filed prior to 19.10.2007, the question of the applicability of the doctrine of 'Promissory Estoppel' would not arise, as 'Idea', 'Unitech' or other respondents did not alter their position pursuant to any promise.

195. The doctrine of 'Promissory Estoppel', indisputably is not only to be used as a shield, but also as a sword. It is also not in dispute that the said doctrine has been applied in India on innumerable occasions.

Mr Dayan Krishnan, principally relied upon a three-Judge Bench decision of the Supreme Court in Union of India and Others Versus Godfrey Phillips India Ltd, 1984 (4) SCC 369, wherein an unanimous view has been expressed through Bhagwati, J (as the learned Chief Justice of India then was) in the following words:-

“There can therefore be no doubt that the doctrine of promissory estoppel is applicable against the Government in the exercise of its governmental, public or executive functions and the doctrine of executive necessity or freedom of future executive action cannot

be invoked to defeat the applicability of the doctrine of promissory estoppels.”

196. A controversy arose with regard to the effect and extent of applicability of such a doctrine, which was noticed by a two Judge Bench of the Supreme Court of India in State of Punjab Versus Nestlé India Ltd. reported in 2004 (6) SCC 465, wherein the judgements taking a contrary view including the case of **Jit Ram Shiv Kumar v. State of Haryana** reported in 1981 (1) SCC 11 was taken into consideration, to hold that ‘Godffrey Phillips’ having been rendered by a three-Judge Bench shall prevail over the Two Judge Bench decisions.

197. The question also came up for consideration in Southern Petrochemical Industries Company Ltd. Versus Electricity Inspector reported in 2005 (5) SCC 447 wherein the principle was applied to a case, where the doctrine of ‘Promissory Estoppel’ was taken into consideration along with the doctrine of ‘Legitimate Expectation’, in the following terms :-

“133. Legitimate expectation is now considered to be a part of the principles of natural justice. If by reason of the existing state of affairs, a party is given to understand that the other party shall not take away the benefit without complying with the principles of natural justice, the said doctrine would be applicable. The legislature, indisputably, has the power to legislate but where the law itself recognizes existing right and did not take away the same expressly or by necessary implication, the principles of legitimate expectation of a substantive benefit may be held to be applicable.

134.(C) *Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.*”

(Emphasis supplied)

198. Reference in the said case was also made R V. North and East Devon Health Authority reported in 2000 (3) All E.R. 30, wherein the question arose as to whether the said decision would be taken into consideration vis-à-vis public interest.

199. Yet again, in State of Haryana Versus Jagdish reported in 2010 (4) SCC 216, the law was laid down by the Supreme Court of India, thus :-

“53. The right of the respondent prisoner, therefore, to get his case considered on a par with such of his inmates, who were entitled to the benefit of the said policy, cannot be taken away by the policy dated 13.8.2008. This is evident from a bare perusal of the recitals contained in the policies prior to the year 2008, which are referable to Article 161 of the Constitution. The High Court, therefore, in our opinion, was absolutely justified in arriving at the conclusion that the case of the respondent was to be considered on the strength of the policy that was existing on the date of his conviction.”

54. *The State authority is under an obligation to at least exercise its discretion in relation to an honest expectation perceived by the convict, at the time of his conviction that his case for premature release would be considered after serving the sentence, prescribed in the short-sentencing policy existing on that date. The State has to exercise its power of remission also keeping in view any such benefit to be construed liberally in favour of a convict which may depend upon case to case and for that purpose, in our opinion, it should relate to a policy which, in the instant case, was in favour of the respondent. In case a liberal policy prevails on the date of consideration of the case of a “lifer” for premature release, he should be given benefit thereof.”*

200. It cannot, however, be contended that the State cannot change the policy decision. No judgement of the Supreme Court of India says so. Decisions of the Apex Court are indeed to the contrary.

In fact, it has been clearly held in various decisions of the Supreme Court of India that even the doctrine of ‘Promissory Estoppel’ would not be applicable in the case of a valid change in the policy decision.

201. The Validity/legality of the policy decision has not been questioned by ‘Unitech’.

202. ‘Idea’ did so in its petition.

203. We have noticed heretofore the submissions made on behalf of ‘Idea’.

Nobody has any legal right to obtain a licence. Section 4 of the Indian Telegraph Act clearly provides that so far as working of a Telegraph is

concerned, it is the 'exclusive privilege' of the Central Government. The 'exclusive privilege' of the Central Government can be parted with only by reason of a licence. The licensee, therefore, is granted by the Union of India in terms of the provisions of the Statute. While doing so, it is entitled to lay down a policy decision therefor.

Legitimate Expectation

204. The doctrine of 'legitimate expectation' is binding as a rule of law for regularity, predictability and certainty in the Government's dealings with public. It operates both in procedural and substantive matters. **(See Jitender Kumar Vs. State of Haryana – 2008 (2) SCC 161 paras 58 & 59 at page 183).**

205. In Southern Petro-Chemical Industries Vs. Electricity Inspector – 2007 (5) SCC 447, the Supreme Court of India upon considering the said principles, stated the law thus :-

“133. Legitimate expectation is now considered to be a part of the principles of natural justice. If by reason of the existing state of affairs, a party is given to understand that the other party shall not take away the benefit without complying with the principles of natural justice, the said doctrine would be applicable. The legislature, indisputably, has the power to legislate but where the law itself recognizes existing right and did not take away the same expressly or by necessary implication, the principles of legitimate expectation of a substantive benefit may be held to be applicable.

134.(C) *Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.*

136. *"In determining whether an authority has acted "unlawfully", the Court expressed its discontent with the standard laid down in Coughlan. It will be in the fitness of the continuing theme to refer to Coughlan on this point :*

"The traditional view has been that the Wednesbury categories were exhaustive of what was an abuse of power. However, in Coughlan the Court preferred "to regard the Wednesbury categories as the major instances (not necessarily the sole ones), of how public power may be misused" (para 81).

In Coughlan the Court followed R. v. Inland Revenue Commrs. Ex p Unilever in asking itself whether the reneging by an authority on its promise was 'so unfair as to amount to an abuse of power' (para 78). It concluded that it was, However, without refinement, the question whether the reneging on a promise would be so unfair as to amount to an abuse of power is an uncertain guide."

After having established such an abuse the court may ask the decision-taker to 'take the legitimate expectation properly into account in the decision-making process". It does not necessarily follow that a legitimate expectation of a substantive benefit will be satisfied. (See also Barratt v. Howard.)"

206. The Supreme Court of India categorically stated that the said principle was not to be applied in the face of the legislative power by the State.

207. Yet again, in *Bajaj Hindustan Versus Shaadi Lal Enterprises*, reported in 2011 (1) SCC 640, it was held as under:

“41. The power to lay policy by executive decisions or by legislation includes power to withdraw the same unless it is by mala fide exercise of power, or the decision or action taken is in abuse of power. The doctrine of legitimate expectation plays no role when the appropriate authority is empowered to take a decision by an executive policy or under law. The court leaves the authority to decide its full range of choice within the executive or legislative power. In matters of economic policy, it is settled law that the court gives a large leeway to the executive and the legislature. Granting licences for import or export is an executive or legislative policy. The Government would take diverse factors for formulating the policy in the overall larger interest of the economy of the country. When the Government is satisfied that change in the policy was necessary in the public interest it would be entitled to revise the policy and lay down a new policy.”

(See also State of Himachal Pradesh Vs. Nazi Vyavasayik Sangh 2011 (4) SCALE 801]

208. In *Sethi Auto Service Station Vs. Delhi Development Authority* – 2009 (1) SCC 180, the said principle has been reiterated. Upon taking note of various decisions operating in the field, it was categorically held :-

“33. It is well settled that the concept of legitimate expectation has no role to play where the State action is as a public policy or in the public interest unless the action taken amounts to an abuse of power. The court must not usurp the discretion of the public authority which is empowered to take the decisions under law and the court is expected to apply an objective standard which leaves to the deciding authority the full range of choice which the legislature is presumed to have intended. Even in a case where the decision is left entirely to the discretion of the deciding authority without any such legal bounds and if the decision is taken fairly and objectively, the court will not interfere on the ground of procedural fairness to a person whose interest based on legitimate expectation might be affected. Therefore, a legitimate expectation can at the most be one of the grounds which may give rise to judicial review but the granting of relief is very much limited. (Vide Hindustan Development Corpn)”

209. We may, however, notice that it would not mean that the expectation may not be legitimate. It must necessarily be so. It cannot be a mere anticipation. The principles of natural justice however, must be kept in mind.

The said doctrine, moreover, cannot have any application if there has been a substantial change in the policy or is otherwise contrary to public interest.

210. Recently in Regina Vs. Secretary of State for Foreign & Commonwealth Affairs (No.2) reported in 2009 (1) Appeal Cases page 453, it has been held :-

“The legitimate expectation may entail either (1)of decision maker will take his existing policy into account, or (2) an obligation on the decision maker to consult those affected, before changing his policy, and (3) an obligation for the decision maker to confer a substantiate benefit on an identified person or group.”

211. It was furthermore observed that substantive expectation will only be upheld, where not to do so would be equivalent to abuse of contract or an abuse of power, but it can lawfully be frustrated if there is an overriding public interest which justifies that cause.

It was observed :-

“Whether the test of overriding interest is one of proportionality or irrationality, the Court’s supervision in assessing any justification is found to exist, the decision-maker will not necessarily be required to honour a promise when to do so would be to assume executive powers.”

212. Recently, the Gujarat High Court in ***Bharat Mohan Lal Trivedi Vs. Union of India*** reported in Manu/GT/0764/2009 in a matter of allocation of petrol pumps by Public Sector Oil Companies in the light of the guidelines issued by the Union of India in that behalf and where a “comfort letter” had been issued, despite invoking the doctrine of ‘promissory estoppel’ and ‘legitimate expectation’ opined as under:-

“9.1 Once the said guidelines have come into operation the dealership has to be awarded on the terms and conditions as stated in the said policy decision. The comfort letter clearly points out that the company will make offer to the landlords provided all the terms and conditions of the Company prevailing at that time are fulfilled. The

respondent Oil Company cannot deviate from the guidelines issued by the Government of India.

9.2 In conclusion, I am of the view that as per the comfort letter it is evident that the petitioners are entitled to get an offer from the Oil Company provided all the terms and conditions of the Company prevailing at that time are fulfilled. As and when the respondent Corporation decides to run petrol pump as being owned and being operated petrol pump, first offer has to be given to the petitioner subject to the terms and conditions as well as Corporation's policies prevailing at the time of offer made to the landlords.”

213. Learned counsel would contend that the operators other than TTSL have a better right in the matter of application of the doctrine of 'legitimate expectation' so far allocation of spectrum is concerned. It has been contended that past practice had been that the existing licences were required to be amended. We have noticed heretofore the effect of the amendment of the licence.

214. Moreover, consistent past practice, although may be a ground for invoking the said doctrine, the Apex Court in **Official Liquidator Vs. Dayanand** reported in (2008) 10 SCC 1 refused to do so on the premise that no promise was made to the employees by any competent authority of the Government of India for their absorption in the regular cadre.

It is also not a case like *Global Energy Vs. Central Electricity Regulatory Commission* 2009 (15) SCC 570 where a licensee pursuant to an interim licence started trading in electricity.

215. There cannot be any doubt whatsoever, that the consistent past practice adopted by the State would furnish grounds for application of the doctrine of 'legitimate expectation'. **(See State of Haryana Vs. Jagdish (2010 (4) SCC 216 at page 238).**

216. In this case, we are of the firm view, the doctrine of 'legitimate expectation' cannot be applied so as to confer on the private respondents a right of priority in the matter of allocation of spectrum over 'TTSL' and that too by completely ignoring the change in the policy decision.

It is also not a case when the said doctrine can be applied on the basis of proportionality doctrine.

Estoppel/Waiver/Acquiescence Issue

217. 'TTSL' has made its position clear that it does not intend to unsettle the settled position so far as spectrum, which has already been allocated, is concerned.

If, however, spectrum is now available for allocation to the different contenders, can it be said that only because no action had been taken so long by TTSL, it would not be entitled to any priority at all?

218. In this case, this Tribunal is concerned with the applicability of policy decision. It is not concerned with any other aspect of the matter.

The DoT has maintained a consistent stand that it intends to carry out its obligations relating to priority in allocation of spectrum in the light of

the legal entitlement of the parties. It has reiterated its stand before this Tribunal in the instant cases.

Why it did so is not for us to consider. It has made no reservation in this behalf.

219. Can the purported past practice and/or any delay on the part of 'TTSL' be cited to be the reason for denying it of its legal right?

Does it lie in the mouth of 'Unitech' or 'Videocon' to plead delay, acquiescence or waiver?

The answer to the said question must be rendered in favour of TTSL.

220. The other licensees could raise the contentions provided any pleading has been raised in this behalf. If no pleading has not been raised, the respondent should not ordinarily be permitted to raise such a contention. If a decision, which may, otherwise, be found to be valid, should not ordinarily be permitted to be deviated or departed from. If such a policy decision is not intended to be deviated by the Central Government, there is absolutely no reason why TTSL should be deprived from the claim of its priority in the matter of allocation of spectrum, if it is found to be otherwise legally entitled thereto.

221. Mr. Dayan Krishnan would rely upon a decision of the Supreme Court of India in Khoday Distilleries Ltd. Vs. Scotch Whisky Association reported in 2008 (10) SCC 723 wherein it was held :-

“43. *The principles of waiver and acquiescence are applicable in a case of this nature. Apart from the ordinary rule of waiver of a right expressly provided for in a case of passing off, the court has consistently been noticing the development of law in this field. The principles in that behalf were laid down by way of provender in Scotch Whisky Assn. v. Pravara Sahakar Shakar Karkhana Ltd.*

45. *Noticing various other decisions, Oliver, L.J., noticing a decision in Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd.*¹⁷ *opined (Habib Bank case*¹⁴*, All ER p. 666h-j)*

“Furthermore, the more recent cases indicate, in my judgment, that the application of the Ramsden v. Dyson principle (whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial) requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.”

It was held: (Habib Bank case All ER p. 668c-e)

“I have to acknowledge my indebtedness to counsel on both sides for some illuminating arguments, but at the end of them I find myself entirely unpersuaded that the judge erred in any material respect. He concluded his judgment in this way on the question of estoppel:

‘Of course, estoppel by conduct has been a field of the law in which there has been considerable expansion over the years and it appears to me that it is essentially the application of a rule by which justice is done where the circumstances of the conduct and behaviour of the party to an action are such that it would be wholly inequitable that he should be entitled to succeed in the proceeding.’

That, to my mind, sufficiently appears on the facts of this case.”

Thus, in cases involving equity or justice also, conduct of the parties has also been considered to be a ground for attracting the doctrine of estoppel by acquiescence or waiver for infringement.

47. *The question again came up for consideration before this Court in Ramdev Food Products (P) Ltd. v. Arvindbhai Rambhai Patel wherein it was held: (SCC p. 769, para 103)*

“103. Acquiescence is a facet of delay. The principle of acquiescence would apply where: (i) sitting by or allowing another to invade the rights and spending money on it; (ii) it is a course of conduct inconsistent with the claim for exclusive rights for trade mark, trade name, etc.”

The delay by itself, however, may not be necessarily a ground for refusing to issue injunction. It was opined: (Ramdev case, SCC p. 770, para 106)

“106. The defence of acquiescence, thus, would be satisfied when the plaintiff assents to or lays by in relation to the acts of another person and in view of that assent or laying by and consequent acts it would be unjust in all the circumstances to grant the specific relief.”

It was furthermore observed: (SCC p. 770, para 108)

“108. Specific knowledge on the part of the plaintiff and prejudice suffered by the defendant is also a relevant factor. (See Spry on Equitable Remedies, 4th Edn., p. 433.)”

48. *In Halsbury’s Laws of England, 4th Edn., Vol. 16, Para 1505, it is stated:*

“1505. Estoppel by matter in pais.—Where a person has by words or conduct made to another a clear unequivocal representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable man, understand that a certain representation of fact was intended to be acted on, and that the other has acted on the representation and thereby altered his position to his prejudice an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be.”

222. In that case, the Court was concerned with enforcement of intellectual property. There cannot be any doubt or dispute, whatsoever, that a person can waive even a legal right. It is furthermore true that acquiescence is a facet of delay. If a person is found guilty of delay and by reason thereof another person has altered its position, the later ordinarily cannot suffer because of the latches on the part of the others.

223. In this case, however, the Central Government is the appropriate authority to implement its policy decisions. If for the purpose of

implementing its policy decision and/or the principles enunciated therein and if a Court of law can uphold the validity thereof, it is entitled to stick to its own position.

224. In fact, the Supreme Court of India in *Kuldeep Singh Vs. Government of NCT, Delhi* reported in 2006 (5) SCC 702 has categorically held that irrespective of the fact as to whether the Court directs implementation or not, the State may implement its policy decision, although the petitioner might not have claimed any relief by way of cancellation of the licence.

In that case, a statement was made before the Supreme Court of India by the Additional Solicitor General that steps would be taken for cancellation of licence of those licensees who had been granted licence after the cut-off date.

In this case also, if the Central Government intends to abide by its own policy decision, we do not think, that the Court should come on its way in doing so.

225. Reliance has been placed by Mr. Dayan Krishnan on *Virender Choudhary Vs. Bharat Petroleum Corporation* reported in 2009 (1) SCC 297 wherein the Supreme Court of India was dealing with a Letter of Intent vis-a-vis delay in challenging the issuance thereof in granting dealership in favour of the appellants therein. It was held :-

“20. The fifth respondent did not acquire an indefeasible right. He was selected by the Oil Selection Board. The said selection

was subsequently cancelled and a letter of intent was issued in favour of the appellant in May 2004. It was not questioned immediately after issuance of the letter of intent in favour of the appellant in May 2004. In his writ application, the fifth respondent did not question the grant of dealership in favour of the appellant. He was afforded an opportunity to amend the writ petition. He filed such an application only after 16 months. However, the writ petition itself was withdrawn and only in October 2006, the present writ application was filed. From the facts as noticed hereinbefore, there can, therefore, be no doubt that from May 2004 to October 2006, the respondent did not take any step to challenge the insurance (sic issuance) of the letter of intent granting dealership in favour of the appellant.”

226. In that case, the appellant therein had made huge investments. It had created an infrastructure; a large number of employees were appointed and in that view of the matter, it was held that the High Court should have considered that aspect of the matter for granting an equitable relief. Such is not the case herein.

227. It is furthermore difficult for us to accept that any of the private respondents had made any investment in the Delhi circle or any other circle where spectrum is yet to be allocated.

The question of allocation of spectrum could have arisen provided the same was available.

If the same was not available, a licensee may not make any further investment without any firm assurance that such allocation would be made within a time frame. We, therefore, are of the opinion that TTSL's petition

cannot be said to be barred under the principles of 'Estoppel/Waiver' or 'Acquiescence'.

State as a litigant

228. Mr. Ramji Srinivasan, learned Senior Counsel appearing on behalf of the TTSL would contend that the State is expected to be a benevolent litigant and, thus, not to rest its case on mere technicality.

229. We, in passing, may refer that the Supreme Court of India in *Urban Improvement Trust, Bikaner Vs. Mohan Lal* (2010 (1) SCC 512) has held as under :-

"6. This Court has repeatedly expressed the view that Governments and statutory authorities should be model or ideal litigants and should not put forth false, frivolous, vexatious, technical (but unjust) contentions to obstruct the path of justice. We may refer to some of the decisions in this behalf.

8. *In Madras Port Trust v. Hymanshu International² this Court held: (SCC p. 177, para 2)*

"2. ... It is high time that Governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens. Of course, if a Government or a public authority takes up a technical plea, the Court has to decide it and if the plea is well founded, it has to be upheld by the court, but what we feel is that such a plea should not ordinarily be taken up by a Government or a public authority, unless of course the claim is not well founded and by reason of delay in filing it, the

evidence for the purpose of resisting such a claim has become unavailable.”

230. However, in this case, this Tribunal is not much concerned with the conduct of the State inasmuch as it, in unequivocal terms, has undertaken to implement its own policy decision and give priority to those who are legally entitled thereto.

Maintainability of the Petition of ‘Idea’

231. We have noticed heretofore that Idea Cellular Ltd. had filed a petition before this Tribunal in the year 2008. A petition was also filed by its predecessor Spice Communications Ltd.

One of the prayers made in the said petition was to declare that the procedure adopted by the Respondent on 10.1.2008 in issuing the LOIs was illegal, bad in law and null and void.

232. Without assigning any reason however, the said petition was withdrawn on 22.01.2009 with a prayer for leave to file a fresh petition.

The said order dated 22.01.2009 does not record any reason for grant of liberty.

It reads as under:

“Counsel for the petitioner submits that for the present, the cause of action in this petition does not survive. Therefore, he seeks liberty to withdraw the petition. However, he prays that, if need be, liberty be granted to the petitioner to file a fresh petition. This petition is disposed of accordingly with liberty to file a fresh petition, if need be.”

We may, however, notice certain admitted facts in this behalf.

233. 'Idea' obtained a licence for operating in the Delhi Circle on or about 05.10.2001 as a fourth licensee. It was allocated spectrum to the extent of 4.4 MHz which was later extended to 8 MHz.

234. 'Spice', however, in its own independent capacity filed an application for grant of licence in the year 2006 pursuant where to only a letter of intent was issued in its favour on 10th January 2008. Concedingly, it had been granted a licence on 4th March 2008 although spectrum is yet to be allocated to it.

However, it is not in dispute that in the said capacity, 'Idea', on the ground of merger of 'Spice' and itself filed an application for allocation of spectrum to the extent of 4.4 MHz.

235. We have noticed heretobefore the principal prayer made by 'Idea' in its petition.

In these proceedings, the policy decision dated 19.10.2007 is not in question.

We have noticed heretobefore that the 'Spice' had joined the petition of COAI being Petition No. 286 of 2008 but it had withdrawn therefrom.

236. Evidently, therefore, 'Spice' had questioned the policy decision dated 10th January 2008 on the premise that the Union of India was not

justified in altering its policy decision from “first come first serve” basis to “first pay first serve” basis.

237. The stand taken by DoT in these proceedings, however, has given rise to a new cause of action. Even the leave granted by this Tribunal in Petition No. 23/2008 is required to be taken into consideration. We cannot re-examine the said issue in this petition.

238. We are, however of the opinion that ‘Idea’ or ‘Spice’ should not now be permitted to question the crossover technology and/or the efficacy thereof they having expressly given up the said plea.

Whether ‘TTSL’ otherwise would be entitled to priority on the merit of its own claim was, thus, required to be considered independently and not on the basis of any contention raised by ‘Spice’ in this behalf.]

Locus Standi of Idea to maintain the Petition

239. Mr Ramji Srinivasan, the learned counsel appearing for TTSL urged that ‘Idea’ has no *locus standi* to maintain this petition as although the scheme of amalgamation/merger of ‘Idea’ and ‘Spice’ had been sanctioned both by the Gujarat High Court and the Delhi High Court, on an application filed by the Union of India for stay of operation of the said order granting sanction of the said scheme of merger and the same having been granted, this petition would not be maintainable.

240. Mr Vaidyanathan has drawn the attention of this tribunal to the proceeding sheet dated 13.04.2011 wherein this Tribunal noticed the submissions made by the learned counsel.

It was observed:

“Subject to the outcome of the said proceedings, we are of the opinion that keeping in view of the fact that in these matters having regard to the fact that a question between the licensee and the Union of India as also the question of priority between the licensees inter-se are involved, the parties should be heard in as much as it has rightly been pointed out by Mr. Ruchir Mishra, the learned counsel appearing on behalf of the Respondent No.1 that M/s. Idea Cellular Limited is claiming its right on the basis of the license granted in favour of Spice Communication Ltd.”

241. We have also noticed heretobefore that the petitioner has drawn the attention of this Tribunal with regard to the order of stay of merger of ‘Idea’ and ‘Spice’. In this case, we are not concerned with the effect of any order which has been passed by the Delhi High Court or which may be passed hereinafter. As, however, the matter is pending consideration, there cannot be any doubt or dispute that the correctness of the stand taken by ‘Idea’ would completely depend on the order of the Delhi High Court.

We, in this petition, may proceed on the basis that the petition filed by ‘Idea’ would be maintainable.

242. This Tribunal, as noticed heretofore having granted leave to 'Idea' and 'Spice' to file a separate petition in case the need arises therefor will, thus, have to be considered along with the merit of the matter.

In other words, the petition of 'Idea' cannot be rejected on the ground of lack of locus standi alone. We must, however, hasten to add that the same would not mean that the respondents could not have raised other questions.

Conclusion:-

243. We may summarise our findings as under :-

- (i) This Petition is maintainable.
- (ii) The Petitions filed by 'Idea' and 'Unitech' are also maintainable having based on a subsequent cause of action.
- (iii) Keeping in view of the judgment of this Tribunal dated 31.3.2009 passed in Petition No. 84 of 2008, the validity of the policy decision dated 10.01.2008 cannot be questioned. To the said extent, the Union of India as also 'Idea', 'Unitech' and 'Videocon' are bound by the said judgment.
- (iv) The policy decision dated 10.01.2008 even otherwise is not invalid in law. The Central Government cannot be said to have committed any error in giving effect to its own policy decision, as disclosed before this Tribunal in the earlier Petition by

affirming an affidavit dated 18.8.2008 as also the affidavit filed before us in the present proceedings. By reason of the said affidavits, the Central Government has not taken different or inconsistent stand from the one they had taken earlier.

- (v) TTSL having regard to the earlier decision of this Tribunal and being 'existing licensee' became entitled to be placed in Category III and not in Category V.
- (vi) TTSL as an 'existing licensee' does not fall in the same class as the 'new licensees' despite the fact that it was required to apply for and obtain amendment in its licence.
- (vii) In terms of the policy decisions dated 19.10.2007 and 10.01.2008, TTSL having deposited the entire amount of the fees, (which was not entry fees, but an amount equivalent thereto) as has been recommended by the Telecom Regulatory Authority of India, was entitled to grant of priority in the matter of allocation of spectrum over 'Idea', 'Unitech' and others.
- (viii) The stand of the 'Videocon' so far as prayer (D) of the Petition is concerned, that it was entitled to a priority over TTSL is not correct as the said prayer has been made in the alternative and was to be considered only in the event prayers (a) to (c) thereof were to be rejected.

- (ix) Table V is only a list and not a priority list. It has not been shown that the said list has been acted upon and the TTSL would otherwise be bound thereby.
- (x) Even if in the past, the Central Government did not, in letter and spirit comply with its existing policy decisions vis-a-vis aforementioned Tables appended to its affidavit dated 18.8.2008 as also the affidavit filed by it in the case of 'Unitech', the same by itself cannot be a ground to debar TTSL in claiming priority having regard to its legal entitlement, to which the Central Government committed itself not only in the earlier round of litigation but also in the present proceedings.
- (xi) The doctrine of 'promissory estoppel' has no application in the instant case.
- (xii) Neither 'Idea' nor 'Unitech' or 'Videocon' can claim any priority over TTSL only because it has deposited the entry fees immediately prior to TTSL.
- (xiii) The said operators also cannot invoke the doctrine of 'legitimate expectation' in claiming priority in respect of allocation of spectrum over TTSL, both the categories forming different classes.
- (xiv) The Petition filed by TTSL is not barred under the 'principles of Estoppel, Waiver and Acquiescence'.

(xv) It is also not a case where the Petition of TTSL should be rejected only on the ground of delay, particularly in view of the fact that the Central Government itself has expressed its intention to implement its own policy decision.

(xvi) It is not a case where the status quo ante as on the date on which the affidavit was filed keeping in view the list of operators mentioned in Category V should be allowed to be continued.

244. The Petition of TTSL, therefore, should be allowed and those of 'Idea' and 'Unitech' are to be dismissed.

245. 'Idea' and 'Unitech' shall pay the costs of these petitions of TTSL in equal proportions.

.....J
(S.B. Sinha)
Chairperson

.....
(G. D. Gaiha)
Member

.....
(P. K. Rastogi)
Member

//Shree/rkc//