

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

Dated 3rd July, 2012

Petition No.518 of 2011

(M.A.Nos.1 & of 93 of 2012)

Vodafone Mobile Services Limited & Ors. ...Petitioners
Vs.
Union of India(DoT) ...Respondent

Petition No.519 of 2011

(M.A.Nos.2 & of 94 of 2012)

Bharti Airtel Limited & Anr. ...Petitioners
Vs.
Union of India(DoT) ...Respondent

Petition No.520 of 2011

(M.A.Nos.3 & of 95 of 2012)

Idea Cellular Ltd. & Anr. ...Petitioners
Vs.
Union of India(DoT) ...Respondent

Petition No.521 of 2011

(M.A.Nos.4 & of 96 of 2012)

Aircel Cellular Ltd. & Anr. ...Petitioners
Vs.
Union of India(DoT) ...Respondent

Petition No.522 of 2011

(M.A.Nos.5 & of 97 of 2012)

Tata Teleservices Limited & Anr. ...Petitioners
Vs.
Union of India (DoT) ...Respondent

BEFORE:

**HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON
HON'BLE MR. P.K.RASTOGI, MEMBER**

- For Petitioners
in P.No.518/11 : Dr. Abhishek Manu Singhvi, Sr. Advocate
Mr. C.S. Vaidyanathan, Senior Advocate
Mr.Manjul Bajpai,Advocate
Ms.Harshita Verma,Advocate
Ms.Nupur Pallavi,Advocate
- For Petitioners
in P.No.519/11 Mr.S. Ganesh, Senior Advocate
Mr.Gopal Jain,Advocate
Mr.Kaushik Mishra,Advocate
Mr.Ankur Sood,Advocate
- For Petitioners
in P.No.520/11 Mr.Meet Malhotra,Senior Advocate
Mr.Gopal Jain,Advocate
Mr.Kaushik Mishra,Advocate
- For Petitioners
in P.No.521/11 Mr.Meet Malhotra,Senior Advocate
Mr.Gopal Jain,Advocate
Mr.Kaushik Mishra,Advocate
Mr. Ravi S.S. Chauhan, Advocate
- For Petitioners
in P.No.522/11 Mr. Ramji Srinivasan, Senior Advocate
Mr.Manjul Bajpai,Advocate
Ms.Nupur Pallavi,Advocate
Mr.Harshita Singhal,Advocate
- For Respondent UoI (DoT) : Mr.A.S.Chandhiok,ASG,
Mrs.Maneesha Dhir,Advocate
Mr.Ritesh Kumar,Advocate
Mr.K.P.S.Kohli,Advocate
Mr.Abhishek Kumar,Advocate
- For Intervenor - BSNL : Mr.Vivek K. Tankha,ASG
Mr. Sumeer Sodhi,Advocate
Ms.Padmaja Kaul,Advocate
Mr. Varun K. Chopra, Advocate
Ms.Sanyukta Mukherjee,Advocate
Ms.Suchitra A. Chitale,Advocate

JUDGMENT

P.K.Rastogi, Member

These petitions have been filed by the petitioners who are having UASL licence in certain circles but were not allotted 3G spectrum, however, have started providing 3G services to its customers in those circles by making intra circle roaming arrangement with the service providers who were successful bidder in the auctions conducted by the Union of India and got 3G spectrum allotted. The Union of India by its letter dated 23.12.2011 have instructed these operators to stop providing such services immediately as the same was not permissible. The operators were asked a confirmation of having stopped the services by 3.00 p.m. by next day.

2. While the contention of the petitioners is that the UASL allows the licensees to provide all type of access services including voice, non-voice messages, internet services and broadband services irrespective of the frequency or spectrum used, the respondent's contention is that the petitioner cannot provide access services which require the use of 3G spectrum until and unless the said frequencies are allotted to these operators by the concerned authority of the Department of Telecommunications and the required amendment is carried out in the UASL licences for use of such spectrum.

Further, petitioners contend that they are providing 3G services to their customers by making intra circle roaming arrangement with the service providers who were allotted 3G spectrum. Intra circle roaming is permissible under the UASL/CMTS licence.

3. We may peruse the communication of Union of India dated 23.12.2011 to these operators in service areas not having 3G spectrum but are providing such services which are available by virtue of 3G spectrum band only. The respondent informed the petitioners that they are allocated only 900/1800 MHz (2G spectrum in short) frequency under the UASL licence and 3G services cannot be provided under intra – circle roaming arrangement. It reads as under :

"Sub : Intra service roaming arrangement for use of 3G spectrum entered by you with licensee having 3G spectrum in those service areas where your company does not have 3G spectrum

It has been brought to the notice of the licensor that you are providing services in certain service areas to your customers which are otherwise presently available by virtue of 3G spectrum in 2.1 GHz band only and which cannot be provided with the spectrum allocated (in the form of carrier of 200 KHz each) to you in the 900/1800 MHz bands under the provisions of CMTS/UAS licenses granted to you through the above mentioned intra service area roaming arrangements. This has been further corroborated by your communications in which you have informed DoT about the above mentioned Intra Service Area roaming arrangements for the purposes of meeting the security requirements and various other your

communications in the matter.

2. On examination of your various communications in the matter vis-à-vis the terms and conditions of CMTS/UAS licence, terms and conditions of the NIA for auction of 3G and BWA spectrum along with queries & responses issued in this regard and the amendment of license for right to use of 3G spectrum issued to the successful bidders. It has been concluded that provision of the services by you which are presently available by virtue of 3G spectrum in 2.1 GHz band only, to your customers through the above mentioned intra service area roaming arrangements is not permissible.

3. You are, therefore, instructed to stop provision of such services immediately in all such service areas where you are providing services under above mentioned Intra Service Area roaming arrangement. A confirmation of having stopped the services may be provided to this office latest by 15.00 hrs. of 24.12.11 with copy on email ID diras4-dot.a.nic.in and to the concerned TERM cell along with the names of the LSAs where the services were being provided. Name(s) of the licensees for each service area with whom such arrangements were made may also be indicated.

4. These instructions are issued without prejudice to any other remedy available to the licensor and also to any other actions for the breach of any of the conditions of the CMTS/UAS license agreements signed with the company."

4. The petitioners have submitted that :

(i) Clause 2.2(a) (i) of the UASL allows the licensee to provide all type of access services including the voice and/or non-voice messages over its network. The petitioners are also allowed to provide the Internet Services, Internet Telephony and broadcasting services. Clause 2.2(a) (iii) also allows the licensee

to provide the Broadband Services including the voice, data and video services. Thus, 'Service' includes all types of fully mobile services, whether 2G or 3G.

(ii) Existing licensees were allocated 3G Spectrum without any requirement for any new 3G license to be issued to them. They were merely issued an amendment to their existing License inter-alia to permit the use of additional spectrum allocated through the auction.

(iii) The definition of 'Service' under license agreement was not amended to include 3G Services. On the contrary, the amended clause 23.7 (re permitting use of 3G spectrum) clearly states and authorizes use of 3G spectrum block for provision of 3G services as defined in the "Scope of the License" in the Schedule Condition 2 of the UAS License Agreement. Thus, all Licensees providing 3G Services are doing so under their existing license agreement.

(iv) Intra-circle roaming is specifically allowed. DoT vide an amendment to the License Agreement on 12.06.2008 (order no. 842-725/2005-VAS/269) extended the permission of roaming to

the Intra-circle scenario. This amendment is a part of the License Agreement and permits operators to enter into "*mutual commercial agreements for intra service area roaming facilities with other licensed Cellular Mobile Telephone Service Licensees / Unified Access Service Licensees*".

(v) Prior to the 3G Spectrum auction, the DoT had provided written responses and clarifications to certain queries raised in relation to the auction. In brief, DoT clarified that:

- (a) Licensees can enter into bilateral roaming arrangements with other Licensees for 3G Services.
- (b) intra-circle roaming is governed by the Licence Agreement provisions and applicable Government regulations.
- (c) the roaming policy is applicable to the License Agreement and not to specific spectrum bands that have been allocated under the License Agreement.

(vi) In November 2003, the DoT announced the policy of Unified licence called Unified Access Service Licence (UASL) under which only one licence was to be issued for providing all types of services i.e., fixed and mobile services [all types of

access services, Internet Telephony, Internet Services and Broadband Services including triple play i.e voice, video and data].

(vii) All access voice, data and video services can be provided using any band i.e. 800 (generally known as CDMA spectrum), 900 / 1800 bands (generally known as 2G GSM spectrum) as also in 2.1 GHz band (generally known as 3 G spectrum). The only difference between the two sets of band is that the data speeds in 3G band are higher in comparison to 2G bands, due to use of different technologies.

(viii) On 25.10.2010, the DOT issued a consolidated replies to the queries raised by prospective bidders with regard to auction of 3G spectrum. It was clear from the said queries and responses of DoT that in respect of UAS licensees who do not hold 3G spectrum, entering into roaming arrangements on the 3G networks of other UASLs in the same licensed area was permitted. DoT clearly confirmed the following that:

- (a) Roaming arrangements were based on bilateral decision between operators.

- (b) The roaming policy was applicable to the licences and not to specific spectrum bands. Hence, roaming would be permitted.
- (c) ICR guidelines were already provided by the DoT. These guidelines pertain to licence conditions and are not specific to spectrum.
- (d) Provision of services was governed by the licence held by the service provider. The current Auctions were for spectrum, not licences.
- (e) Roaming arrangements are as per terms of applicable licence, TRAI recommendations and bilateral arrangements between operators.

5. In Petition No. 519 of 2011, Bharti Airtel made additional submissions :

- (i) The petition is filed for a judicial determination and adjudication of the petitioners' contractual rights under the UASL/CMTS License Agreement, which entitles

the petitioner to, inter alia, execute 3G intra-circle and inter circle roaming arrangements with other telecom operators.

(ii) The DoT's decision to disallow the roaming services will prove to be an entry barrier to the operators who have not won 3G spectrum in a particular service area and in turn, will force migration of its customers to other operators.

(iii) The disallowance of the 3G roaming agreement will reduce the number of operators providing 3G services in each circle and will allow those operators who have 3G spectrum to charge higher tariffs due to lack of sufficient competition.

(iv) The DOT has failed to respond to any of the communications by the petitioner. The DoT has suddenly issued the impugned communication to [stop] 3G ICR. The impugned letter has been issued in violation of the principles of natural justice.

6. The Petitioners prayed this Tribunal for the following reliefs:

- i. Declare / hold that the Petitioners are permitted, both intra circle and inter circle, ICR arrangement for provision of all kinds of services as provided in clause 2.2 of the UAS License including 3G services to its subscribers through ICR / roaming arrangements, in all areas where Petitioners have roaming arrangements irrespective of nature of Spectrum;
- ii. Injunct / Restrain DoT and Term Cells from acting in any manner contrary to or in breach of the terms of the License Agreements, which permit and allow, both intra-circle and inter-circle roaming arrangements between the licensees, in all areas where Petitioners have roaming arrangements irrespective of nature of Spectrum;
- iii. Direct DoT / TERM Cells / Respondents not to initiate, take or pursue any adverse steps / proceedings against the Petitioners with respect to the Petitioners' ICR arrangements for provision of 3G services, either as steps pursuant to DoTs impugned order dated 23.12.2011 or otherwise;

- iv. Strike down the impugned Order dated 23.12.2011 issued by DoT;
7. The petitioners prayed for ad-interim order in terms of the relief sought in the main prayer also.
8. The respondent filed a short reply for the same. It submitted that :
 - (i) Prior to auction of 3G/BWA Spectrum, the services were provided by using the 2G Spectrum, which ought to have remained the same even post auction of 3G/BWA Spectrum. However, through the illegal roaming arrangements the 2G Telecom Service Providers are providing 3G services to its subscribers, which is not permitted under the terms and conditions of its license, as they were not the successful bidders for 3G.
 - (ii) In terms of license conditions and conditions of 3G/BWA Auction, a Telecom Service Provider who is not a successful bidder for 3G Spectrum, can not enroll a subscriber to provide 3G services by any arrangement including by way of roaming.
 - (iii) The roaming arrangements would be strictly be in accordance with the terms and conditions of the license. A

Licensee can enter into roaming agreements, but by way of such roaming agreements it can provide only such services to its subscribers which are permitted under its own license and for which it has got the requisite spectrum as per the mandate of its own license.

(iv) Further such Licensee has to establish its own network infrastructure which include installation, networking and operation of necessary equipment and systems.

(v) The right to use 3G spectrum and provide 3 G service by a Telecom Service Provider occurs only when the concerned Telecom Service Provider was a successful bidder under auction of 3G Spectrum in the concerned Service Area and deposited the bid amount. Further, the license was required to be amended to include various Clauses for right to use of 3G Spectrum in the 2.1 GHz Band.

Pursuant to aforesaid amendment in the UAS License, the concerned Telecom Service Provider has to apply for requisite independent Wireless Operating License for 3G Spectrum from the Wireless Planning Coordination Wing (WPC Wing) of the Respondent. It is only upon issuance of the Wireless Operating License, a Telecom Service Provider obtain a right to

commercially provide 3G services to its subscribers under the earmarked 3G Spectrum.

(vi) Upon earmarking of 3G Spectrum, the concerned Telecom Service Provider has to establish its own state-of-the-art digital network in the concerned Service Area, which is compliant with the earmarked Spectrum so as to enable it to provide 3G services to subscribers.

(vii) The 3G spectrum allottees have to meet its rollout obligations in terms of License Amendment for commercial use of 3G. It has to maintain quality of standard also.

(viii) The agreement entered into between a 3G Operator and the petitioners are in the nature of Mobile Virtual Network Operator (MVNO), which is not part of Government telecom policy. It may be noted that under MVNO, a Telecom Service Provider uses telecom infrastructure including spectrum of other Telecom Service Operator, without having its own spectrum and network infrastructure, for providing the services to its own subscribers.

9. Bharat Sanchar Nigam Limited (BSNL in short) filed one application to implead itself in these proceeding. By our order dated 12th February, 2012, we passed following order:

"So far as Impleadment Application by BSNL is concerned, we are of the opinion, having regard to the fact that the Applicant supports the case of DOT on the premise that by reason of such bilateral agreements, it had been suffering losses for which representations have been filed before the DOT, we are of the opinion, that it may be heard in the matter as an intervenor. Moreover, even by intervening in this proceedings, BSNL will be supporting the impugned order of the DOT dated 23.12.2011 which is being impugned herein."

10. The intervenor BSNL has submitted that :
 - a. The Petitioners along with other Telecom Service Providers have formed a cartel and violating the compliance of law pertaining to use of 3G spectrum, adherence to the national telecom policy, terms and conditions of the Cellular Mobile Telephone Service License.
 - b. The Petitioners are providing 3G services to their subscribers, by entering into illegal arrangements/ agreements by the Petitioners have has caused huge loss to the public exchequer not only in terms of the Spectrum Charges, but also the recurring loss on account of Radio Spectrum Charges,
 - c. Due to such illegal arrangements, the Telecom Service Provider including the Petitioners are being illegally benefited/enriched and is adversely affecting the business interest of law abiding Telecom Service Providers including the Applicant.

- d. The Applicant is an authorized 3G Telecom Service Provider in 20 Telecom Service Areas out of total 22 Telecom Service Areas, as the Applicant has paid a sum of Rs. 10,186.31 crores as 3G Spectrum Charges, being the Winning Price for such Spectrum in the 3G/BWA Auction. It may be noted that apart from paying Rs. 10,186.31 crores for 3G Spectrum, the Applicant has also invested a substantial sum of money in settling up its own state-of-the-art digital network infrastructure in the said 20 Telecom Service Areas for providing 3G services.
- e. The Petitioners, in some Telecom Service Areas, without paying for earmarking of 3G Spectrum or investing a single penny in settling up telecom infrastructure, network etc. are illegally acquiring and continue to acquire subscriber by misrepresenting that they can provide 3G services in such Telecom Services Areas where in terms of the License Conditions they are prohibited and not authorized/entitled to provide 3G services.
- f. The prior to auction of 3G/BWA Spectrum, only such services were provided which can be provided through 2G Spectrum, which ought to have remained the same even post auction of 3G/BWA Spectrum. However, through the illegal roaming arrangements, the Petitioners are providing 3G services, when they are authorized to provide only such services which are capable under 2G spectrums therefore, the provisioning of 3G services, by a 2G Telecom Service Providers to its subscriber amounts to reselling the services of 3G Telecom Service Provider by using its 3G Spectrum.

- g. After auction of the 3G Spectrum on 19.04.2010 none of the Petitioners were licensed to provide 3G services on pan-India basis rather they succeeded to obtain only certain circles in different geographical areas. However, they are offering pan-India services on 3G spectrum in blatant violation of the terms and conditions of the UAS License as well as the law.
- h. If the illegal arrangements between the petitioners are not stopped the interest of law abiding service providers such as the Applicant will be greatly prejudiced.

Analysis

11. The principal question for our determination is whether the petitioners having UASL/CMTS license alongwith 2G spectrum in certain circles can provide 3G services to its customers in these circles although 3G spectrum has not been allotted to them. Whether such services can be provided by making intra circle roaming arrangements with operators having 3G spectrum in these circles.

12. The contention of the petitioners is that the definition of 'services' in terms of UASL licence include all types of fully mobile services whether 2G, 3G or 4G. It allows the licensee to provide all types of access services including the VOICE or non VOICE messages, internet services, internet telephony, broadband services including the voice, data and video services.

The petitioners further contend that in case of successful bidders of 3G spectrum, the existing licenses were merely amended to permit the use of additional spectrum. The definition of service in license was not amended to include the 3G services.

The amending clause 23.7 merely authorizes use of 3G spectrum block for provision of 3G services as defined in the 'scope of the license'. According to the petitioners all licensees providing 3 G services are doing so under their existing licence agreements. Further, licence conditions as amended on 12.06.2008 permitted intra circle roaming. This amendment is part of the licence agreement and permits the operator to enter into mutual commercial agreement for intra service area roaming facilities with other licensed CMTS licensees/ UAS licensees.

13. We may read the relevant provisions of the UASL :

"2. Scope of the Licence

2.1 This LICENCE is granted to provide SERVICE as defined in Para 2.2 of this LICENCE AGREEMENT, on a non-exclusive basis in the designated SERVICE AREA and others can also be granted LICENCE for the said SERVICE in the same Service Area.

Provided further that the LICENSOR, of its own or through a DESIGNATED OPERATOR, shall always have a right to operate the SERVICE anywhere in India including the service area for which this licence is granted.

Details of various service areas are enclosed as Annexure-VI.

2.2 (a)(i) The SERVICES cover collection, carriage, transmission and delivery of voice and/or non-voice MESSAGES over LICENSEE's network in the designated SERVICE AREA and includes provision of all types of access services. Access Service Provider can also provide Internet Telephony, Internet Services and Broadband Services. If required, access service provider can use the network of NLD/ILD service licensee. In addition to this, except those services listed in para 2.2 (b)(i) licensee cannot provide any service / services which require a separate licence. The access service includes but not limited to wireline and / or wireless service including full mobility, limited mobility as defined in clause 2.2 (c) (i) and fixed wireless access. However, the licensee shall be free to enter an agreement with other service provider(s) in India or abroad for providing roaming facility to its subscriber under full mobility service unless advised / directed by Licensor otherwise. The LICENSEE may offer "Home Zone Tariff Scheme (s)" as a subset of full mobile service in well defined geographical Areas through a tariff of its choice within the scope of orders of TRAI on the subject. Numbering and interconnection for this service shall be same as that of Full mobile subscribers.

"Note: A Licensee may enter into mutual commercial agreements for intra service area roaming facilities with other licensed Cellular Mobile Telephone Service Licensees/ Unified Access service Licensees. Further, TRAI can also prescribe tariffs/charges for such facilities within the provisions of TRAI Act, 1997 as amended from time to time."

2.2 (a) (iii) The access service providers can provide Broadband services including triple play i.e voice, video and data.

2.2 (b)(i) Further, the LICENSEE can also provide Voice Mail, Audiotex services, Video Conferencing, Videotex, E-Mail, Closed User Group (CUG) as Value Added Services over its network to the subscribers falling within its SERVICE AREA on non-discriminatory basis. The Licensee cannot provide any service except as

mentioned above, otherwise shall require a separate licence. However, an intimation before providing any other VALUE ADDED SERVICE, which is mentioned above or listed in item 74 of Annexure-I, has to be sent to the LICENSOR and TRAI.”

14. The reading of cl. 2.2 (a)(i) shows that services to be provided by the licensee cover collection, carriage, transmission and delivery of voice and/or non-voice messages over licensee’s network in the designated service area and includes provision of all types of access services. Further, in addition to this, except those services listed in para 2.2 (b)(i), licensee cannot provide any service which require a separate licence.

Under para 2.2 (b), licensee can also provide voice mail, audio tax services etc. as value added services over its network. However, the licensee cannot provide any service except as mentioned above, otherwise shall require separate license.

15. The question before us is whether provision of 3G services requires a separate license

The term ‘license’ has been defined in Annexure-I of the Licence agreement between the petitioner and the respondent, which may be read as :

"30. LICENCE: Licence means a Licence granted or having effect as if granted under section 4 of the Indian Telegraph Act 1885 and Indian Wireless Act 1933."

Therefore, if the service require license granted under Indian Telegraph Act 1885 and Indian Wireless Act 1933, that service will be called as requiring separate license.

Whenever license is provided to a particular operator, a frequency authorization is also made under clause 43 of the license. We may read the relevant clause from license agreement of the petitioner :

"43. FREQUENCY AUTHORISATION

43.1 A separate specific authorization and licence (hereinafter called WPC licence) shall be required from the WPC wing of the Department of Telecommunications, Ministry of Communications permitting utilization of appropriate frequencies / band for the establishment and possession and operation of Wireless element of the Telecom Service under the Licence Agreement of Unified Access Service under specified terms and conditions including payment for said authorization & WPC licence. Such grant of authorization & WPC licence will be governed by normal rules, procedures and guidelines and will be subject to completion of necessary formalities therein.

43.2 For this purpose, a separate application shall be made to the "Wireless Advisor to the Government of India, WPC Wing, Department of Telecommunications, Ministry of Communications, Sanchar Bhawan, New Delhi-110 001" in a prescribed application form available from WPC Wing.

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 the 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 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. While efforts would be made to make available larger chunks 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 or 6.2 + 6.2 MHz in respect of TDMA based system shall be allocated to any new Unified Access Services Licensee. The spectrum shall be allocated in 824-844 MHz paired with 869 – 889 MHz, 890 – 915 MHz paired with 935 – 960 MHz, 1710 – 1785 MHz paired with 1805 – 1880 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 or 4.4 + 4.4 MHz in respect of TDMA system shall be assigned to any new Unified Access Services Licensee.”

16. The petitioners, being GSM operators have been allocated frequency of 900 MHz or 1800 MHz band, which is in short called as

2G Spectrum. A sample copy of the Wireless Operating license issued by WPC Wing of DOT to one of the petitioners is produced below :

"GOVERNMENT OF INDIA
Ministry of Communications & Information Technology
Department of Telecommunications
Wireless Planning and Co-ordination Wing
Sanchar Bhawan, 20, Ashoka Road
New Delhi – 110001

File : L-14045/32/2007-NTG1 Date : 14/06/2011
Valid upto : 31/03/2012
(or validity of service licence
whichever, is earlier)

1. *Licence No. :* UASL/117/GSM1
2. *Name & :* BHARTI HEXACOM LIMITED
Address of the License Airtel Centre, Sixth Floor, 'A' Wing
 Regulatory Plot No. 16, Udyog Vihar,
 Ph-IV, Gurgaon, 122001, Haryana
 Gurgaon H.O
 GURGAON
 HARYANA-122001
3. *Purpose of :* SERVICE PROVIDER FOR GSM MOBILE
the License SERVICES
4. *Area of service* RAJASTHAN
5. *Particulars of the licensed station :* As per Annexure
6. *Authorised frequency (ies) and parameters :*

<i>frequency (ies) frequency band in MHz</i>	<i>Emission</i>	<i>Power (in dBW)</i>	<i>Hour of operation</i>	<i>Schedule reference</i>
890.2-896.2 MHz	200 KQ 7W	3	H24	UASL/117/GSM1/994-1398
935.2-941.2 MHz	200 KQ 7W	13	H24	UASL/117/GSM1/994-1398
<i>Total = (6.2+6.2 MHz)</i>			H24	UASL/117/GSM1/994-1398

7. Particulars of license apparatus :

<i>Name of the Manufacturer</i>	<i>Model no.</i>	<i>Schedule reference</i>
ERICSSON INDIA PVT. LTD.	INDOOOR BTS 2694/444/900 MHZ HW	UASL/117/GSM1/994-1398
ERICSSON INDIA PVT. LTD.	MAIN Remote BTS/2111/3x2/900 MHZ HW	UASL/117/GSM1/994-1398
ERICSSON INDIA PVT. LTD.	BTS 2694 EXPANSION (444-644) 900 MHZ HW	UASL/117/GSM1/994-1398
ERICSSON INDIA PVT. LTD.	INDOOOR BTS 2694/222/900 MHZ HW	UASL/117/GSM1/994-1398

Conditions :

The service provider/ licensee is hereby granted Wireless Operating License (WOL) to establish wireless network subject to the following :

1. The validity of this WOL is for a period of 5 years from the date of issue of license which can be extended by further periods of upto 5 years at a time, subject to the remaining validity period of the underlying main service license."

The sample copy of the license issued by WPC Wing shows that one of the petitioner has been allocated frequency in 900 MHz band (6.2 MHz +6.2 MHz in the range of 890.2-896.2 MHz and 935.2-941.2 MHz). Particulars of license apparatus have also been approved by the WPC Wing. The licensee was granted Wireless Operating License to establish wireless network subject to certain conditions on the aforementioned frequency.

17. 3G services have been defined in the notice inviting applications (NIA) issued in connection with auction of 3G and BWA spectrum. Definitions and Glossary of Terms are at page 105 of the NIA document (page 249 of the paper book).

"3G / BWA - In case of successful bidders, services offered under the scope of respective service licenses using 3G/BWA spectrum assigned through the auction process."

Therefore, 3G services are those services which use 3G spectrum and 3G spectrum can be got through the process of auction only. In this petition, the petitioners have not got the 3G spectrum allocated to them in the impugned circles.

18. It will be of relevance to see the application of Bharti Airtel Limited requesting Assistant Wireless Advisor for issuing operating network license for Mumbai circle for 3G services where it got 3G spectrum. Following application shows that Bharti Airtel Limited itself applied for operating license for 3G services in the circle in which it was a successful bidder. In fact, it specifically mentioned the frequency details, Tx frequency as 2166.5 MHz and Rx frequency as 1976.5 MHz :

"Date : 26/12/2011

To,

*The Asst Wireless Advisor(V)
Department of Telecommunications
Ministry of Communications
No. 619, WPC Wing
Sanchar Bhawan, Ashoka Road
New Delhi – 110001*

*Sub : Operating License Application 3G Mumbai Circle
(Additional)*

*WPC online acknowledgment No. 2012/00264 No. of sites : 461
156987*

Dear Sir,

Please find enclosed the operating licence applications for Mumbai Telecom Service area

All required documents are attached herewith for your ready perusal.

You are requested to issue us the **Operating licence at the earliest.**

With regard

Bharti Airtel Limited

Sant Pratap Goel
Chief Technical Officer"

"APPLICATION FOR **NETWORK LICENSE (3G Services)** (License Appl. Id. 2012100264)

Date : 04/01/2012

First name	BHARTI AIRTEL LIMITED	LAST NAME		NATIONALITY	INDIAN
Address1	AIRTEL CENTRE, REGULATORY AFFAIRS	ADDRESS 2	SIXTH FLOOR A WING PLOT NO. 16	Address 3	UDYOG VIHAR PH-IV, GURGAON
E mail	Suraj.dwivedi@airtel.in	Phone		Fax	
City	Gurgaon	State	Haryana	Country	India
Pin code	122001	Comments		Name of circle/ service area	
Frequency details					
Tx frequency	Rx frequency	Emission deisgnatin	Hour of operation	Power (dbw)	Remarks
2166.5	1976.5	SMooG7W	H24	13	MOBILE

Authorized signatory"

19. On receiving the application for issue of network license alongwith frequency details, the WPC Wing of DOT granted Wireless Operating License (WOL) to establish wireless network subject to certain conditions. We may peruse the sample license no. UASL 22/1M/3G1 issued to Bharti airtel for Mumbai Circle on 14.06.2011 wherein certain frequencies (1974-1979 MHz and 2164-2169 MHz) were authorized for 3G mobile services:

*"GOVERNMENT OF INDIA
Ministry of Communications & Information Technology
Department of Telecommunications
Wireless Planning and Co-ordination Wing
Sanchar Bhawan, 20, Ashoka Road
New Delhi – 110001*

File : L-14045/12/2010-3G

*Date 30/05/2011:
14/06/2011*

*To,
BHARTI AIRTEL LIMITED
Airtel Centre, Regulatory Affairs
Sixth Floor, 'A' Win,
Plot No. 16, Udyog Vihar,
Ph-IV, Gurgaon, 122001, Haryana
Gurgaon H.O
GURGAON
HARYANA-122001*

Subject : Issue of Wireless Station Licence No. UASL-22/1M/3G/95-1191 to operate CDMA/ UASL at Mumbai Telecom Service Area under Indian Telegraph Act, 1885

Sir,

I am directed to refer to your letter no. Nil dated 08.04.2011 and to forward herewith the license no. UASL-22/1M/3G/95-1191 incorporating the details of the wireless stations(s) alongwith the related technical parameters. Kindly keep one photocopy of this license at the respective station(s) as a proof of license.

2. The above license is granted subject to the conditions annexed herewith. The terms and conditions not herein defined will be as per the service license for above mentioned service area(s).

3. One photocopy of this license may kindly be signed and returned to this Ministry."

"GOVERNMENT OF INDIA
Ministry of Communications & Information Technology
Department of Telecommunications
Wireless Planning and Co-ordination Wing
Sanchar Bhawan, 20, Ashoka Road
New Delhi – 110001

File : L-14045/12/2010-3G1 *Date : 30/05/2011/
14/06/2011*
Valid upto : 30/09/2015
*(or validity of service licence
whichever, is earlier)*

- 1. Licence No. : UASL-22/1M/3G1*
- 2. Name & : BHARTI AIRTEL LIMITED*
Address of the License Airtel Centre, Regulatory Affairs
Sixth Floor, 'A' Wing
Plot No. 16, Udyog Vihar,
Ph-IV, Gurgaon, 122001, Haryana
Gurgaon H.O
GURGAON
HARYANA-122001
- 3. Purpose of : SERVICE PROVIDER FOR 3G MOBILE*
the License SERVICES
- 4. Area of service MUMBAI*

5. *Particulars of the licensed station* : As per Annexure

6. *Authorised frequency (ies) and parameters* :

<i>frequency (ies) frequency band in MHz</i>	<i>Emission</i>	<i>Power (in dBW)</i>	<i>Hour of operation</i>	<i>Schedule reference</i>
1974-1979 MHz	5MOOG7W	3	H24	UASL-22/1MG1/95-1191
2164-2169 MHz	5MOOG7W	13	H24	UASL-22/1MG1/95-1191

7. *Particulars of license apparatus* :

<i>Name of the Manufacturer</i>	<i>Model no.</i>	<i>Schedule reference</i>
NOKIA SEIMENS NETWORKS	OD NodeB 111 FSMC	UASL-22/1MG1/95-1191

Conditions :

The service provider/ licensee is hereby granted Wireless Operating License (WOL) to establish wireless network subject to the following :

1. *The validity of this WOL is for a period of 5 years from the date of issue of license which can be extended by further periods of upto 5 years at a time, subject to the remaining validity period of the underlying main service license."*

20. While inviting bid for 3G spectrum, the respondent had issued "Notice Inviting Applications" wherein the successful bidder were to deposit the bid amount. After deposit of bid amount by successful bidder, an amendment was to be carried out in the licence condition by including various clauses for right to use 3G spectrum in the 2.1 GHz band. The amendment of unified Access Service License agreements to use 3G spectrum for provision of telecom access services also authorizes the use of 3G spectrum block for provision of telecom

access services as defined in the "Scope of Licence". Besides it provided for validity period for 3G spectrum, roll out obligation, license fee for 3G spectrum etc. We may reproduce the relevant portion of the amendment of the licence agreement:

"1st September 2010

To

*Vodafone Essar Mobile Services Limited
7th Floor, DLF centre, Sansad Marg,
New Delhi – 110001*

Subject : Amendment of Unified Access Services (UAS) Licence Agreements(s) to use 3G spectrum for provision of telecom access services

In pursuance of condition 5.1 of the UAS license agreement(s), clause 4.6 of the notice inviting applications (NIA) for "auction of 3G and BWA spectrum" vide No. 9P-11014/13/2008-PP dated 25.02.2010, WPC Wing's Letter of Intent (LOI) no. L-14047/05/2010 -3G dated 11.06.2010 and on the request of the licensee vide letter no. DOT VEL/File -7/06-10/12 dated 21.06.2010, the licensor hereby insert following condition 23.7 in the UAS license agreement(s) for the Delhi service area(s) with effect from 01.09.2010.

23.7 Use of 3G Spectrum : The licensee is also authorized to use the 3G spectrum block (as earmarked in the above said Letter of Intent) for provisioning of Telecom Access services as defined in the 'Scope of the licence' in the Schedule Condition 2 of the UAS License agreement, from the date of award of right to commercially use the 3G spectrum i.e. 01.09.2010 till the validity of the UAS licence agreement or for a period of 20 years from 01.09.2010, whichever is earlier, subject to compliance of following

conditions.”

- (i) Validity period of 3G
- (ii) Roll Out obligations for 3G spectrum

(R.K.Gupta)“

21. It is clear from the aforementioned provisions of the terms and conditions of license that the provision of 3G services cannot be provided without amendment to the UAS licence under Indian Telegraph Act, 1885 without providing a license from WPC wing of DOT under Indian Wireless Act, 1933 for the relevant spectrum required to provide 3G services.

Thus, it is clear that the provisions of 3G services require a separate license. If the UASL licensee does not have separate license to provide 3G services, it violate clauses 2.2(a) (i) and 2.2(b) (i) of the terms and conditions of the license.

22. I would like to examine the question as to whether it is possible to provide 3G service by the petitioners to its subscribers by way of intra circle roaming arrangement with other operators having 3G

spectrum? We may read the definition of 'subscriber' in clause 62 of the agreement :

"62. "SUBSCRIBER" Subscriber means any person or legal entity, which subscribe to Service from the LICENSEE."

We may read the definition of 'service' also:

"55. "SERVICE" covers collection, carriage, transmission and delivery of voice or non-voice messages over LICENSEE's network in licensed service area and includes provision of all types of services except for those requiring a separate Licence."

The definition of 'service' and that of 'subscriber' show that the petitioner should have the license and the required network to provide particular type of service to its subscribers. In the petitions filed before us, the petitioner have established only 2G network and have not setup 3G network which requires separate equipment and separate allocation of frequency.

23. The contention of the petitioner is that they will provide 3 G services to its customers by way of roaming facility which is permissible under their license by way of an arrangement made with the service providers who have got the 3G spectrum allotted. The petitioner has pointed out that clause 2.2 (a) provides that "the

licensee shall be free to enter an agreement with other service provider(s) in India or abroad for providing roaming facility to its subscriber under full mobility service unless advised / directed by Licensor otherwise.

"Note: A Licensee may enter into mutual commercial agreements for intra service area roaming facilities with other licensed Cellular Mobile Telephone Service Licensees/ Unified Access service Licensees. Further, TRAI can also prescribe tariffs/charges for such facilities within the provisions of TRAI Act, 1997 as amended from time to time."

The petitioners contend that apart from provision of intra circle roaming in the licence condition of the petitioner, clarification given by DOT to the participants of 3G auction, the respondent have allowed intra circle roaming between 2G spectrum holder and 3G spectrum holder.

24. According to the petitioner, in case of roaming, the roaming seeker neither require to own the spectrum nor required to install its own network. The roaming service given by the roaming provider to roaming seeker means handling the origination, handover as well as termination of the roaming traffic of the subscriber of the roaming seeker while roaming in the telecommunication network of roaming provider as per agreed commercial principles.

25. Normally, roaming facility is provided to the subscribers of a licensee outside its service area where the service provider does not have its network. In case of inter circle roaming facility the service provider provides the service of its network to its subscribers on its home network when the subscriber moves temporarily from one area to other service area, the subscriber roam on the network of other service provider. Such facility is provided by having a inter circle roaming arrangement between two service providers. The subscriber basically remains active most of the time on the home network. However, when he goes out of the service area he visits on the network of other service provider for a short period. The service provider having home network is called as roaming seeker and the service provider who provides the roaming facility temporarily is called a roaming provider.

In case of intra-circle roaming, the roaming seeker should also have its home network and the licence for the spectrum for which it is providing service to its subscribers. Its subscribers can roam on the facility of roaming provider temporarily only and not permanently.

26. Basically such intra circle roaming arrangement are resorted to save capex. They need not duplicate the infrastructural facilities in

the entire circle and such facilities can be shared among the roaming seeker and roaming provider. If two service providers want to have intra circle roaming for 2G services, both the service providers should have the relevant licence and the spectrum for a particular service area for providing particular type of service. Both the service providers i.e. roaming seeker and roaming provider should have relevant license for providing 2G services as well spectrum in 2G band of frequencies. However, if there is a case, where the roaming seeker has not established its own network for a particular type of service (say 3G services) and the roaming seeker does not have a authorization of using the said frequency (3G spectrum) from the WPC Wing of the DOT, such subscribers of roaming seekers will always be permanently on the visitor's network. In fact the subscribers of roaming seeker in such a situation will be using the spectrum of roaming provider on a permanent basis. The subscriber will be permanently on the visitor's network.

27. In the petitions filed before us, the petitioner neither have setup 3G network nor got the 3G spectrum allotted from the licensor. The petitioners have started providing 3G services by way of making roaming arrangement wherein the roaming providers have been allotted 3G spectrum and have established their network. If the

petitioners provide 3G services to its subscribers by this arrangement, the subscribers will always be on the visitor's network of roaming provider for 3G services as the petitioners established only 2G network and do not have the relevant 3G network.

28. I am of the view that such arrangement is not permissible under the terms and conditions of license. Infact, UASL licensee without having the relevant (3G) spectrum providing 3G services to its subscribers will be acting as Mobile Virtual Network Operator (MVNO) where the service provider does not have its network in that frequency still provides services to the subscriber. At present, MVNO is not part of government telecom policy and is specifically prohibited. The telecom industry itself understood that MVNO is that entity who has no frequency assignments, but who can provide mobile services to the users by means of entering into an agreement with license access service provider. (underlining is ours)

We may produce few relevant paras from the consultation paper by TRAI on Mobile Virtual Network Operator(MVNO) issued on 05.05.2008 :

"1.10 The New Telecom Policy, 1999 (NTP-1999) had envisaged resale in the Telecom Services market at an appropriate time. This Consultation Paper on MVNOs is being

brought out to discuss the need and timing of introduction of MVNO and the various issues relating to the introduction of MVNO in India, elicit views of all the stakeholders before finalizing the recommendations. The Chapter 2 deals with the types of MVNO. The regulatory and licensing issues are covered in Chapter 3 and International experience in Chapter 4. Chapter 5 consolidates the issues for consultation.”

“2.1.1. Definition MVNO model has gained popularity in the last few years. MVNO operates through commercial arrangements with licensed Mobile Network Operators (MNO). The MVNO provides the telecom service under its own brand to the subscribers. MVNOs do not have their own spectrum. The key difference between a simple reseller or a franchisee and MVNO is that MVNOs add value and sell either niche or generalized value added services to subscribers¹.”

Definition by ITU⁴ -

A mobile Virtual Network Operators (VNO) is an operator that offers mobile services but does not own its own radio frequency. Usually, this operator has its own network code and in many cases issues its own SIM card. The mobile VNO can be a mobile service provider or a value-added service provider.

COAI Response to the TRAI Consultation Paper No. 9/2008 on
Mobile Virtual Network Operator (MVNO)

Issue 1 Do you agree with the definition of MVNO given in section 2.1.6? If not please suggest alternate definition with justification.

- (a) The definition of MVNO given by the Authority in Section 2.1.6 of its Consultation Paper states that the MVNO can provide wireless (mobile) access services to customers by “sharing” the spectrum of the Access Provider. It is respectfully submitted that MVNOs do not “share” spectrum with access providers/MNOs.

(b) "Sharing spectrum" conveys a sense of ownership/co-ownership, which is not true in the case of an MVNO.

(c) This is also borne out by the definition of MVNO adopted by various international authorities, reproduced by the Authority in its Consultation Paper. The said definitions clearly state that an MVNO

- "...does not have an allocation of spectrum..."(OFTEL);
- "...does not own its own radio frequency..."(ITU);
- "...does not have access to the spectrum..."(Pyramid Research);
- "...does not have its own radio frequency allocation..."(Ovum);
- "...does not have an allocation of spectrum..."(OFTA);

(d) In light of the above we would like to submit that an MVNO may be defined as follows:

"MVNO licensee is an entity who has no frequency assignments, but who can provide mobile services to users by means of entering into an agreement with a licensed access service provider."

29. Infact, 3G and 2G spectrum are allotted with different carrier sizes. While 3G spectrum (in 2100 MHz Frequency band) has been allotted with carrier size of 5 MHz; TDMA (2G) spectrum is allotted with carrier size of 200 KHz each for in 900 MHz/1800 MHz frequency band and 1.25 MHz each for CDMA in 800 MHz frequency band.

30. The petitioners have contended that notice inviting application was issued during 3G auction process, certain queries were raised by the bidders and by way of clarification a consolidated list of queries were released in the form of a document. According to the petitioner, the responses given by the DOT are definitely binding on the licensor. However, learned counsel for the respondent submits that there cannot be any estoppel against the statute and doctrine of promissory estoppel cannot be made applicable when no promise is made. The relevant queries and the responses are reproduced below:

"11. Please clarify 3G roaming is mandated or whether it will be a bilateral decision between operators?"

At present, mandatory roaming is not part of the Government's telecoms policy. Roaming arrangements are based on bilateral decision between operators.

12. Will intra circle roaming be allowed in areas where an operator does not have a 3G network?"

Intra-circle roaming will be governed by the UAS/ CMTS licence provisions and applicable Government regulations.

48. DoT order No. 842-725/2005-VAS/269 dated 12th June 2008 allows intra-circle roaming amongst UASL licensees. After 3G auctions not all existing UASL licensees will hold 3G spectrum in any licensed areas due to the limited 3G blocks on offer. Will customers of UASL licenses who do not hold 3G spectrum be allowed to roam on the 3G networks of other UASLs in the same licensed area?

Furthermore, till such time as more 3G blocks are released into the market, will it not be customer friendly for the government to mandate that 3G spectrum holders allow the customers of operators not holding 3G spectrum in the same licensed area to roam on their networks under an administered pricing mechanism?

60. What is the roadmap for future 3G spectrum allocation for the existing 3G players (successful bidders) beyond 5MHz? Will there be any cap on the maximum number of service providers in a service area?

The roaming policy is applicable to the licences and not to specific spectrum bands. Hence, roaming will be permitted. However, at present, mandatory roaming or MVNO is not part of the Government's telecoms policy.

The Government may allocate 3G Spectrum in the future through competitive auction processes only.

Successful bidders in the current auction may be allowed to bid for more 3G future auctions, subject to M&A guidelines and minimum Competition criteria being met in the relevant circles.

The current regulations do not impose any cap on the maximum number of service providers in a service area.

62. Additional spectrum available in future will be for new or existing operators or for both? How the future 3G spectrum is envisaged to be given to an existing operator, will it be subscriber linked or further auction will take place? In case it is for both, will preference be given to existing 3G players.

Additional spectrum will be for both new and existing operators. The Government may allocate 3G Spectrum in the future through competitive auction processes only. Successful bidders in the current auction may be allowed to bid for more 3G Spectrum in future auctions, subject to M&A guidelines and minimum competition criteria being met in the relevant circles. No preference is expected to be given to existing 3G players.

188. Please confirm whether 3G services can be rolled out in 2G spectrum assignments?

Provision of services is governed by the licence held by the service provider. The current Auctions are for spectrum, not licences.

205. Request confirmation that the license term of a company which is the result of a merger between 2G & 3G licensees could be shortened to the term of the 2G licensee regardless of the fact that the award of 3G spectrum entitles an entity to a licence duration of 20 years?

There are no separate 2G and 3G service licences. Entities with 3G spectrum would necessarily need to have an UAS or CMTS licence or obtain/ acquire an UAS licensee. Upon merger of licences, if the period of the existing UAS/ CMTS licence of the licence with lesser remaining term is expiring before the period of expiry of the right to use the 3G Spectrum, then the period of validity of UAS/ CMTS licence with respect to the usage of 3G Spectrum or BWA Spectrum only will get extended to 20 years from the time of award of the 3G Spectrum or

BWA Spectrum (awarded as part of the current Auction). However, terms of extension, if any, of the right to use any spectrum other than 3G Spectrum or BWA Spectrum associated with the licence and the terms thereof beyond the original term will be specified in due course.

230. Will intra-circle roaming be allowed for 3G & BWA?

The provision for intra-circle roaming is as applicable to the service licence, and is not different for/ specific to the spectrum being currently auctioned.

371. When an UAS licence is obtained by a winner of a 3G spectrum, is it mandatory for the existing 2G service providers to mandatorily provide roaming?

There is no mandatory roaming as on date. Roaming arrangements are as per terms of applicable licence, TRAI recommendations and bilateral arrangements between operators."

The contention of the petitioner is that the response of the licensor for these queries show that roaming facility between 2G and 3G service will be available and once that commitment has been made by the respondent on the query which have been published by the DOT, the licensor cannot reverse its stand.

31. However, Mr. A. S. Chandiok, the learned ASG appearing on behalf of the respondent read the important notice relating to these queries and its responses:

"Important Notice

This document has been prepared on behalf of the President of India by the Department of Telecommunications, Ministry of Communications & Information Technology, Government of India in connection with the proposed allocation of spectrum in the 2.1GHz and 2.3GHz bands by auction.

The document is for information purposes only and has no binding force. It is made available on the express understanding that it will only be used by the Recipients for the sole purpose of assisting these Recipients in deciding whether they wish to proceed with a further investigation of possible participation in the Auction(s). The document is not intended to form any part of the basis of any investment decision or other evaluation or any decision to participate in the Auctions and should not be considered as a recommendation by the Government or its advisers to any Recipient to participate in the Auctions. In the event of any difference between this document and the provisions of the Notice (or any other applicable laws, regulations or other statutory provisions), the latter are definitive and take precedence.

Each Recipient must make its own independent assessment of the potential value of an allocation of the spectrum after making such investigation as it may deem necessary in order to determine whether to participate in the Auction(s). All information contained in this document is subject to updating, modification and amendment. The amendments, if any, will be put up on the Auctions website. These amendments will be part of the document.

While the information contained in the document has been prepared in good faith, no representation or warranty, expressed or implied, is or will be made as to the reliability, accuracy or the completeness of any of the information contained herein.

Neither the Government nor its advisers (including their respective directors, partners, officers or employees) accept or will accept any responsibility or liability as to, or in relation to, the accuracy or completeness of the information contained in the document or any other written or oral information made available to any interested party or its advisers and any liability in respect of any such information or any inaccuracy in the

document, or omission from the document, is expressly disclaimed. In particular, but without prejudice to the generality of the foregoing, no representation or warranty is given as to the achievement or reasonableness of any future projections, estimates, prospects or returns contained in the document.

The document does not constitute an offer or invitation to participate in the Auctions, nor does it constitute the basis of any contract which may be concluded in relation to the Auctions or in respect of any allocation of spectrum. Recipients are not to construe the content of the document, or any other communication by or on behalf of the Government or any of its advisers, as financial, legal, tax or other advice. Recipients should carry out an independent assessment and analysis of the information, facts and observations contained herein. Accordingly, each Recipient should consult its own professional advisers as to financial, legal, tax and other matters concerning any potential participation in the Auction(s) or any allocation of the spectrum.

This document has not been filed, registered or approved in any jurisdiction. Recipients of this document resident in jurisdictions outside India should inform themselves of and observe any applicable legal requirements.

This document outlines the Government's expectations in relation to the proposed Auctions. The Government reserves the right, in its absolute discretion, at any stage, to withdraw its proposal to conduct the Auctions or any part thereof or to terminate further participation in the proposed Auctions by any entity, to change the structure and timing of the proposed Auctions, to refuse entry to any entity into the Auctions or to vary any other terms of spectrum allocation at any time without giving any reason whatsoever.”(underlining is ours)

The respondent has specifically brought to our notice that the document is not intended to form any part of the basis of any investment decision or other evaluation or any decision to participate in the auctions and should not be considered as a recommendation by

the Government or its advisers to any recipient to participate in the auctions. However, in the event of any difference between this document and the provisions of the notice or any other applicable laws, regulations or any other statutory provision, the later are definitive and take precedence. Further, it was also made clear that while the information contained in the document has been prepared in good faith no representation or warranty expressed or implied, is or will be made as to reliability, accuracy or the completeness of any of the information contained herein. Further, this document is for information purpose only and has no binding force.

32. The learned counsel for the respondent further contended that no commitment has been made by the DOT where 3G services will be permitted by way of intra circle roaming by those licensee who were not allotted 3G spectrum and who do not have 3G network.

33. I would like to go through the queries and response given by the licensor in detail:

Query No. 11. Please clarify 3G roaming is mandated or whether it will be a bilateral decision between operators?

The query is related to whether 3G roaming is mandated or

whether it will be a bilateral decision between operators, the response of the DOT was that at present, mandatory roaming is not part of the Government's telecoms policy and Roaming arrangements are based on bilateral decision between the operators.

In my view, the reply of DOT does not give any right to the petitioners for 3G services by way of roaming.

Query no. 12. The question was "Will intra circle roaming be allowed in areas where an operator does not have a 3G network?"

The DOT has simply replied that Intra-circle roaming will be governed by the UAS/CMTS licence provisions and applicable Government regulations.

In my view, there is no commitment from the DOT to allow 3G roaming in this case. In fact, one operator with 2G spectrum and the other operator with 3G spectrum and 2G spectrum, intra circle roaming will be definitely permissible for 2G services.

Query no. 48 : After 3G auctions not all existing UASL licensees will hold 3G spectrum in any licensed areas due to the limited 3G blocks on offer. Will customers of UASL licenses who do not hold 3G spectrum be allowed to roam on the 3G networks of other UASLs in the same licensed area.

Further, there was suggestion that such roaming should be mandated under an administered pricing mechanism in the interest of consumers.

The DOT replied that the roaming policy is applicable to the licences and not to specific spectrum bands. Hence, roaming will be permitted. However, at present, mandatory roaming or MVNO is not part of the Government's telecom policy.

Therefore, if both the roaming seeker and roaming provider are having relevant spectrum, the roaming will be permitted. But without having the relevant spectrum, the operator is nothing but like a MVNO, which does not have spectrum.

I am of the view that the reply of the DOT in this question is contradictory one and it is not understood whether the person who has prepared the reply has understood the query well before answering it. If roaming is permitted for the subscribers of the licensee not holding 3G spectrum to roam on 3G network of other UASL, how is that MVNO is not permissible? Both part of the response cannot go together. The petitioner cannot derive benefit from the part of the response to a question. The reply has to read fully.

Query no. 188 - There is no commitment from DOT.

Query no. 205 - This query more related to the period of licence and not concerned with 2G-3G roaming arrangement.

Query no. 230 - No commitment was made by DOT on 2G/3G roaming aspect.

Query no. 371 - The DOT has replied that roaming arrangement are as per the terms and condition of the licence, TRAI recommendations, bilateral arrangement between the operators and there is no provision of mandatory roaming.

34. The DOT while giving response to query no. 48, has given a contradictory response. In such a situation, we have to read the disclaimer where it is mentioned that if there is difference between this document and the provisions of notice or any applicable laws regulations or other statutory provisions the later are definitive and take precedence.

35. Further, the petitioners in these petitions are not successful bidders in the auction. How any response given during the process of auction can be binding on the licensor vis-a-vis these petitioners? As

no promise has been made to these petitioners, the doctrine of promissory estoppel is not applicable.

36. I am of the view that the doctrine of promissory estoppel cannot be invoked by a third party. The petitioners did not succeed in getting the 3G spectrum. No contract was signed between the petitioners and the respondent. Therefore, the petitioners will not get any benefit out of the response given by DOT during the auction proceedings. The petitioners will be governed by their own license agreement.

The query and responses are not in the nature of circular instructions of the department. The responses are for the purpose of auction of the 3G spectrum only. These responses cannot create any new right to the parties having effect of changing the terms and conditions of their licenses.

37. The Petitioners have been asked to submit the copies of the inter-circlce roaming arrangement made between the parties to examine the nature of the arrangement. We may produce few relevant clauses of the agreement between the parties (Vodafone Essar Limiter & Idea Cellular Limited).

"Generic Requirements

- (a) The Roaming Seeker shall only provision its Subscribers to access the 3G network of the Roaming Provider and shall disable access to the 2G network of the Roaming Provider, with the exception of the Circles where the Roaming Provider and the Roaming Seeker have an ongoing 2G roaming arrangement. In addition, the Roaming Provider shall also ensure 2G network access denial to the Subscribers of the Roaming Seeker by appropriately configuring the networks;(underlining is ours)
- (b) The Roaming Provider shall ensure that access is provided only to such Subscribers of the Roaming Seeker which are provisioned for 3G facility in the Roaming Seeker's Home Location Register (HLR) and who have handsets which are compliant with national security regulations in force at any point in time. The while list on the network shall be updated on at least a fortnightly basis and in accordance with the guidelines of the DoT.
- (n) The Roaming Provider shall ensure separate and unique 2G and 3G Local Area Code for supporting the roaming regime."

38. The contention of the Petitioner is that it is a pure and simple roaming arrangement for availing higher speed service on roaming provider's 3G network on the subscribers of roaming seeker. The

subscriber desiring to stay only on 2G network have to necessarily to utilize home network of roaming Seeker. Thus the subscriber of roaming seeker does not stay permanently on the 3G network of roaming provider.

On the other hand, the counsel for the Respondent argued that the arrangement is nothing but the roaming seeker acting as MVNO as the roaming is provided for provision of 3G services only and not for 2G.

39. Intra-circle roaming is permissible as per license condition between two operator in the same circle but the condition is that both the operators should have relevant licenses/authorization to provide certain services. In the present petition, the Petitioners are the roaming seekers having UASL license with 2G band of frequencies. The roaming providers have UASL licenses with 2G band of frequencies as well as 3G spectrums (2.1GHz frequencies). If intra circle roaming is provided for 2G services, this will be in accordance with the license condition and clauses 2.2(a) as amended as both the service provider will have requisite network as well as the spectrum. Intra circle roaming between two operators who got 3G network and 3G spectrum will also be permissible.

40. However, the arrangement made between the parties are such that it specifically bars 2G roaming, and allows only 3G roaming for the subscribers of the roaming seekers i.e. petitioners herein. The roaming seeker neither has network nor the spectrum for 3G services. As the roaming seeker is providing 3G services by using the spectrum and network of the roaming provider, the Petitioner work like MVNO which is not permissible at present.

41. Similarly we may reproduce the clause 5.8 of the agreement between Tata tele services & Aircel limited.

"I. Traffic Projection/allocation 3G ICR Services

In case of 3G ICR Services, VPLMN shall provide capacity of [40%] to HPLMN, VPLMN shall provide the capacity to HPLMN will restrict its 3G ICR traffic to the above projections. In case the traffic in differential rates shall apply that would be mutually agreed later. For clarity, the capacity split between the Parties is provided below:

Circle	3G VPLMN	Capacity Split #	
		VPLMN	HPLMN
Haryana	TTL	60%	40%
UP-W	TTL	60%	40%
Gujarat	TTL	60%	40%
Rajasthan	TTL	60%	40%
MP	TTL	60%	40%
Maharashtra	TTL	70%	30%
UP-E	AIRCEL	60%	40%
Kolkata	AIRCEL	60%	40%
West Bengal	AIRCEL	60%	40%
Bihar Orissa	AIRCEL	60%	40%

<i>AP</i>	<i>AIRCEL</i>	<i>60%</i>	<i>40%</i>
<i>TN</i>	<i>AIRCEL</i>	<i>70%</i>	<i>30%</i>
<i>Assam*</i>	<i>AIRCEL</i>	<i>60%</i>	<i>40%</i>
<i>NE*</i>	<i>AIRCEL</i>	<i>60%</i>	<i>40%</i>
<i>J&K*</i>	<i>AIRCEL</i>	<i>60%</i>	<i>40%</i>
<i>Punjab</i>	<i>TTL</i> / <i>AIRCEL</i>	<i>60%</i>	<i>40%</i>
<i>Kerala</i>	<i>TTL</i> / <i>AIRCEL</i>	<i>60%</i>	<i>40%</i>
<i>Karnataka</i>	<i>TTL</i> / <i>AIRCEL</i>	<i>60%</i>	<i>40%''</i>

42. The chart as mentioned above indicates that while Tata Teleservices got 3G spectrum in few circles, Aircel got the same in other circles. Home Public Land Mobile Network (HPLMN) (roaming seeker) doesn't have 3G spectrum while Visited Public Land Mobile Network (VPLMN) (roaming provider) have 3G spectrum in the circles mentioned above. The agreement indicates that the roaming provider having 3G spectrum have limited the usage of its 3G spectrum to the roaming seeker to certain percentage.

This shows that the 3G spectrum is being earmarked to certain percentage for roaming seeker. I am of the view that such arrangement of earmarking the part of the 3G spectrum allotted by a successful bidder to a service provider without any authorization by the licensor is not permissible.

While giving reply to the questions 206 and 278 in queries and responses, the respondent clarified that the trading and sharing of spectrum was not permissible. We may read the relevant questions and responses in this regard:

206. Request confirmation whether spectrum trading/sharing/transfer shall be allowed between 2G/3G (800 MHz & 2.1 GHz) /BWA spectrum holders?

Not as per current policy. However, it may be noted that this is one of the areas where a TRAI consultation process is underway.

278. a. Is there any time frame, or any "off period", before a follow up auction for the same spectrum bands that are currently planned for auction?

a. There is no such "off period". However, if there is an Auction within a period of 12 months from the date of completion of the relevant Auction in any of these bands, then the Reserve Price will be equal to the Winning Price in the current Auctions.

b. The eligibility of winning/ other bidders in participating in any such follow up auction.

b. Subject to adequate competition, it is not envisaged that there will be any restrictions. The competition criteria are currently included in the M&A guidelines, however these may be changed from time to time, based on the Government's assessment of the "adequacy" of competition.

c. Would spectrum sharing and spectrum trading in the spectrum bands planned for auction be permitted?

c. At present, spectrum trading and sharing are not permitted. However, it may be noted that TRAI is currently carrying out a consultation process on these and related issues, which may or may not lead to a change of related policy in future.

Principle of Natural Justice

43. Although Vodafone in Petition No. 518 of 2011 did not plead for violation of natural justice but the learned counsel appearing on behalf of the Petitioner raised the issue that the impugned communication dated 23.12.2011 violated the principle of Natural Justice as neither show cause notice was issued before the said communication by the Respondent nor any opportunity of hearing was given to the Petitioners. Similar contentions have been raised by other petitioners.

According to the petitioner, the impugned communication was issued after 5.30 p.m. on Friday after the Court vacations had started. This undue haste on the part of the respondent directly impacted the subscribers who would have been deprived of 3G services.

44. However, the Respondent has contended that number of letters were written by the D.O.T. and its Term Cell seeking an explanation of Vodafone starting 3G services. Vodafone has also written number of letters to the TERM Cell explaining its position. Further, the principle of natural justice would apply only in cases where there was some right which was likely to be affected by an act of administration.

45. The issue before us is whether D.O.T. could have issued a letter instructing the Petitioner to discontinue providing the 3G services to its customers as it did not have license and the spectrum for providing such services without issuing show cause notice to the petitioners.

46. We have been taken through various letters and communications between the Department of Telecommunications and its Term Cell on one hand and letters of Vodafone on the other hand by the respondent.

On 17.03.2011, the Term Cell of DOT at Kochi wrote to the CEO of Vodafone Essar, Kerala seeking intimation as to how it was proposed to start 3G services in Kerala as given in SMS since 3G spectrum license for 3G services had not been taken by Vodafone in Kerala. On 25.03.2011, Vodafone replied to the Term Cell explaining various aspects that they were authorized to launch its 3G services in Kerala due to the terms and conditions of the license and due to the response given to the query raised by the operator during 3G spectrum auction.

Similarly, for Rajasthan circle, the TERM Cell wrote to the Vodafone that they could not start 3G services without specific approval from the licensor. On 18.08.2011, Vodafone wrote to the

Term Cell, Rajasthan that they had not started any new service and it was only intra circle roaming arrangement between it and Bharti in Rajasthan Circle which would facilitate its subscribers to avail of 3G services.

On 25.08.2011, the Term Cell of Delhi wrote to different Telecom Service Providers (TSP) stating that TSPs who were not having spectrum and license could not enter into Intra Circle and Inter Circle roaming arrangement and only 3G TSPs can enter into roaming arrangement for 3G services both in Intra circle service area as well as inter circle service area. A 2G TSP could not enter into agreement with 3G TSP either for inter circle or intra circle for providing 3G services.

Thus, we see that the petitioners were well aware of the objections raised by the respondent at different points of time.

47. Some of the petitioners have got CMTS/UASL licenses starting from a period even prior to the year 2000 and were providing 2G mobile services to their customers in accordance with the terms and conditions of their licence and the allotment of spectrum in 2G band. After the auction of the 3G spectrum, the petitioners being the

unsuccessful bidder, did not get either the amendment to their licence or the allocation of 3G spectrum from the respondent. It is not understood as to how the petitioner got any right to start 3G services. The licensor did not confer any right to such effect.

48. I am of the opinion that show cause notice would have been necessary, if the petitioner were conferred any right to provide the 3G services to its customer under the licenses granted to it and the impugned letter of the respondent dated 23.12.2012 would have curtailed such rights.

49. If the Petitioners are providing such services they are likely to be proceeded against by the licensor for violation of the terms & conditions of their license. If the licensor decide to initiate the proceeding against the Petitioners as mentioned at para 4 of the impugned letter, the Respondent is bound to issue show-cause notice before taking any punitive action. The impugned letter of Department of Telecom simply instructed the Petitioner to stop the illegal services which were not authorized by the licensor. The letter seems to be more in the nature of advice to the petitioner without any penal consequences.

Therefore, I am of the view that the principle of natural justice is not violated by the impugned communication dated 23.12.2011.

Conclusion

50. In view of the above circumstances and the aforementioned reasons, I am of the view that the petitioners who have not got 3G spectrum allotted by the licensor in certain circles, cannot provide 3G services to its customers in those circles by way of making intra circle arrangement with the service providers having 3G spectrum.

51. Accordingly, these petitions are dismissed with cost quantified at Rs. 50,000/- for each petition.

/NC/

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(P.K. Rastogi)
Member