TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated: 29th April, 2014

Petition No. 518 of 2011
(M.A. No. 99 of 2013)

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

Petition No. 519 of 2011

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

Petition No. 520 of 2011

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

Petition No. 521 of 2011
(With M.A. No. 310 of 2013)

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

Petition No. 522 of 2011
(With M.A. No. 305 of 2013)

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

Petition No. 308 of 2013
(MA Nos.282 & 318 of 2013)

Idea Celluar Ltd. …Petitioner
Vs.
Union of India …Respondent

Petition No. 349 of 2013

Bharti Airtel Ltd. …Petitioner
Vs.
Union of India & Ors. …Respondents

Petition No. 353 of 2013
(With M.A.No.317 of 2013)

Vodafone South Ltd., New Delhi & Ors. …Petitioners
Vs.
Union of India & Anr. …Respondents

BEFORE:

HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON
HON'BLE MR. KULDIP SINGH, MEMBER

Petitioners/Applicant (in P.Nos.518 of 2011 & 353 of 2013)	:	Mr. Maninder Singh, Sr. Advocate Mr. Manjul Bajpai, Advocate Mr. Shashwat Bajpai, Advocate Mr. Saravjeet Kumar Thakur, Advocate Ms. Disha Sachdeva, Advocate Mr. Tejveer Singh Bhatia, Advocate
For Petitioners (in P.Nos. 519, 520 of 2011 and 308, 349 of 2013)	:	Mr. Maninder Singh, Sr. Advocate Mr. Gopal Jain, Advocate Mr. Ankur Sood, Advocate Ms. Stephanie V. Sonowane, Advocate
For Petitioners (in P.No.521 of 2011)	:	Mr. Meet Malhotra, Sr. Advocate Mr. Ravi S.S. Chauhan, Advocate
For Petitioners (in P.No.522 of 2011)	:	Mr. Manjul Bajpai, Advocate Mr. Shashwat Bajpai, Advocate

For Respondent – UoI(DoT)	:	Ms. Maneesha Dhir, Advocate Mr. K.P.S. Kohli, Advocate Ms. Neha Singh, Advocate
For Respondent – BSNL	:	Mrs. Suchitra A. Chitale, Advocate Ms. Eesha Mahapatra, Advocate
For Respondent – Reliance Communications Ltd.		Ms. Shally Bhasin, Advocate Mr. Nakul Mohta, Advocate

O R D E R

By Aftab Alam, Chairperson

The Dispute: its genesis

This batch of cases raises the question about the validity of what is loosely called as intra-circle 3G roaming. Or to put the matter in legalese: whether it is permissible for two mobile phone operators within the same service area/circle, one having its 2G network on the lower frequency 900 MHz (the primary GSM band) or 1800 MHz bands and the other, a 3G network on the higher frequency 2100 MHz band, to enter into a bilateral arrangement under which the subscribers of the former are able to roam on the 3G network of the latter?

The frequencies in 2100 MHz or 2.1 GHz (loosely called the 3G spectrum in this country) were allocated by the Central Government to different mobile phone operators on the basis of an auction. As everyone had known from before, owing to the limited availability of spectrum, no single operator was able to get the 3G

spectrums in all the 22 circles in the country; some operators got the 3G spectrums in some of the circles while some others got it in the other circles. And this actually gave rise to the situation where service operators that had got the 3G spectrums in certain circles but not in other circles joined hands to supplement and complement each other.

After the allocation of 3G spectrums was made to the operators in the respective circles where they were the highest bidders they completed the roll out obligations in terms of the licence and then entered into the arrangement, the validity of which is in question, in the following manner. Operator X might have secured the rights to use 3G spectrum in circle A but it does not have the right to use 3G spectrum in circle B where those rights are held by operator Y. In circle B though operator X has its 2G network from before working on 900 or 1800 MHz spectrum earlier allocated to it and similarly operator Y has its 2G network in circle A from before. Operators X and Y entered into an arrangement through a bilateral agreement that provided for the subscribers of X in circle B to roam on the 3G network of Y and *vice-versa* the subscribers of Y in the circle A to roam on the 3G network of X.

Here it must be said in fairness that the above was not a clandestine arrangement but it was entered into between the operators openly and after giving due intimation to the Telecom Regulatory Authority of India (TRAI) and the

Department of Telecommunication (the DoT). A copy of the agreement entered into by the operators was sent to TRAI. One of the petitioners before the Tribunal, Aircel Cellular Limited on 26 September 2011 informed the DoT that it had entered into an intra-circle roaming agreement with Tata Teleservices Limited, requesting the concerned authorities to test their systems and the authorities actually held a test of their centres.

The Union of India, acting through various agencies seems to have taken a while to take a view on the validity of the arrangement in question. For several months, even while the arrangement was in place and at work, TRAI, the DoT, and the different Term Cells appear to be speaking about it in different voices. But once the Central Government took a final view on the matter, it came down heavily upon the operators engaged in the arrangement. On 23 December 2011 it issued a communication, peremptorily instructing the operators engaged in intra-circle 3G roaming to discontinue the arrangement and to report compliance by the following evening. The petitioners are even aggrieved by the timing of the communication which according to them, was calculated to deny them recourse to the court. December 23 was a Friday and the courts and this Tribunal had closed for the winter vacation.

The Dispute does not get resolved

Anyhow, a number of operators, namely, (i) Vodafone Mobile Services Limited & others[1], (ii) Bharti Airtel Limited[2], (iii) Idea Cellular Limited[3], (iv) Aircel Cellular Limited and another[4] and (v) Tata Teleservices Limited and another[5] rushed to the Tribunal and were able to get an order on 24 December, 2011 giving them interim protection by restraining the Union of India from taking any coercive measures for enforcing the impugned order.

All the petitions were finally heard by a division bench[6] of the Tribunal but unfortunately the matter ended up in a divided judgment delivered on 3 July 2012. The Member took the view that intra-circle 3G roaming was in violation of the terms of the licence and hence, impermissible and all the five petitions were, therefore liable to be dismissed. The operative part of the judgment of the Member read as under:

> "**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."

[1] Petition no. 518 of 2011
[2] Petition no. 519 of 2011
[3] Petition no. 520 of 2011
[4] Petition no. 521 of 2011
[5] Petition no. 522 of 2011
[6] The Chairman sitting with a Member.

The Chairman, however, took the contrary view. In a very long and exhaustive judgment that dealt with every conceivable issue arising in the case, he decided almost all the points relating to the merits of the case in favour of the petitioners. He additionally held that the impugned letter being issued without giving the operators an opportunity of hearing was also in violation of principles of natural justice. On behalf of the respondents it was urged that the Tribunal should examine and decide the validity of the intra-circle roaming agreements entered into by the operators-petitioners. But the Chairman in his judgment declined to go into that question and left it open to the concerned authority in the DoT to examine that aspect of the matter and pass a fresh order after giving the petitioners an opportunity of hearing. The Chairman's judgment, in the end, set aside the impugned order with the following directions:

> "212. Learned Additional Solicitor General as also Ms. Dhir have raised a specific contention that the agreements entered into by and between the parties hereto inter-se are violative of the conditions of licence as by reason thereof spectrum was being shared and/or sub-licenced. Although, this Tribunal has heard learned counsel for the parties at great length on the construction of the said ICR agreements, I am of the opinion that the said question need not be finally answered. The Respondent at the time of passing of the impugned order did not have with it the copies of the agreements.
>
> The copies of the said agreement had been supplied to the Respondents only in terms of the order passed by this Tribunal.
>
> Such a question having not been gone into by the DoT while passing the impugned order and in fact it could not have been gone into in view of the fact that the copies of the agreements been not with it and furthermore the

DoT itself being of the opinion that roaming facilities would not amount to sharing of spectrum, at least it should give an opportunity of hearing.

It would, therefore, not be fair to pronounce finally on the said issue and the purpose would be sub-served if the Respondent is given liberty with regard thereto and take a decision upon giving an opportunity of hearing to the Petitioners and/or the holders of 3G spectrum.

If such a notice is issued, the Respondent upon considering the cause shown by the proceedees may pass appropriate orders.

It goes without saying that in the event the Respondent ultimately holds that the said ICR agreements are violative of the conditions of licence, it would be open to it to make such consequential orders as it may think fit and proper.

213. It has been noticed heretobefore that the TRAI in its recommendations did not positively say that the ICR agreements entered into by the Petitioners were violative of the terms and conditions of the licence. It has assigned several reasons suggesting that the licensees should not be allowed to continue to do so as by reason thereof inter-alia the Central Government would lose a lot of revenue. But then, as noticed heretobefore, its views were prima-facie in nature. The same were to be accepted by the DoT.

It would, therefore, be reasonable to hold a final decision that DoT would consider the terms and conditions of each ICR agreement separately, so that the terms and conditions contained therein may be analysed and the decisions therefor are rendered thereafter.

Conclusion

214. For the reasons aforementioned, these Petitions are allowed, the impugned orders dated 23.12.2011 are set aside with liberty to the Respondent to pass appropriate orders upon giving due opportunity of hearing to the Petitioner.

In the facts and circumstances of the case, there shall be no order as to costs."

At that time there was no third Member in the Tribunal for the hearing of the cases to proceed in terms of section 14 (K) of the Act. On 2 November 2012 the Chairman retired and a few months later the only remaining Member too retired on

18 February 2013. The Tribunal was thus rendered non-functional until 17 June 2013 when it restarted functioning after the appointments of a new Member and a new Chairman.

Thus after the split verdict rendered by the Tribunal the position was that the petitioners-operators continued to enjoy the interim protection granted by the Tribunal while the controversy had ended up in a stalemate with no prospects of its early resolution.

At this stage Aircel and Tata Teleservices that were only running some pilot projects till then and were yet to offer intra-circle 3G roaming facility to their respective subscribers on a commercial basis, suspended their bilateral services.

Developments During the Period the Tribunal Remained Non-functional:

In order to get over the impasse, the Union of India decided to act as directed in the judgment by the Chairman (the judgment by the Member was in any way in their favour!). On 28 September 2012 it issued a notice to Bharti Airtel limited to show cause why penalty should not be imposed against it for being engaged in intra-circle roaming in violation of the licence. Bharti promptly challenged the notice before the Delhi High Court in W. P. (C) no.6334 of 2012. The writ petition was disposed of by the High Court in consent terms by order dated 3 October 2012. By that order Bharti was granted liberty to file its reply to the notice and the Union of India, in turn, was asked to adjudicate on the dispute

after giving Bharti an opportunity of hearing and further, to not take any coercive action against Bharti till a final order was passed on its show cause. The operative order of the High Court in that writ petition is as under:

> "After arguing the matter for some time for the irrespective sides, both Dr. Singhvi and Mr. Rajeeve Mehra, learned ASG submittedthatthe writ petition can be disposed of on the following agreed terms:
>
> > The petitioner would file a reply to the impugned show cause notice dated 23.12.2011. On receipt of the reply, the concerned authority will adjudicate upon the issues raised before it, after according the petitioner, through its representative, a hearing in the matter.
> >
> > The petitioner, however, shall file with the adjudicating authority, a list of its new customers as well as remuneration received in respect of the services in issue.
> >
> > Pending the adjudication, the respondent will not take any coercive measures against the petitioner.
> >
> > In case the adjudication results in an order, which is adverse to the interest of the petitioner, it will have liberty to take recourse to a remedy, which may be available toit in law.
>
> With the aforesaid directions in place, the writ petition and the application are disposed of."

Another mobile phone operator, namely Reliance Communications Ltd. though not a party to the said writ petition challenged the order dated 3 October 2012 passed by a learned single judge of the High Court in LPA No.838/2012 on the plea that granting interim protection to Bharti and thus allowing it to continue providing 3G services under intra-circle 3G roaming agreements with other operators in areas for which Bharti itself did not have the license was prejudicial to its interests. The LPA was disposed of by a Division Bench by order dated 20 December 2012. It slightly modified the order passed by the single judge and

made the adjudication by the DoT time-bound. The operative order in the LPA is as under:

> "8. We are however unable to agree. We rather find that the DoT, by issuance of the notice dated 28th September, 2012, has found a way around the imbroglio created by the split verdict aforesaid of the TDSAT. Rather than awaiting the appointment of another Member of the TDSAT and hearing before such Member and awaiting the decision, DoT has issued show cause notice It is worth mentioning that the Chairperson of TDSAT quashed the order dated 23rd December, 2011 for the reason of the same having been issued without complying with the principles of natural justice. DoT, by issuing the notice dated 28.09.2012 is now complying with the principles of natural justice. The learned Single Judge has rightly, with the consent of the counsels, granted an opportunity of hearing to the respondent no.2.
>
> 9. xxxxxxxxxxxxxxxx
>
> 10. The learned ASG after obtaining instructions states that a response to the Notice dated 28th September, 2012 has already been filed by the respondent no.2; that a Committee for adjudication will be constituted within a period of one week from today and the said Committee will fix the date for hearing within two weeks therefrom and the hearing will be concluded in a further period of two weeks, provided the respondent no.2 does not take any adjournment; the final order will be passed within a period of four weeks from the conclusion of the hearing.
>
> 11. xxxxxxxxxxxxxxxxx
>
> 12. In view of the aforesaid, we dispose of this appeal with the following directions:
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> (i) The respondent no.1 shall constitute a Committee for adjudication as to the Notice dated 28th September, 2012 within a period of one week from today.
> (ii) The Committee shall fix the hearing within a period of two weeks therefrom.
> (iii) The hearing will be concluded in a period of two weeks from the date fixed by the Committee and the respondent no.2 shall cooperate with the adjudication proceedings and hearings.
> (iv) The Committee shall conclude the proceedings and pass orders in a period of four weeks from conclusion of hearing.

> 13. Since this time schedule is suggested on the submissions of learned ASG, we expect that the Committee to adhere to the time schedule."

On the same day on which the above order was passed in Reliance's LPA, the Division Bench also took up a PIL[7] which was filed earlier seeking a direction to the Union of India to restrain the licensees of 3G services from providing the said services in circles for which they do not hold the 3G license by entering into agreements with others. It was then disposed of (with liberty to apply for revival later, depending upon the order passed by the Tribunal) as the matter, at that time, was at an advanced stage before the Tribunal. After the split verdict by the Tribunal, however, an application was made for revival of the PIL which was taken up by the court immediately after the Reliance's LPA was disposed of. In the LPA the Court referred to the order passed by it on Reliance's LPA and then passed the following order:

> "6. We have today disposed of the said LPA by making the said adjudication proceedings time bound.
>
> 7. We, in the circumstances enquired from the learned ASG as to why the procedure which has been adopted by UOI against the respondent no.5 Bharti Airtel Ltd. cannot be adopted against respondent no.6 M/s Idea Cellular Ltd. and respondent no.7 M/s Vodafone Essar Mobile Services Ltd. also. The learned ASG after obtaining instructions has informed us that similar notices as issued to the respondent no.5 Bharti Airtel shall also be issued to the respondent no.6 M/s Idea Cellular Ltd. & respondent no.7 M/s Vodafone Essar Mobile Services Ltd. as well as to others similarly placed, within one week from today. He further states that time of

[7] WP (C) 7189 of 2011: Yakesh Anand Vs Union of India and others.

> 60 days is required to be given for filing of reply and thereafter the said notices shall also be adjudicated in a time bound manner keeping in view the time schedule fixed by us in our order of today in LPA No.838/2012.
>
> 8. We are of the opinion that the UOI, by adopting the modus aforesaid of issuing the show cause notices, has got over the imbroglio which was prevailing owing to the conflict aforesaid of the TDSAT.
>
> 9. We had earlier disposed of the petition since TDSAT was seized of the dispute. Revival of the writ petition was sought pleading that the proceedings before TDSAT had come to naught owing to the split judgment aforesaid and there being till date no third member to resolve the said conflict. Now that a via media has been found to the said situation, the position which prevailed as on the date when the writ petition was disposed of stands restored and it is not necessary for this Court to go into the issues raised in the writ petition, till the UOI itself takes a decision and/or challenge, if any thereto, is brought.
>
> 10. xxxxxxxx.
>
> 11. We accordingly dispose of this application for revival of the petition as, in view of aforesaid, no need is felt at this stage for revival of the petition."

Following the orders passed by the High Court, Bharti submitted its reply to the show cause notice on 26 November 2012. And on 21 December 2012 the Union of India issued similar show cause notices to Vodafone, Idea, Aircel and Tata Teleservices.

Bharti was given a hearing on 4 January 2013 and it submitted the written submissions on 16 January. The Committee constituted in terms of the High Court order then passed a detailed order rejecting Bharti's reply to the show cause notice

and directed it to immediately discontinue the arrangement under which it was providing 3G services to its subscribers in circles where it did not have the 3G spectrum (in 2100 MHz band). By this order the DoT's Committee also imposed on it a penalty of Rs.350 crores[8].

Vodafone submitted its reply to the show cause notice on 19 February 2013. It was, however, not given any oral hearing and a similar order as in the case of Bharti, was passed against it on 5 April 2013 and only afterward it was intimated by letter dated 26 June 2013 that it could make a representation on the order dated 5 April. Vodafone wrote back asking for the letter to be withdrawn on the ground that the matter was sub-judice.

Idea submitted its reply to the show cause notice on 18 February 2013.And a similar order of penalty was passed against it as well, without affording to it, like Vodafone, any opportunity of hearing.

Aircel and Tata Teleservices submitted their replies to the show cause notices on 18 February 2013; Aircel also filed a further clarification on 22 May 2013. They were given a hearing on 2 July 2013 but in their case the Committee passed no final order.

[8] @ Rs.50 crores for each of the 7 licences; the maximum stipulated under the licence.

All the three operators against whom penalty orders were passed took the matter to the High Court. Bharti filed a writ petition[9] challenging the penalty order dated 15 March 2013 and was able to obtain, from a learned single judge an order dated 18 March staying the operation of the impugned order of penalty. Once again Reliance that was not a party to Bharti's writ petition intervened in the matter and filed LPA no. 189 of 2013 against the order of the single judge granting stay in Bharti's favour. The division bench by order dated 4 April 2013 stayed the order passed by the single judge. Bharti challenged the order of the division bench before the Supreme Court in SLP (C) of 2013; CC 8417 of 2013. The Supreme Court restored the protection against the order of penalty but at the same time restrained Bharti from taking in any new subscribers on its intra-circle 3G roaming arrangement. The interim order passed by the Supreme Court on 11 April 2013 is as under:

> "11. In the meantime, the petitioner shall not extend the facilities available to any new customer on the basis of the Intra Circle Roaming Arrangements.
>
> 12. Subject to the aforesaid condition, no coercive steps shall be taken on the basis of impugned Demand Notice."

[9] W.P. (C) no. 1766 of 2013

Following the order passed by the Supreme Court, the following day the High Court passed interim orders in the same terms in the cases filed on behalf of Vodafone[10] and Idea[11].

In July 2013, as noted above, this Tribunal resumed functioning and consequently the High Court dismissed Bharti's writ petition on 13 September 2013 with liberty to approach this Tribunal. Following the dismissal of the writ petition by the High Court, the Supreme Court on 23 September 2013 dismissed the SLP/appeal arising from the High Court's interlocutory order passed in the writ petition with the direction to the Tribunal to adjudicate upon the issues involved in the case. Idea and Vodafone similarly withdrew their writ petitions filed before the High Court challenging the penalty orders passed against them on 5 August and 4 September respectively with liberty to move the Tribunal.

The Dispute Comes Back to the Tribunal:

All the three operators faced with the penalty orders then came to this Tribunal. Bharti filed Petition no. 349 of 2013 challenging the penalty order dated 15 March 2013 passed against it for engaging in intra-circle 3G roaming arrangement. Vodafone and Idea similarly filed Petitions nos. 353 of 2013 and 308 of 2013 respectively challenging the penalty orders dated 5 April 2013 passed against them. On admission, these three cases were connected with the five

[10] W.P.(C) no. 2221 of 2013
[11] W.P.(C) no. 2222 of 2013

petitions filed earlier against the order dated 23 December 2011 that remained pending for final disposal after the split verdict of the Tribunal in those cases.

From the above it is evident that so far as Bharti, Vodafone and Idea are concerned the controversy has taken a fresh turn after the split verdict by the Tribunal. In their case the earlier petitions[12] filed by them challenging the earlier order issued by the DoT directing them to discontinue the intra-circle 3G roaming arrangement lost practically all relevance as after the split verdict they were given a show cause notice and fresh orders were passed in their case after they submitted their replies to the show cause notice. Bharti was also given a hearing before passing the order. In case of Aircel and Tata Teleservices, however, the controversy rested at the same stage at which the matter had earlier come before the Tribunal, that is, against the order dated 23 December 2011 for, though show cause notices were given to them as well, no final order was passed in their case.

When the hearing of these cases commenced and as the above-described developments came to light, on 30 October 2013, the Tribunal passed the following order to define the parametre of hearing of the matter.

> "Let it be noted that the Tribunal intends to address the core of controversy between the two sides namely, whether it is valid and permissible for a non-3G operator in a circle to enter into an arrangement with a 3G operator in the same circle by means of a bilateral agreement to enable the subscribers of the former to roam over and use the 3G network of the latter.

[12]Bharti: Petition no. 519 of 2011
Vodafone: Petition no.518 of 2011 and
Idea: Petition no. 520 of 2011

> Addressing the main question directly will cut across a number of preliminary and anciliary issues that are likely to arise in the hearing of the first batch of five cases and it would thus avoid going into issues that may not be fully relevant to the main controversy and save quite a lot of time.
>
> Needless to say that all contentions of both sides on the merits of the cotroversy are expressely left open.
>
> At this stage, however, it needs to be noted that in so far as Aircel Cellular Ltd. & Anr. and Tata Teleservices Ltd. & Anr. (being the petitioners in Petition Nos. 521 and 522 of 2011 respectively) are concerned, they are not affected by the developments after the split verdict and in their case no final order was passed by the committee/DoT constituted pursuant to the order of the High Court. Mr. Meet Malhotra and Mr. Manjul Bajpai appearing for the petitioners in the aforesaid two petitions, therefore, submitted that their clients have not filed any fresh petitions and they would defend the validityof the arrangement on the basis of their earlier petitions.

After this order Aircel[13] and Tata Teleservices[14] filed applications making the formal prayer that their petitions on which a split verdict was rendered may be heard and finally decided.

Defining the Parametre of Adjudication:

Our intent, as indicated in the order of 30 October 2013, is to finally decide the controversy concerning the validity of the intra-circle 3G roaming arrangement. But before proceeding to examine the contentions of the parties on merits, it is necessary to take note of a number of submissions made on behalf of the petitioners. Mr. Maninder Singh, learned senior counsel appearing for Vodafone submitted that in *Union of India Vs Association of Unified Telecom Service*

[13] M.A. no. 310 of 2013
[14] M.A. no. 305 of 2013

Providers of India[15] it is held by the Supreme Court that a licence (the Unified Access Services Licence) granted to the operators-petitioners by the Union of India under section 4 of the Indian Telegraph Act is in the nature of a contract. It followed, according to Mr. Singh, that being a party to the contract it was not open to the Union of India to unilaterally find the other party to the contract guilty of its breach and to impose penalty for the self-asserted breach. Only court could decide whether or not there was any breach of the contract. In support of the submissions Mr. Singh relied upon the decisions of the Supreme Court in *State of Karnataka Vs. Shree Rameshwara Rice Mills*[16], paragraphs 7 and 8 and *J.G. Engineers (P) Ltd. Vs Union of India*[17], paragraphs 17-20 and a decision of the Rajasthan High Court in *State of Rajasthan Vs. Nathu Lal*[18], Dr. Singhvi, learned senior counsel appearing for Bharti similarly argued that the intra-circle 3G roaming arrangement was based on an agreement entered into by two competent (corporate) persons. He further submitted that a contract could only be nullified through the judicial process by a competent court but in this case the order of the DoT directing the operators to discontinue the intra-circle 3G arrangement and the decision of the Committee imposing penalty against the operators amounted to undoing a validly executed contract between two parties.

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[15] (2011) 10 SCC 543
[16] (1987) 2 SCC 160
[17] (2011) 5 SCC 758
[18] AIR 2006 Raj 19

Mr. Singh appearing for Vodafone and Mr. Gopal Jain appearing for Idea further contended that the penalty orders passed by the Committee against Vodafone and Idea are in any event completely unsustainable as the orders were passed without giving any opportunity of hearing to the two operators in violation of the principles of natural justice.

We have noted the submissions for the sake of the record but we do not propose to dilate on these issues because we intend to go to the root of the matter so as to conclude the controversy, which is already in the third round of litigation.

Some Technical Issues

For a proper appreciation of the controversy it will be useful to have some basic idea of certain technical issues and the phenomenon of "roaming", relevant to the present.

Electro-magnetic radiation/waves have an enormously vast range of frequencies and depending upon their frequencies are naturally useful, or with the advances in technology are put to many different kinds of use for the mankind. To name a few, audible sound (from 20 hertz to 24000 hertz) and visible light (from 3 trillion hertz, seen as red to 750 trillion hertz, seen as violet) allow us to hear and see, *e-m* radiations in the micro-waves spectrum are used for cooking food and x-radiations are used for diagnostic and high energy (i.e., higher frequency) x-rays

for therapeutic purposes. *E-m* waves within a broad range of frequencies are also used for everyday communication services as highlighted in the following table[19].

E-m Characteristics and Communication Services

Frequency Range	Communication Services
Very Low Frequency (VLF) **3-30 kHz** • passes easily through objects	• submarine communications
Low Frequency (LF) **30-200 kHz**	
Medium Frequency (MF) **300 kHz-3 MHz** • ground waves (during day and night) • sky waves (at night only)	• broadcast AM radio: 535-1605 kHz
High Frequency (HF) **3-30 MHz** • behaves similarly to MF • also affected by seasons (summer versus winter)	• shortwave radio: 5.9-26.1 MHz
Very High Frequency (VHF) **30 MHz-300 MHz** • direct waves only	• broadcast FM radio: 88-108 MHz • broadcast television: 54-88, 174-216 MHZ
Ultra High Frequency (UHF) **300 MHz-3 GHz** • behaves similarly to VHF • greater absorption, interference than VHF (due to higher frequencies)	• broadcast television: 470-806 MHz • **cellular telephone: 824-849 (uplink), 869-894 MHz (downlink)** • **global positioning system: 1.56-1.61 GHz** • **low Earth orbiting satellites (LEOs):* 1.61-1.63, 2.48-2.50 GHz** • **personal communication service (PCS): 1.85-1.99 GHz**
Super High Frequency (SHF) **3 GHz-30 GHz**	• DBS satellites (Ku-band): 14 GHz uplink, 11 GHz downlink • satellites (Ka-band): 27.5-30

[19]Communications Law and Policy by Jerry Kang.

	GHz uplink, 17.7-20.2 GHz downlink
Extremely High Frequency (EHF) 30 GHz and above	

*Used for global telephone and data service, especially to isolated areas.

From the above table it would appear that *e-m* waves with the frequency range between 300 MHz to 3000 MHz (or 3GHz) are used for mobile telephony while other frequencies are used for other kinds of telecommunication. In order to ensure interoperability between networks in different countries and to maintain an international standard the definition of frequency bands for different kinds of telecommunication technologies is made by International Telecommunication Union (ITU), which is an agency of the UN. From within the broad range defined by ITU, different countries make allocation of frequencies for different specified uses in the country. In India the task is assigned to the Wireless Planning and Co-ordination Wing (WPC) of the Ministry of Communications, Department of Telecommunications, Government of India. In India WPC Wing of the DoT makes allocation of frequency spectrums for specified purposes, having regard to the Defence needs and the objects of rapid growth of telecommunications in the country, collection of revenue, commercial demands and other relevant considerations as envisaged under the National Telecom Policy framed by the Government of India. The spectrum allocated by WPC can only be utilised for the specified purpose and for no other purpose.

In India mobile telephony was first introduced in the year 1994-95 and at present is based on two different technologies, namely Global System for Mobile Communication **(GSM)** and Code Division Multiple Access **(CDMA)**. The GSM uses Time Division Multiple Access (TDMA) over Frequency Division Duplex (FDD) carriers and CDMA is a spread spectrum technology. In CDMA, the channel bandwidth of each carrier frequency is much larger (1.25 MHz) than GSM (200 KHz).

In India 800 MHz is the assigned frequency band for CDMA technology. Multiple paired channels of 1.25 MHz bandwidth are allotted which are used to provide both voice and data services. Hence, 2.5 MHz in 800 MHz band actually means 2x1.25 MHz, that is, 2 channels of 1.25 MHz bandwidth for the uplink and 2x1.25 MHz, that is, two channels of 1.25 MHz bandwidth for the downlink. The channels or the spectrum can be allotted in the multiples of pairs of 1.25 MHz (one uplink + one downlink).

The GSM was originally designed for operation in 900 MHz band but it was soon adapted for 1800 MHz. The introduction of GSM into North America meant its further adaptation to 800 and 1900 MHz bands. **In India** GSM operators were initially allotted 4.4 MHz spectrum in **900** MHz band. Each channel in GSM technology is 200 KHz wide and is allotted in pairs, one for uplink and one for

downlink. 4.4 MHz spectrum, therefore, means 22 channels/frequencies, each 200 KHz wide, totaling to 22x200 KHz, that is, 4.4 MHz. Being paired, it is actually 4.4 + 4.4 MHz for uplink and down-link. Subsequently, **1800 MHz** band was also assigned for GSM with the channel remaining the same, that is, 200 KHz in pairs. Over the years, the versatility of GSM has resulted in the specifications being adapted to many more frequency bands to meet niche markets.

In the past decade, GSM has completely overtaken CDMA and at present GSM is the standard by which the vast majority of mobile hand-sets work in India, Europe and many other parts of the world.

3G Services

3G is defined in Newton's Telecom Dictionary[20] as under:

> "Third Generation Mobile System. …….. 3G is the generic term for the third generation of wireless mobile communications networks. Most commonly, 3G networks are discussed as graceful enhancements of the GSM cellular standards. Thereby, existing GSM networks can be upgraded on a non-disruptive basis. The enhancements include **greater bandwidth, more sophisticated compression techniques, and the inclusion of in-building systems**. 3G networks will transmit data at 144 kilobits per second, or up to two megabits per second from fixed locations. This planned evolution of GSM is an integral part of the ITU-T's vision of IMT-2000. 3G will, theoretically, standardize three mutually incompatible standards: FDD, TDD, and CDMA2000. FDD and TDD are extensions of GSM architecture using CDMA technology in the air interface. CDMA2000 is the extension of IS95 air interface for wideband data applications."

IMT-2000 (International Mobile Telecommunications-2000) vision can thus be described as a family of technologies for 3rd Generation mobile

[20] 26th Updated & Expanded Edition.

communications. The objectives of this family concept include an assurance of global roaming and interoperability between the various technologies.

3G was initially marketed as a way to make video calls on the mobile network but it is also a highly efficient way of browsing the internet and communicating on a smartphone using voice over IP and by email and instant messaging. It is fast becoming a common way to connect while at places, e.g. roads, which are not covered by Wi-Fi.

3G spectrum

In India, 2.1 GHz (or 2100 MHz) is the assigned frequency band for 3G technology in case of GSM (And hence, the common name "3G spectrum"). As per the standards, the channels for 3G technology are 5 MHz wide and, therefore, the spectrum or bandwidth for 3G technology in case of GSM is allotted in multiples of 5 MHz paired channels/frequencies. In India, so far none of the licensees has been allotted more than 5 MHz bandwidth (spectrum) for 3G.

Concept of Roaming in GSM

Roaming is a general term referring to the extension of connectivity service in a location that is different from the home location where the service was registered. Roaming ensures that the wireless device is kept connected to the network, without experiencing any break or interruptions/losing the connection. Traditional GSM Roaming is defined (vide GSM Association Permanent

Reference Document AA.39) as the ability for a cellular customer to automatically make and receive voice calls, send and receive data, or access other services, including home data services, when travelling ***outside the geographical coverage area of the home network*, by using a visited network.**

How Roaming works

To understand how roaming works, it is necessary to first know about the Home Location Register (HLR) and the Visitor Location Register (VLR). The HLR is a database in the home network of the subscriber where the subscriber is defined/created. The HLR contains the information about the subscriber, including the details of services available to it. The VLR contains a copy of most of the data stored in the HLR. It is, however, temporary data that exists for only as long as the subscriber is "active" in the particular area covered by the VLR. The VLR database will, therefore, contain some duplicate data as well as the current location of the subscriber. As the subscriber moves from one area to another, its location is constantly updated in the VLR.

When a subscriber moves into an area **outside the geographical area of its home network**, the visited network first verifies with reference to the subscriber data stored in the subscriber's home network, the subscriber's authentication and authorisation for using the network services at the place of visit and finding a positive response extends the facilities to the visiting subscriber as may be

authorised in the plan with the home network. Needless to say, all this takes place within a fraction of seconds and without the subscriber experiencing any significant break in the service.

Two operators, the roaming partners, generally enter into roaming agreements and the GSM Association broadly outlines the content of such roaming agreements in standardized form for its members.

Types of Roaming

The following main types of roaming are well known of which practical examples may be found in different parts of the world:

Regional Roaming

This type of roaming refers to the ability of moving from one region to another region inside national coverage of the mobile operator. Initially, operators may provide commercial offers restricted to a region (sometimes to a town). Due to the success of GSM and the lowering down of the cost, regional roaming is rarely offered to clients except in nations with wide geographic areas like the USA, Russia, India, etc., in which there are a number of regional operators.

National roaming

This type of roaming refers to the ability to move from one mobile operator to another in the same country (in countries where a nationwide license is issued). For example, a subscriber of T-Mobile USA who is allowed to roam on AT&T

Mobility's service would have national roaming rights. For commercial and license reasons, this type of roaming is generally not allowed unless under very specific circumstances and strict regulatory scrutiny. It is, however, employed to create a more competitive market when a new operator is assigned a mobile telephony license, by allowing the new entrant to offer coverage comparable to that of established operators (by requiring the older operators to allow roaming to the subscribers of the new entrant while the new comer has time to build up its own network).

International roaming

This type of roaming refers to the ability to move to the network of a service provider abroad. It is of particular interest to international tourists and business travelers.

Inter-standards roaming:

Inter-standard roaming refers to roaming between two different standards (technologies). This term is now widely used in mobile communications where especially CDMA customers want to use their phones in areas where there is no CDMA network or there is no roaming agreement in place to support roaming on the used standard. In Europe there is hardly any CDMA network. Most CDMA customers originate from the Americas or the Far East. In order to enable them to roam in Europe, inter-standard roaming is the handy solution.

Since mobile communication technologies have evolved independently across continents, there is a significant challenge in achieving seamless roaming across these technologies. However, a number of the standards-making industry-bodies came together to define and achieve interoperability between the technologies as a means to achieve inter-standards roaming. This allows the CDMA customers arriving in Europe to register on the available GSM networks. Typically, these technologies were implemented in accordance with technological standards laid down by different industry bodies and hence, the name.

Permanent Roaming

This type of roaming refers to customers who purchase service with a mobile phone operator intending to permanently roam, or be off-network. This becomes possible because of the increasing popularity and availability of "free roaming" service plan, where there is no cost difference between on and off network usage. The benefits of getting service from a mobile phone operator that isn't local can include cheaper rates, or features and phones that aren't available on local mobile phone operator, or to get to a particular mobile phone operator's network to get free calls to other customers of that mobile phone operator through a free unlimited mobile to mobile feature.

The above covers the majority of roaming types in vogue though there are some other types which are rarely used.

Roaming in India

In the context of India, the **inter-circle roaming** is similar to the regional roaming where each circle is one region and when a subscriber moves from one circle to the other, it is called inter-circle roaming. **Intra-circle roaming in India is similar to National roaming as described above, where roaming is permitted between different operators in the same geographical (license) area**. However, while intra-circle roaming is permitted in India based on bilateral commercial agreements, it is not mandatory for any operator, existing or otherwise, to provide such roaming to any other operator.

Mobile Virtual Network Operator (MVNO)

These are service providers who provide mobile service to the subscribers using the resources of a Mobile Network Operator (MNO). There are different types of MVNOs. However, it is generally accepted that the MVNOs do not have any spectrum. On the one extreme, there are MVNOs who have no network at all and use the platform of MNOs. Generally such MVNOs buy minutes of usage in bulk from the MNOs and resell these in retail or bundle these with some other services that they sell to their customers. On the other extreme, there could be MVNOs who have their own core network but use the radio resources and spectrum of the MNO.

The Facts:

Now a look at the relevant facts. In November 2003, the DoT announced Unified Access Service Licence policy under which the licence-holder was permitted to provide all types of services, namely, fixed and mobile services that included all types of access services, internet telephony, internet services and broadband services comprising triple play i.e. voice, video and data. On 27 September 2006, TRAI made recommendations for introduction of services based on 3G technology; TRAI also recommended 2100 MHz band as the carrier frequency for 3G technologies. On 1 August 2008, the DoT issued 3G Spectrum Guidelines for allotting frequencies in 2.1 GHz (or 2100 MHz) band for providing high speed data and video services **under the existing UAS licences.** And on 9 December 2008, the DoT accepted TRAI's recommendations for auction of 3G spectrum.

On 25 February 2010, the Government of India, Ministry of Communications & IT in the DoT issued a Notice Inviting Applications for auction of 3G and BWA spectrums. The NIA is a voluminous document. It began with the introduction in paragraph 1.1 stating as under:

> "The Government of India (the "Government"), through the Department of Telecommunications ("DoT"), proposes **to allot the rights to use certain specified radio spectrum frequencies in the 2.1 GHz band (the "3G Spectrum")** and in 2.3 GHz band (unpaired) (the "BWA Spectrum") by means of auction in various telecom service areas in India."
>
> (emphasis added)

Paragraph 1.3 of the NIA provided that auction of 3G spectrum and BWA spectrum would be conducted through separate processes and paragraph 2.1 laid down as under:

> "Rights to use spectrum at specified frequencies in the following bands (subject to fulfilment of eligibility conditions, relevant licence conditions and any particular conditions related to specific frequency blocks) for a period of 20 years (from the date of award of right to commercially use the allocated spectrum block) are being offered for award.
>
> **3G Auction**
>
> - 2.1 GHz, paired, in blocks of 5 MHz, i.e. each block of 2X5 MHz.
>
> **BWA Auction**
>
> - 2.3 GHz, unpaired, in blocks of 20MHz.
>
> Spectrum usage rights shall be awarded separately for specific service areas.
>
> **The spectrum shall not be used for any activity other than the activities for which the operator has a licence. The award of spectrum by itself does not confer the right to provide services. For instance, in order to provide mobile telephony using the 3G Spectrum, the Successful Bidder will also need to possess or acquire, as the case may be, a UAS/CMTS licence for the relevant service areas.** Similarly, in order to provide BWA services using the BWA Spectrum, the Successful Bidder will also need to possess (or acquire) a UAS/CMTS/ISP-category 'A' licence. The detailed conditions that must satisfied by potential Bidders in order to participate in the various Auctions are described in Section III.
>
> In the case of the 3G Auction, the Government has decided to assign by auction three or four blocks of 5MHz of paired spectrum in the 2.1 GHz band in each of the 22 service areas, as per details given in Table 2 below."

A table giving the details of the quantum of spectrum available for auction in different service areas and the reserve prices for the spectrum in the metro and the other categories of the service areas followed the above.

Paragraph 3 (with its many sub-paragraphs) dealt with the conditions to be satisfied by the prospective bidders in order to participate in the auction. Paragraph 4 (with its many sub-paragraphs) contained the general conditions and paragraph 4.6, dealing with assignment of spectrum provided as under:

> "**4.6 Assignment of spectrum**
>
> *Existing licensees*
>
> - Upon receipt of the Successful Bid Amount, the DoT (WPC) shall issue a Letter of Intent allocating the frequencies to the Successful Bidder ("allocation of frequency");
>
> - Necessary amendments to enable use of frequency allocated by WPC for provision of services under applicable license (including migration to ISP category 'A' licence, if applicable) shall be made to the existing UAS/ CMTS/ ISP licence ("assignment of frequency") of the Successful Bidder or its nominated entity (as applicable), within 15 days of DoT receiving an application for such amendments;
>
> - In case of Bidders that have existing UAS/ CMTS licences in both Chennai and Tamil Nadu (excluding Chennai) service areas and in case the Group Bidding Entity is successful in the Auction for Tamil Nadu (including Chennai), then the Bidders have to provide Undertakings and Board Resolutions of both the licensee companies (as applicable) confirming that their UAS/ CMTS licences of Chennai and Tamil Nadu (excluding Chennai) service areas shall be merged as per DoT letter no. 842-503/2005-VAS/5 dated 15th September, 2005. A copy of the letter is available on the DoT website;
>
> - It may be noted that after assignment of 3G Spectrum, the licensees shall be allowed to utilise the spectrum for commercial operations only from 1st September, 2010. However, in the meantime, they can take steps to enable launch of commercial operations;
>
> - Successful Bidders in the BWA Auction can use the assigned frequency for commercial purposes immediately after assignment as per the terms of the applicable licence.
>
> *New entrants*
>
> - Upon receipt of the Successful Bid Amount, the DoT (WPC) shall issue a Letter of Intent allocating the frequencies to the Successful Bidder;

- Upon the Successful Bidder obtaining a UAS licence or an ISP-category 'A' licence, as applicable, the DoT shall assign the specified spectrum;

- In case the Successful Bidder acquires an existing licensee, necessary amendments to the licence of the acquired entity will need to be made prior to assignment of spectrum;

- It may be noted that after assignment of 3G Spectrum, the licensee shall be allowed to utilise the spectrum for commercial operations only from 1st September, 2010. However, in the mean time, they can take steps to enable launch of commercial operations"

Telecom in this country, in the year 2010 used to be (as it still is) a new, major and highly vibrant and rapidly expanding sector and the introduction of 3G technology with limited availability of spectrums as the carrier was bound to give rise to a number of questions in the mind of the operators,.

And hence, Paragraph 8.1 in the NIA provided for further enquiries. The relevant paragraph is as under:

"**Contacts for further enquiries**

Enquiries, if any, may be directed to the following e-mail address: "spectrum-dot@nic.in" upto 10 calendar days before the last date for submission of applications.

The Government may or may not respond to any query, in part or full, at its sole discretion. **In case it responds to any query, the respondent shall be made public.** However, the identity of the person making the query will not be disclosed, to the extent possible.

Further contact details for support during the e-auction will be separately provided to the eligible Applicants."

(emphasis added)

As anticipated, many queries were received by the DoT and all those queries along with the responses were compiled in a document titled as "Auction of 3G

and BWA Spectrum: Queries and Responses". An "important notice" in which the Government's responses were hedged with countless qualifications, however, preceded the document.

The petitioners, along with others, submitted applications for participation in the auction for 3G spectrums which was held in the month of May 2010. On 25 May 2010, the DoT published results of the auction and also separately issued directions for payments by the successful bidders. On receipt of payments, the DoT issued to the licensees the Letter of Intent (LoI) earmarking 3G spectrum under UAS/CMTS licence– reg.

The Letter of Intent dated 11 June 2010 issued to Vodafone for Delhi Service Area is taken here as a sample. The LoI earmarked the specified spectrum for provision of licence services. Para 3 of the LoI however stipulated that the earmarking of spectrum under the LoI was only for taking steps towards import of equipment, obtaining SACFA clearance, network planning, testing etc. and the commercial launch of services using the earmarked spectrum was permitted only after 1 September 2010. In paragraphs 5 and 6 of the LoI, it was further stated as under:

> "5. You are requested to approach Access Service (AS) Division of DOT to get necessary amendments made in the UAS/CMTS Licenses of the above Telecom Service Areas for authorization to use the above spectrum for provision of Telecom Access Services before commercial launch and submit the same to this office for issue of regular assignment/ Wireless Operating license.

> 6. This LOI is subject to all the terms and conditions of the Notice Inviting Applications for auction of 3G and BWA spectrum No.P-11014/13/08-PP dated 25th February 2010."

On 1 September 2010, the DoT made amendments in the UAS licences of the licence holders for the Telecom circles where they were earmarked spectrums in 2100 MHz band for provision of 3G service. The amendment comprised addition of sub-clause 7 to clause 23 of the UAS licence, dealing with "technical conditions". It needs to be clarified that earlier clause 23 of the licence ended at sub-clause 6 and there was no sub-clause 7 in it. The amendment incorporated in the licence of Vodafone in Delhi telecom circle, in so far as relevant for the present, is reproduced below by way of sample:

> **"Subject: Amendment of Unified Access Services(UAS) Licence Agreement(s) to use 3G spectrum for provision of telecom access services.**
>
> In pursuance of Condition 5.1 of the UAS licence agreement(s), Clause 4.6 of the Notice Inviting Applications (NIA) for "Auction of 3G and BWA Spectrum" vide No. P-11014/13/2008-PP dated 25.02.2010, WPC Wing's Letter of Intent (LoI) no. **L-14047/09/2010-3G** 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 licence 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 for 3G Spectrum:*** *The licensee is authorized to use this spectrum for a period of 20 years from the date of award of right to commercially use the 3G spectrum i.e.01.09.2010 for operation of Telecom Access Services as defined in the 'Scope of the license' in Clause 2, Part 1 General Conditions of the UAS License agreement,*

subject to the condition of validity of the UAS licence agreement. In case the UAS licence is cancelled/ terminated/ revoked/ surrendered for any reason, the spectrum usage rights shall stand withdrawn forthwith. If the validity period of the UAS licence agreement expires before the expiry of the right to use the 3G Spectrum for 20 years, awarded by means of the said Auction, then the validity of the UAS licence for operation of Unified Access Services by using the said 3G Spectrum only, shall be extended to make it coterminous with the validity of the right to use the 3G Spectrum, without any charges and in such manner as the Licensor deems fit. The extension shall be done on the application of the licensee made 3 months in advance of expiry of the validity period of the UAS licence. This does not include authorization or extension of period of validity of the UAS license for providing Unified Access Services using wireline and/or spectrum allocated under Clause 43 of the UAS licence agreement.

(ii) ***Roll-out obligations for 3G Spectrum:*** *xxxxxxxxx*

(iii) ***Licence Fee for 3G Spectrum:*** *Over and above the 'Licence Fees' payable by the licensee as per Condition 18.2 of the UAS licence agreement, the licensee shall also pay the annual licence Fee as share of Adjusted Gross Revenue (AGR) from the services using 3G spectrum as per rates mentioned in Condition 18.2 of the UAS licence agreement. All conditions contained in Part-III Financial Conditions of UAS Licence Agreement will continue to be applicable to the Licensees as amended by government from time to time.*

(iv) ***Spectrum Usage Charges:*** *xxxxxxxxx*

(v) ***Merger of 3G spectrum blocks:*** *xxxxxxxx*

(vi) ***Breach, revocation and surrender for 3G Spectrum:*** *xxxxxxxxx*

(vii) ***Applicability of the NIA for 3G Spectrum:*** *This amendment of the UAS licence agreement is subject to all the terms & conditions of the Notice Inviting Applications (NIA) for "Auction of 3G and BWA Spectrum" vide No.P-11014/13/2008-PP dated 25.02.2010. The licensee shall comply with all the terms & conditions of the above said Notice Inviting Applications (NIA) unless and otherwise amended by the licensor by way of amendment of the UAS licence agreement from time to time."*

2. All other terms and conditions of the UAS licence agreement including amendments and instructions issued from time to time shall remain unchanged."

After the issuance of the LoC, followed by the amendment (insertion of sub-clause 7 to clause 23) of their UAS licences, the operators entered into bilateral arrangements for intra-circle roaming. At this stage (March 2011 onwards) a number of TERM cells raised the issue of the validity of the arrangement and reported to the DoT that the arrangement under the agreement was not authorized in law. There is, however, evidence to suggest that at that time the DoT looked at the matter differently. On 10 October 2011 the DoT made a reference back to TRAI under the proviso to section 11(1) of the TRAI Act 1997, in respect of certain recommendations from TRAI's recommendations dated 11 May 2010 and 8 February 2011 on "Spectrum Management and Licensing Framework". In the reference letter it was stated that the Government had considered TRAI's recommendations and in respect of certain recommendations there was a need for modification/clarification for further action. The letter was followed by a voluminous Addendum enumerating the recommendations under reference. The one relevant for the present is as under:

TRAI's Recommendations	**DoT's Comments on the recommendations for TRAI's Reconsideration**
(v) Spectrum sharing will not be permitted among licensees having 3G spectrum.	Intra Service Area roaming in 3G network where one of the operators does not have 3G spectrum shall not be treated as spectrum sharing.

The matter however, took a turn when barely ten days later TRAI sent an advisory to the DoT on 20 October 2011 expressing its views against intra-circle

3G roaming. The advisory by TRAI seems to have settled the issue. On 23 December 2011 the DoT issued the letter asking all the concerned operators to immediately stop the intra-circle 3G roaming services. This gave rise to the present litigation and, as noted earlier in the judgment, the communication was challenged in the first batch of the five petitions filed before the Tribunal.

The case of the parties:

The key to a clear understanding of the nature of the dispute lies in the provisions of the Unified Access Services Licence, issued by the Union of India under section 4 of the Indian Telegraph Act and held by all the operators-petitioner. According to the Union of India, the intra-circle 3G roaming arrangement is not covered by the provisions of the UAS licence and it is in contravention of the provisions of the licence. The petitioners on the other hand maintain that the arrangement is not only covered by the UAS licence but is fully in conformity with its provisions. The petitioners, in support of the contention strongly rely upon clause 2 of the UAS licence. Clause 2 of the licence deals with the scope of the licence agreement, and clause 2.2 that defines Service that may be provided under the licence forms the sheet-anchor of the petitioners' case; clause 2.1 along with clause 2.2 provide as under:

> "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.
>
> 2.2(a)(i) The SERVICES cover collection, carriage, transmission and delivery of voice and/or non-voice MESSAGE 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 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 wire-line 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 Access 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."

In the licence agreement, originally clause 2.2 ended at the above but on 12.06.2008 the Central Government, exercising its right to amend the licence, added the following "formulation" below clause 2.2(a)(i) of the UAS licence vide circular letter No.842-725/2005-VAS/269. The petitioners strongly rely upon the added note, which provides as under:

> "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."

Clause 2.2 provides that in addition to the services enumerated in that clause the licensee cannot provide any service/services, which require a separate licence

excepting those services that are enumerated in clause 2.2 (b) (i). Clause 2.2 (b) (i) is as under:

> "2.2 (b)(i) Further, the LICENSEE can also provide Voice Mail, Audio-tex services, Video Conferencing, Video-tex, 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, which require a separate licence. However, an intimation before providing any other VALUE ADDED SERVICE has to be sent to the LICENSOR and TRAI."

It was contended on behalf of the petitioners-operators that the main body of clause 2.2 read with sub-clause (b) (i) of clause 2.2 was itself more than sufficiently wide to cover intra-circle roaming arrangement of the kind under consideration but the addition of the note to clause 2.2(a)(i) removed any possibility of doubt by expressly and explicitly permitting the Licensee to enter into mutual commercial agreements for intra-circle roaming facilities with other licensed Cellular Mobile Telephone Service Licensees/Unified Access Service Licensees.

The provision of clause 2.2 of the UAS licence indeed appears to support the case of the operators-petitioners but Mr. Chandiok, learned Additional Solicitor General, appearing for the Union of India strongly argued against permissibility of any intra-circle roaming arrangement between 2G and 3G service providers and maintained that a number of other provisions in the licence lead to the conclusion contrary to the one espoused by the petitioners.

Submissions of UOI

On conclusion of hearing (that went on for 14 days) each party filed voluminous Written Submissions. On behalf of Union of India/DoT also a Notes of Submissions is filed that runs into 44 pages. It has been settled by Mr. Chandiok, the learned ASG and filed through Ms. Maneesha Dhir, counsel for Union of India. The Notes of Submissions filed on behalf of the Union of India covers in details all the oral submissions made by Mr. Chandiok and for the sake of convenience, therefore, we propose to refer to the written Notes of Submissions.

The submissions on behalf of the Union of India are arranged under twelve heads, some of which are sub-divided into several sub-heads. The twelve heads of submissions are as under:

"(i) Meaning of Licence

"(ii) Difference between 2G and 3G licences and 2G and 3G services

"(iii) The petitioner who is a 2G licensee cannot provide '3G services' and cannot acquire subscribers for 3G services by way of roaming facility

"(iv) In this background **the issue** is whether the petitioners can expand the scope of services which can be provided to its subscribers relying on the 'roaming facility'?

"(v) Separate licence for 3G services

"(vi) The TRAI has also held that 2G licensees cannot provide 3G services after examining the replies of the petitioners

"(vii) Effect of Queries and Answers

- There cannot be any Estoppel against a statute
- Doctrine of promissory estoppel is not applicable where no promise is made.

"(viii) Re: The jurisdiction of the DoT to pass the impugned orders

"(ix)

- In any case the concept of principles of natural justice is alien to commercial contracts
- The right of the parties in the present case is a contractual one being governed by the licence.

"(x)

- By way of this kind of roaming arrangements petitioners are acting as MVNO which is not permissible

"(xi)

- No one have vested rights to provide roaming services.

"(xii)

- Revenue loss"

As to the questions regarding jurisdiction of the DoT [under heading no. (viii)] and the principles of natural justice [under heading no.(ix)], we see no reason to advert to those points because as indicated earlier in this judgment (under the marginal heading, "defining the parameter of adjudication"), we intend to decide the controversy on merits, that is to say, the legal validity of the intra-circle roaming arrangement on the basis of a bilateral agreements between two operators.

The question relating to the effect of queries and answers is indeed very important but in that regard the issues of 'estoppel against statute' or the 'doctrine of promissory estoppel' do not arise in any manner. The responses of the Union of India to the queries made by the prospective bidders and the petitioners are important from a different perspective, as we shall examine in due course.

As to the submissions that the rights of the petitioners are contractual in nature [heading no.(ix)] and that the petitioners have no vested right to provide roaming services, the first thing that needs to be noted is that these submissions are rather discordant with the first submission that the petitioners are no more than mere licensees. The Notes submitted on behalf of the DoT begin by stressing the fragility of the petitioners' rights. A reference is made to section 4 of the Indian Telegraph Act and the meaning of licence as defined in the Black's Law Dictionary and reliance is placed on the Supreme Court decisions in (i) UOI Vs.

Association of Unified Telecom Service Providers of India[21] and (ii) State of Orissa Vs. Narain Prasad[22] to contend that grant of right to use spectrums is no more than parting of privilege which, by force of law, vests exclusively with the Central Government and the licence gives to the petitioners nothing better than purely permissive rights.

To our mind the question that requires consideration is not whether the rights of the petitioners are permissive or contractual. The question that requires consideration is what are the limits of those rights under the contract or as privilege parted in favour of the petitioners by the Central Government on payment of consideration. The question, therefore, is not whether the rights of the petitioners are permissive or contractual or whether the petitioners have any vested right to provide roaming services. The question that needs consideration is whether there is any provision in the UAS licence or in any related document, directly or by implication prohibiting the petitioners from entering into the arrangement of intra-circle roaming.

According to the DoT there is such a bar in the licence. And this takes us to the submissions under heads (ii), (iii), (iv) and (v).The submissions under these

[21] (2011) 10 SCC 543, paragraph 37
[22] (1996) 5 SCC 740, paragraph 35

heads, though overlapping, go to the core of the controversy and are required to be examined in some detail.

The theme of the submissions under head (ii) is that the petitioners are holders of "2G licences" that allows them to provide "2G services" by setting up a "2G network" in the "2G spectrums". In support of the submissions reliance is placed on clauses 43.1 and 43.5 of the UAS licence that provide as under:

> **"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.
>
> 43.5 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 824-844MHz 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.
>
> 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."

It is stated that at present there are four frequency bands that are open for providing access services: 800 MHz band (CDMA), 900 MHz and 1800 MHz bands (2G, GSM) and 2100 MHz band (3G). It is submitted that the petitioners operate in circles where they have "2G licences". For operating under the licence, they had applied for 900 MHz/1800 MHz bands ("2G bands") and were granted spectrums in those bands only, under clause 43 of the licence; that the petitioners' network is only for 2G (with carriers of 200 KHz bandwidth, in 900 MHz/1800 MHz bands); that 3G is a separate, stand-alone service and not an extension or in continuation of the 2G spectrum. It is further stated that prior to the auction in 2010, 2100 MHz frequency band was not available at all for any commercial usages to provide access services. At present in India, 2G services are accessible

in 900/1800 MHz frequencies divided into 200 KHz bands, and for offering 3G services a contiguous band with carriers of 5 MHz bandwidth is allocated in 2100 MHz frequency band only. Hence, it is contended, the 2G band would not support 3G services and a 2G network is not capable of providing 3G services, and therefore, there was need for auctioning 3G spectrum to enable the successful telecom operators to provide 3G services.

The Note then tabulates the differences between 2G and 3G services to which we shall advert later on.

The submissions[(under head (ii)] as noted above lead to the sequel [submissions under head (iii)] that being the holders of the "2G licences", the petitioners cannot provide "3G services" and cannot enroll subscribers for 3G services by offering roaming facility. In support of the submission, a reference is made to Section 4 of the Indian Telegraph Act and the meaning of Unified Access Services as defined in clause 70 of the definition clauses in Annexure 4 to the UAS licence, containing the "definitions of terms and expressions". Section 4 of the Indian Telegraph Act is under:

> **"4. Exclusive privilege in respect of telegraphs, and power to grant licenses.**
>
> (1) Within India, the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs:

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

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

(a) of wireless telegraphs on ships within Indian territorial waters and on aircraft within or above India, or Indian territorial waters, and
(b) of telegraphs other than wireless telegraphs within any part of India

[Explanation — The payments made for the grant of a licence under this sub-section shall include such sum attributable to the Universal Service Obligation as may be determined by the Central Government after considering the recommendations made in this behalf by the Telegraph Regulatory Authority of India established under sub-section (1) of section 3 of the Telegraph Regulatory Authority of India Act, 1997 (24 of 1997)].

(2) The, Central Government may, by notification in the Official Gazette, delegate to the telegraph authority all or any of its powers under the first proviso to sub- section (1).

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

And definition clause 70 defines Unified Access Service as under:

"Unified Access Services (UAS) means telecommunication service provided by means of a telecommunication system for the conveyance of messages through the agency of wired or wireless telegraphy. The Unified Access Services refer to transmission of voice or non-voice messages over LICENSEE's Network in real time only. SERVICE does not cover broadcasting of any messages voice or non-voice, however, Cell Broadcast is permitted only to the subscribers of the service. The subscriber (all types, pre-paid as well as post-paid) has to be registered and authenticated at the network point of registration and approved numbering plan shall be applicable."

The definition of Unified Access Service is cited to contend that a holder of UAS licence is authorized to provide telecommunication service through wired or wireless network but the service can only be over the licensee's network. According to the Note, it follows that for providing a service, whether through or sans wires, a network is required. The submission is advanced by reference to clauses 2.2.(e), 2.6 and 14 of the licence, which provides under:

> "2.2(e) It is obligatory upon the LICENSEE to provide the above stated services of good standard by establishing a state-of-the-art digital network.
>
> 2.6 LICENSEE shall make its own arrangements for all infrastructure involved in providing the service and shall be solely responsible for installation, networking and operation of necessary equipment and systems, treatment of subscriber complaints, issue of bills to its subscribers, collection of revenue, attending to claims and damages arising out of his operations."
>
> **"14. Way Leave:**
>
> The LICENSEE Company shall make its own arrangements for Right of Way (ROW). However, the Central Government may issue necessary notification conferring the requisite powers upon the LICENSEE for the purposes of placing telegraph lines under Part III of the Indian Telegraph Act, 1885. Provided that non-availability of the ROW or delay in getting permission / clearance from any agency shall not be construed or taken as a reason for non-fulfillment of the Roll-out obligations and shall not be taken a valid excuse for not carrying any obligations imposed by the terms of this Licence."

A reference to clause 14 here may appear somewhat incongruous but on that basis it is contended that unlike a wired network, no wireless network can be set up or exist without spectrum, which is a natural resource owned by the Central Government. And the Central Government alone can authorize a licensee to use

spectrum and then allocate frequencies in certain bands for setting up the network. It thus follows that a wireless network can operate only on the frequency allocated to the licensee by the Government (clause 43 of the licence). It is further submitted that a "2G licensee" can only have "2G subscribers" as a "2G network" working on spectrums in 900/1800 MHz bands is not capable of delivering 3G services.

A reference is then made to clause 2 of the licence and its various sub-clauses (supra) and to the definitions of service and subscriber as contained in the definition clauses 55 and 62 in Annexure 4 to the licence, which are as under:

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

The provisions of clause 2 of the licence and the definitions of "service" and "subscriber" are then read to argue that a "2G licensee" can only have "2G subscribers".

Further support for the submission is sought to be derived from clauses 7and 40.1 of the UAS licence, which are as under:

> **"7. Provision of Service.**
>
> 7.1 The LICENSEE shall be responsible for, and is authorized to own, install, test and commission all the Applicable system for

providing the Unified Access Services under this Licence agreement.

40. Prohibition of certain Activities by the LICENSEE.

40.1 The LICENSEE shall not engage on the strength of this LICENCE in the provision of any other Service requiring separate licence as defined in this Licence Agreement."

On the basis of the above it is submitted that a holder of UAS licence can provide services to subscribers only over his own network. It is also submitted that though Unified Access Licence was a common licence, services are restricted to network which is nothing but spectrum and hence, it was incorrect to claim that merely on the basis of the UAS licence all services including 3G can be provided. It is contended that the cumulative effect of the provisions referred to above is that a licence holder can provide only those services, which have been allowed over the licensee's network. The network of the petitioners being only for 2G (with carriers of 200 KHz in 900/1800 MHz frequency bands) the petitioners cannot provide "a service requiring a separate licence". The corollary is that a 2G licensee can only have customers over its own network that to say, the 2G network. It cannot accept customers for 3G services in circles where it failed to win the 3G spectrum.

It is next submitted [under head (iv)] that the petitioners cannot be permitted to expand the scope of services that they can provide to their subscribers relying on the roaming "facility". It is pointed out that operators who remained unsuccessful in getting spectrums in the 2100 MHz frequency band in certain circles are now

trying to provide 3G services to their subscribers in those very circles by entering into the intra-circle roaming arrangement. And it is undeniable that they are providing 3G services to their subscribers, not through their own network but through the network of another operator who was successful in getting the 3G spectrum in that circle. It is contended that the petitioners' reliance on clause 2.2(a)(i) of the licence was quite misplaced. A reference is then made to the definition of roaming given by TRAI in exercise of its powers under Section 36 of the TRAI Act, which is as under:

> "Roaming means the ability for a cellular subscriber to automatically make and receive voice calls, data and to access other services **while travelling outside the geographical coverage area of the home network, by using the visited network.** It is national roaming when visited network and the home network of the subscriber are in the same country and it is international roaming when visited network and home network of the subscriber are in different countries."

Relying upon the above definition, it is submitted that the concept of roaming would remain the same also in case of intra-circle roaming, and clause 2.2 of the licence only allows the licensee to enable its subscriber to make and receive calls when its own network is not available for any reason. It is possible that an operator is in the process of establishing its network in a circle where others are operating from before or within the same circle an operator may not have coverage at some places or that at a particular time its network is down or faulty at some places. It is submitted that it is only in those cases that intra-circle roaming would be permissible. It is further submitted that the fundamental principle of roaming,

applicable equally to ‘inter-circle’ or ‘intra-circle’ roaming is that the subscriber may be able to make and receive calls using the network of another operator when, for any reason, the subscriber’s operator’s network (i.e., the subscriber’s “home network”) is not available.

It is pointed out that under clause 2.2(a)(i),“roaming” is a “facility” and not a “service” in itself.

With reference to clauses 2.2(a) and 2.2(b)(i) (supra) and to the definitions of “subscriber” and “service” under clauses 55 and 62 of the licence(supra) it is argued that since the petitioners can only have “2G subscribers”, they can provide to their subscribers, even while roaming on the network of someone else, only the same services that were available to them on their home network and not any better or superior services. The scope of the Note of clause 2.2 of the licence is limited to a licensee providing a roaming facility to its existing subscribers. The roaming facility is to offer an existing subscriber the same services it receives on the licensees’ licenced network and not to allow the licensee to gain additional customers by subleasing the network of other service provider. Under the roaming facility, the service provider cannot provide services to its subscriber that are not available on its own network, i.e., the subscriber’s home network due to the inherent limitation of the spectrum held by the service provider. In the present case, the petitioners hold carriers of 200 KHz in 900/1800 MHz frequency bands

and for that reason cannot provide 3G services on their own networks. If a "2G subscriber" is given access to "3G services" through the intra-circle roaming arrangement made by the subscriber's operator in agreement with another "3G operator", purporting to use the roaming "facility" permissible under clause 2.2(a) of the licence, that would amount to changing the nature of the subscribers. A "2G subscriber" has to always remain a "2G subscriber" notwithstanding the roaming facility. Otherwise, it would be beyond the permission granted under the 2G licences and the "2G subscriber" would unauthorisedly become "3G subscriber". In this case, since the petitioners can only have "2G subscribers" hence, under any roaming arrangement, the subscribers can be provided with only those services that are already available to them under the petitioners' network.

It is submitted in the Notes filed on behalf of the Union of India that a conjoint reading of 'roaming' and 'facility' as provided in clause 2.2 of the licence means that roaming is only a facility and the arrangement to enable a service provider to provide services to its subscriber outside the geographically covered area of its own state. In Indian context roaming facilities can be provided in a given telecom circle (intra-circle roaming) or outside a telecom circle (inter-circle roaming) but such roaming is an occasional incident of providing such services to subscribers as used in the home network. It is further stated that the introduction of the Note in clause 2.2(a)(i) was made on 12 June 2008 when there were only 2G

licensees and there were no 3G service providers and it is thus clear that the intention of the said Note was never to permit 2G operators to provide 3G services. Hence, the very fact that the petitioners do not have a network to provide 3G services, disallows them from providing those services to their subscribers.

The fourth and the last limb of the submissions [under heading (v)] in regard to the scope of the UAS licence and the nature of 2G and 3G "services" is that the delivery of "3G services" by a private operator requires a "separate licence for 3G services". A reference is made to the definition of "licence" in definition clause 30, which is as under:

> **"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."

Reference is also made to definition clause 77 defining WPC, the body that in terms of clause 43.1 of the licence is empowered to give separate authorization and licence permitting utilization of appropriate frequencies /band for the establishment and possession and operation of wireless element of the telecom services. Definition clause 77 is as under:

> **"77. WPC** means Wireless Planning and Co-ordination Wing of the Ministry of Communications, Department of Telecommunications, Government of India."

On the basis of the above it is asserted that the petitioners are "2G licensees" and are granted by the WPC the Wireless Operating Network Licence (WOL) to establish 'wireless network' which is restricted to 900/1800 MHz, i.e., 2G network.

It is reiterated that admittedly no 3G spectrums are allotted to the petitioners nor do they have the required license/amendments in their existing licences (the insertion of sub-clause 7 in clause 23) to enable them to provide 3G services. It is again reiterated that 3G service is a separate and a valuable service, and it is not an extension or continuation of 2G spectrum. Offering 3G service requires a separate allocation of 3G spectrum and grant of 3G license. It is pointed out that the guidelines for auction and allotment of spectrum for 3G telecom services was issued on 1 August 2008 and it was clearly stated there that "spectrum in 2.1 GHz band shall be allocated for 3G telecom services through bidding/auction". The guidelines further provided that the successful bidder shall get spectrum allotment for 3G services for a period of 20 years and successful bidders who are not UAS licensees would be granted a separate UAS licence for the concerned service area under the Indian Telegraph Act, 1885. In case the successful bidder was already holding a UAS license, the terms and conditions of the existing UAS licence would be suitably amended. Then Notice Inviting Applications was issued on 25 February 2010 for allotting rights to use specified radio spectrum frequencies in the 2100 MHz band (the "3G Spectrum") through auction in various telecom service areas in India.

The Notes of Submissions then refer to the introduction and several other provisions and stipulations relating to "Spectrum", "Eligibility and Conditions",

"Roll Out Obligations", "Duration", "Breach, Revocation and surrender", "Assignment of Spectrum", and the definitions of certain terms in the NIA.

It is also pointed out that the existing UAS licences held by the successful bidders was amended for the circles where they were able to obtain the 3G spectrums by insertion of sub-clause 7 in clause 23 of the licence. The newly added sub-clause 7(i) provided as under:

> "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. the date of issue of this amendment letter, till the validity of the UAS licence agreement or for a period of 20 years from the date of issue of this amendment letter, whichever is earlier, subject to compliance of following conditions:

It is submitted that the amendment introduced by insertion of sub-clause 7 in clause 23 is not dependent on the UAS license and it would continue even beyond the expiry of the UAS License and hence, it is asserted the amendment is a licence in itself. Further, the successful bidders for 3G spectrums had applied for separate Wireless Operating Licenses (WOL) and were granted the licenses to establish wireless network to enable them to provide 3G services. Although the allocation of 3G spectrums was made through auction, what was the Government in reality parted in favour of the successful bidders was the right to use the 3G spectrums, which is nothing but 'License' under Section 4 of the Indian Telegraph Act. The petitioners before the Tribunal were not among the successful bidders in seven

telecom service areas and therefore, they did not get the requisite amendment in their existing licenses and consequently they do not have the required licence to establish a wireless network providing 3G services to their existing 2G subscribers or to new subscribers. The Petitioners are therefore, prohibited under the existing Unified Access Services License from providing 3G services to their existing 2G subscribers or enrolling new subscribers in guise of 'roaming arrangements'.

Consideration of submissions

The first thing that glaringly sticks out in the submissions made on behalf of the Union of India is that those are entirely and exclusively against operators who were unable to get spectrums in 2100 MHz band in the auction held for the purpose; in other words, against the operators in their capacity as 'losers' in the auction for allocation of spectrums in 2100 MHz band. It is, however, overlooked that a bilateral arrangement has two sides and that in a number of telecom circles the petitioners were the successful bidders and were able to obtain spectrums in 2100 MHz band in those circles. The petitioners entered into the intra-circle roaming arrangement both in telecom circles where they had obtained spectrums in 2100 MHz band and where they had failed to obtain the spectrums in 2100 MHz band. In the former case, where the petitioners may be described as 'winners', their position in the bilateral arrangement is that of 'provider' of a service to a 'seeker' for consideration and in the latter case their position is conversely that of a

'seeker' of a service for consideration from a 'provider', the winner in the auction, in that circle.

The impugned prohibition against intra-circle roaming hits the petitioners in all the telecom circles and in both capacities. But in the submissions advanced on behalf of the Union of India, they are castigated only as the seekers of the service and the submissions completely fail to address the issue from the perspective of the provider of the service in the bilateral arrangement.

The submissions made on behalf of the Union of India somehow fail to realize that the scope of the UAS licence has to be decided independent of the fact whether or not the holder of the licence was able to obtain, in the auction held for the purpose, spectrums in 2100 MHz band in certain telecom circles. The issue before the Tribunal is not limited to whether the losers have a right to enter into the intra-circle roaming arrangement in telecom circles where they are the losers. But the issue at large is whether the intra-circle roaming arrangement is valid and permissible under the terms of the licence.

Coming now to the merits of the submissions, the fundamental premise on which all the elaborations are made is that the UAS licence held by the petitioners is a '2G licence'; that a '2G licence' is different from a '3G licence'; that the holder of a '2G licence' cannot provide '3G services'; that in order to deliver '3G services', it is imperative to have a '3G licence' which is different from a '2G

licence'. This basic premise is extended to spectrums, 'services' and even 'subscribers' and it is contended that '2G spectrums' are different from '3G spectrums', '2G services' are different from '3G services' and even '2G subscribers' are different from '3G subscribers'. In our considered view, the first and the basic premise is seriously flawed and its extension to spectrums, services and subscribers is even more fallacious. The submissions appear to stem from a misconception of the provisions of the UAS licence and are contrary to established and well accepted technological facts. Further, references to at least some of the provisions of the UAS licence [for instance, clauses 2.2(e), 2.6, 7 and 14 of the licence] and to the definition of roaming in the TRAI Regulations[23] are quite inappropriate and do not seem worthy of consideration in any serious deliberations on the issue in hand.

In our view, the basic error in the submissions made on behalf of the Union of India is the confusion between the delivery of services permissible under the licence and the allocation of spectrum for rendering those services. The 'scope of the licence' and the 'authorization permitting utilization of spectrums', though in some ways interconnected, are nevertheless different concepts. The scope of the licence is dealt with in clause 2 of the licence and a bare reading of the clause, specially the provisions of sub-clauses 2.2(a)(i), 2.2(a)(iii) and 2.2(b)(i) leave no

[23] The definition of 'roaming' as cited in the Notes of Submissions is from The Telecommunication Interconnection Usage Charges Regulations, 2003 framed in a completely different context.

room for doubt that the licence is given a very wide scope and permits the delivery of a very vast range of services. The Note appended to sub-clause 2.2(a)(i) by the amendment made on 12 June 2008 expressly allows a licensee to "enter into mutual commercial agreement for **intra-service area** roaming facilities with other licenced Cellular Mobile Telephone Service licensees/Unified Access Service licensees".

The term "service" occurring in clause 2 is also defined in clause 55 of the definition clauses in Annexure IV to the agreement but that definition is in identical terms to the one in sub-clause 2.2(a)(i). The expression "subscriber" is also defined in definition clause 62 but that is not quite relevant for our present purposes. A reading of clause 2 and it various sub-clauses would leave no room for doubt that the use of 3G technology and the delivery of services through 3G technology is not excluded from the scope of the licence. But now arises the question of the availability of spectrums, for it is rightly pointed out in the Notes of Submissions by the Union of India that no wireless network can be set-up or exist without using spectrums.

The issue of frequency authorization is dealt with in clause 43 of the UAS licence. Sub-clause 43.1 stipulates that for the establishment and possession and operation of the wireless element of the telecom service under the UAS licence the operator must obtain a separate, specific authorization and licence (WPC Licence)

from the WPC Wing permitting utilization of appropriate frequency/band; sub-clause 43.5.(i) then states that for wireless operations in subscriber access network, the frequency shall be assigned by WPC Wing from the frequency bands **earmarked in the applicable National Frequency Allocation Plan and in coordination with various users**. A conjoint reading of sub-clause 43.1 and sub-clause 43.5.(i) would make it clear that the WPC Wing shall grant permission and licence to a UAS licence holder for utilization of frequencies/bands appropriate for the technology to be employed by the operator and as earmarked in the National Frequency Allocation Plan and in coordination with other users of frequencies/bands.

A question may arise here whether it is open to the WPC Wing to deny permission and grant WPC licence to a UAS licence holder and thus to effectively prevent him from establishing, possessing and operating the wireless network necessarily required for any telecom service. In this connection, it is important to bear in mind that prior to the National Telecom Policy, 2012 (and the Unified Licence granted under it), a licence granted under section 4 of the Indian Telegraph Act, 1885, like the Unified Access Service licence came 'bundled' with spectrums. That is to say, the grant of the UAS licence was a precondition and the precursor for the permission for utilization of spectrums. It is only with the coming of the Telecom Policy, 2012 that the Government is switching over to another regime

under which the Unified Licence does not guarantee any spectrums and the permission for utilization of spectrums must be obtained by the operator through auction and independently of the Unified Licence. It is, therefore, misleading to suggest that an operator though holding a Unified Access Service licence could still be not in a position to set-up a wireless network for rendering telecom services through denial of Wireless Network Operator Licence and the refusal of permission for utilization of spectrums. The holder of a UAS licence was, therefore, bound to get the permission for utilization of spectrums so long as he fulfilled and abided by the conditions stipulated in clause 43 of the licence.

It is indeed true that the petitioners (that is the 'losers' in the auction and the 'seekers' of the service) are permitted utilization of frequencies in 900 MHz and 1800 MHz with carrier bandwidth of 200 KHz each, for the permission is for employment of 2G technology and the frequencies allocated to the petitioners are not permitted to be used for 3G technology. The restriction against the petitioners from using the allocated frequencies for employing 3G technology has two aspects; one relating to the terms of the licence and other based on technological issues. So far as the licence is concerned, as should be evident from the above discussion, the restriction comes not from the scope of the licence and the range of services permissible under it but from the limitation to which the allocation of spectrums is made to the petitioners in terms of clause 23 and sub-clauses 43.1 and 43.5.(i). In

case the WPC lifts the restriction from the use of the 900 and 1800 MHz spectrums for employment of 3G technology, the scope of the licence under clause 2 is wide enough to permit the petitioners to employ the spectrums already allocated to them for using 3G technology and for rendering 3G services.

Here it will not be out of place to point out that in the Notice Inviting Applications for participating in the auction of the so called 3G spectrums, the provision relating to the eligibility and conditions stipulated as under:

> "Under the NIA any person who is an existing UAS/CMTS Licensee **or** any other entity that has the previous experience in running 3G telecom services whether directly or through a majority-owned subsidiary and gives and undertaking to obtain a UAS License through a New Entrant Nominee as per DOT guidelines."

It also needs to be pointed out that sub-clause 7 to clause 23 that was inserted by way of amendment in the existing UAS licenses of the 'winners' of the frequencies in the 2100 MHz band (on which considerable reliance is placed in the Note of Submissions by the Union of India) authorizes the holder of the existing UAS licence to use the 3G spectrum block as earmarked in the Letter of Intent for provisioning of telecom access services **as defined in the scope of licence in the Schedule Condition 2 (clause 2) of the UAS licence agreement**…..

The inclusion of services that might be rendered through 3G technology in the scope of the licence as defined under clause 2 is thus acknowledged not only in the NIA but also in the newly inserted sub-clause 7 of clause 23.

In this regard, it needs also to be borne in mind that under the National Telecom Policy–2012 the Government is fast proceeding towards what is commonly called the "liberalization of spectrums" under which the spectrums obtained by an operator through auction may be put to use by him for any technology and/or standards.

Coming to the technological aspects, it is undeniable that there is nothing in the physical properties of 900 or 1800 MHz bands that might render them unsuitable for employment of 3G technology. On the contrary, 900 and 1800 MHz bands are as much suitable as 2100 MHz band for use of 3G technology and are in fact in use for 3G technology in many other parts of the world. As a matter of fact 900 MHz band, on account of its greater penetrating power is a more sought after band than both the 1800 and 2100 MHz band. It is, therefore, fundamentally incorrect to describe 900 MHz and 1800 MHz bands as '2G spectrums' and 2100 MHz band as '3G spectrums'. A number of operators in this country holding UAS licence including the petitioners have accumulated spectrums (in 900 and 1800 MHz bands) upto the extent of 10 or even 12 MHz. In case the spectrums in the hands of some of the operators are sufficiently contiguous to make a bandwidth of 5 MHz that can be used without any difficulty for employment of 3G technology and as observed above, the restriction against the petitioners from doing so comes

not from the scope of the licence but from the limitation of the permission granted by the WPC Wing.

In the Notes of Submissions by the Union of India, the differences between 2G services and 3G services are set-out in a tabular mode as under:

S. No.	**Services on 3G network**	**Services on 2G network**
1.	Voice Call	Voice Call
2.	Text Messages	Text Messages
3.	Multimedia Messages	Multimedia Messages
4.	Mobile Internet Speed almost 20 times faster than 2G	Mobile internet with low speed
5.	Video Calling/ Video Conferencing	
6.	Live TV	
7.	High Speed Video-streaming/downloading (for movies, songs, HD gaming, Data Security etc.)	
8.	Multimedia infotainment	

We are afraid that the table does not reflect the technological position accurately.

According to the European Telecommunications Standards Institute (ETSI), the combination of GPRS and EDGE brings system capabilities into the range covered by the International Telecommunications Union IMT-2000 (3rd Generation) Concept and some manufacturers and network operators consider

EDGE networks to offer 3rd Generation services. The above table gives a comparison between 2G and 3G only but EDGE which is between 2G and 3G and which, in some sense is supplemental to 2G can be provided using the spectrum allotted in 900 and 1800 MHz bands. The use of EDGE in 900 and 1800 MHz bands is not prohibited by the DoT and EDGE can definitely and consistently provide on-Internet service with speeds comparable to early 3G deployment which alone, for practical purposes, is possible on the smallest possible bandwidth of 5 MHz presently allotted in India for use of 3G technology.

Before proceeding to the next point, we may once again revert to the licence and look at the matter from a slightly different angle. As noted above, clause 2 of the licence (the relevant provisions of which are quoted above) deals with the scope of the licence and provides for range of services that may be delivered under it. Clause 23 of the licence relates to technical conditions and provides as under:

> "**23. TECHNICAL CONDITIONS:**
>
> 23.1 The Licensee shall provide the details of the technology proposed to be deployed for operation of the service. The technology should be based on standards issued by ITU/TEC or any other International Standards Organization/ bodies/Industry. Any digital technology having been used for a customer base of one lakh or more for a continuous period of one year anywhere in the world, shall be permissible for use regardless of its changed versions. A certificate from the manufacturers about satisfactory working for a customer base of one lakh or more over the period of one year, shall be treated as established technology.
>
> 23.2 Requisite monitoring facilities /equipment for each type of system used, shall be provided by the LICENSEE at its own cost for monitoring as and when required by the LICENSOR.

> 23.3 The LICENSEE shall ensure adherence to the National FUNDAMENTAL PLAN (Which includes National Numbering, routing and Transmission plan issued by Department of Telecommunications and technical standards as prescribed by LICENSOR or TRAI, from time to time. In case of providing choice of Long Distance Operator, the equipment shall support the selection facilities such as dynamic call-by-call selection and pre-selection as per prevailing regulation, direction, order or determination issued by LICENSOR or TRAI on the subject.
>
> 23.4 The Numbering Plan for the Unified Access Services will be as per applicable National Numbering plan. The Licensor reserves the right to modify the National Fundamental plan or its part thereof such as Numbering Plan, Routing Plan, Transmission Plan etc.
>
> 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, justification 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.
>
> 23.6 The LICENSEE may provide additional facilities in case of any value addition/ upgradation that the technology permits at later date with prior intimation to Licensor and TRAI."

The clause ended at sub-clause 6 as shown above. But a sub-clause 7 was added to the licences in respect of the telecom circles for which the licence holder was successful in obtaining the 3G spectrum. Sub-clause 7 that was added to clause 23 in so far as relevant as under:

> "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. the date of issue of this amendment letter, till the validity of the UAS licence agreement or for a period of 20 years from the date of issue of this amendment letter, whichever is earlier, subject to compliance of

following conditions:

(i) **Validity period for 3G Spectrum :** xxxxxxxxxxxxx

(ii) **Roll-out obligations for 3G Spectrum:** xxxxxxxxx

(iii) **Licence Fee for 3G Spectrum:** xxxxxxxxxxx

(iv) **Spectrum Usage Charges:** xxxxxxxxx

(v) **Merger of 3G spectrum blocks:** xxxxxxxx

(vi) **Breach, revocation and surrender for 3G Spectrum:** xxxxxxxxx

(vii) **Applicability of the NIA for 3G Spectrum:** xxxxxxxxxxxxx"

Clause 43 of the licence (the relevant provisions of which are quoted above) deals with the allocation of spectrums.

It is said earlier that the scope of the licence is dealt with in clause 2. The amendment to clause 23 (insertion of sub-clause 7) was needed to allow those licence-holders the use of frequency in 2100 MHz band. It is important to bear in mind that the definition of "service" in the licence was not amended to include the "3G services". The newly inserted sub-clause 7 merely authorized the use of 3G spectrum block for provision of 3G services as defined in the "scope of licence" under clause 2. From a conjoint reading of clause 23 and clauses 43.1 and 43.5, it would thus appear that the licence imposes a restriction on the use of spectrum for a purpose other than the one specified in the allocation made by the WPC/DoT. It, therefore, follows that by entering into the intra-circle 3G arrangement, neither of

the parties can be said to contravene the provisions of clause 23 and/or clause 43.1 and 43.5 of the licence. In case, the 900 MHz band or the 1800 MHz band were used for employment of 3G technology and delivery of 3G services, that would undoubtedly be a patent contravention of the terms of the licence. But that is not the case. On behalf of the DoT, it is repeatedly stated that the 2G operators in this deal are offering and delivering to their subscribers the 3G services not on their own network but on the network of the 3G operator with whom the 2G operator is in the arrangement. We fail to see how that arrangement can be said to violate clause 23 or clauses 43.1 and 43.5 or any other clause of the agreement. We cannot overlook that entering into commercial agreements in furtherance of one's trade or business is part of the fundamental right guaranteed under 19(1)(g) of the Constitution and any prohibition or curtailment of that right must be on some far more definite and tangible basis than a fanciful interpretation of the terms of the licence.

In light of the above discussions we fail to see, in the provisions of the Unified Access licence, any bar against intra-circle 3G roaming. But if anyone were to say that the provisions of clauses 2, 23 and 43 of the licence, read together, give rise to an unclear picture as regards the permissibility of intra-circle 3G roaming, a clear answer is provided in the responses of the Central Government to

the queries made by the petitioners as bidders in the auction for the allocation frequencies in 2100 MHz band.

How the licensor understood the terms of the licence?

Earlier in the judgment, it is noted that paragraph 8.1 of the Notice Inviting Applications allowed for further enquiries in connection with the allocation of the 3G spectrums through auction. In pursuance of the invitation, a number of queries were made which were compiled, along with the Government's responses in a document titled as "Auction of 3G and BWA Spectrum: Queries and Responses". Strangely though, the Government's responses to the queries were prefaced by a lot of disclaimers put under the heading "important notice". The relevant extract from the notice is reproduced below:

> "xxxxxxxxxxx
>
> 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.

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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.

xxxxxxxxxxxxxxx

xxxxxxxxxxxxxxx"

Following the above notice was the main body of the document containing the Government's responses to the queries received by the DoT. Some of the queries along with their responses, relevant for the present, are as under:

No.	Query	Response
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 telecom policy. **Roaming**

		arrangements are based on bilateral decision between operators. (Emphasis added)
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 licences. After 3G auctions not all existing UASL licences 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?	**The roaming policy is applicable to the licenses 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.**(Emphasis added)**
114.	When is the likely roll-out of the 3G ICR guidelines and when is it likely to be implemented?	ICR guidelines are already provided by the DoT. These guidelines pertain to licence conditions and are not specific to spectrum. Please refer to the current ICR guidelines, and any amendments thereof.
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	**There are no separate 2G**

	license term of a company which is the result of a merger between 2G & 3G licenses could be shortened to the term of the 2G licensee regardless of the fact that the award of 3G spectrum entitles an entry to a licence duration of 20 years?	**and3G service licences. Entities with 3G spectrum would necessarily need to have an UAS or CMTS licence.** 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. **(Emphasis added)**
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. (Emphasis added)**
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. (Emphasis added)**

It is thus to be seen that in response to query no. 205 the response of the DoT was clear that **there are no separate 2G and 3G service licenses** and further that the entities with 3G spectrum would necessarily need to have an UAS or CMTS licence. This to our mind is sufficient to demolish the basic premise of all the arguments advanced before us that a 2G operator in order to employ 3G technology for delivering 3G services must have a separate licence than his existing 2G licence.

As regards the permissibility of intra-circle 3G roaming, the answer by the DoT in reply to query nos. 11, 230, 371 and particularly query no. 48 leave no room for doubt that according to the stand taken by the Government immediately before the auction of frequencies in 2100 MHz band the provisions of UAS licence permitted intra-circle 3G roaming.

In order to disown the responses and to avoid its effect on the interpretation of the terms of the licence, in the Notes of Submissions by the Union of India much reliance is placed on the Notice preceding the main document. It is submitted that in view of the Notice the answers to the queries cannot be relied upon in a court of law and that in any case in the event of any difference between the answers to the queries and the UAS licence the provisions of the NIA and the licence would prevail.

In our view, the submissions are quite misconceived and unacceptable for more reason than one. First, the answers given by the Government of India to the queries made by the bidders prior to the auction cannot be dismissed simply on the basis of the notice of disclaimer. The queries were made in earnest and the Government of India was supposed to give their answers with full responsibility. The Government of India cannot be seen playing games in a matter of national importance such as allocation of spectrums that affects not only the operators but is crucial to the promotion and growth of communication in the country.

Secondly, the Government's response was not to some queries that were made gratuitously. Paragraph 8 of NIA is quoted earlier but for ready reference it is reproduced here once again:

> "**Contacts for further enquiries**
>
> Enquiries, if any, may be directed to the following e-mail address: "spectrum-dot@nic.in" upto 10 calendar days before the last date for submission of applications.
>
> The Government may or may not respond to any query, in part or full, at its sole discretion. In case it responds to any query, the respondent shall be made public. However, the identity of the person making the query will not be disclosed, to the extent possible.
>
> Further contact details for support during the e-auction will be separately provided to the eligible Applicants."

It is thus clear that the queries were made in pursuance of the invitation made in the NIA and their responses must therefore, be deemed as an extension and part of the NIA and thus viewed, the responses to the queries would have a binding nature.

It is contended on behalf of the Union of India that the Government's responses will not constitute estoppel or even promissory estoppel. Here there is no question of estoppel or promissory estoppel but the great value and significance of the Government's answers to the queries clearly show how the Government itself has interpreted and understood the terms of the UAS licence at a point of time when the present dispute was not in sight.

The Supreme Court in the decision in the *Godhra Electric Co. Vs. State of Gujarat*[24] examined the question of an interpreting statement made by parties to a written instrument and came to hold that the interpreting statement was liable to be given great weight and importance. In paragraph 10 it was observed as under:

> "10. The question whether subsequent 'interpreting statement' made by parties to a written instrument is admissible in evidence to construe the written instrument is not free from doubt……."

The court then examined a number of English decisions and decisions of courts of several other jurisdictions and came to observe and hold in paragraphs 17 to 19 as under:

> "17. We are not certain that if evidence of <u>subsequent acting</u> under a document is admissible, it might have the result that a contract would mean one thing on the day it is signed but by reason of subsequent event it would mean something a month or year later. <u>Subsequent 'interpreting' statements might not always change the meaning of a word or a phrase. A word or a phrase, is not always crystal clear. When both parties subsequently say that by the word or phrase which, in the context, is ambiguous, they meant this, it only supplies a glossary as to the meaning of the word or phrase. After all, the inquiry is as to, what the intention of the parties was from the language used. And, why is it that parties cannot</u>

[24] AIR 1975 SC 32

clear the latent ambiguity in the language by a subsequent interpreting statement? If the meaning of the word or phrase or sentence is clear, extrinsic evidence is not admissible. It is only when there is latent ambiguity that extrinsic evidence in the shape of interpreting statement in which both parties have concurred should be admissible. The parties themselves might not have been clear as to the meaning of the word or phrase when they entered into the contract. Unanticipated situations might arise or come into the contemplation of the parties subsequently which would sharpen their focus and any statement by them which would illuminate the darkness arising out of the ambiguity of the language should not be shut out. In the case of an ambiguous instrument, there is no reason why subsequent interpreting statement should be inadmissible.

"The question involved is this: Is the fact that the parties to a document, and particularly to a contract, have interpreted its terms in a particular way and have been in the habit of acting on the document in accordance with that interpretation, any admissible guide to the construction of the document? In the case of an unambiguous document, the answer is 'No'. (see Odgers' Construction of Deeds and Statutes, 5th ed. By G. Dworkin, pp. 118-119).

But, as we said, in the case of an ambiguous one, the answer must be 'yes'. In Lamb v. Coring Brick Co., (1932) 1 KB 710 at p. 721 a selling agency contract contained the words 'the price shall be mutually agreed'. Documents showing the mode adopted for ascertaining the price were put in evidence without objection. In the Court of Appeal, Greer L. J. said:

"In my opinion, it is not necessary to consider how this contract was acted on in practice. If there had been an ambiguity and the intention of the parties had been in question at the trial, I think it might have been held that the parties had placed their own constructions on the contract and, having acted upon a certain view, had thereby agreed to accept it as the true view of its meaning".

18. In Balkrishen v. Legge (1900) 27 Ind App 58 the privy Council said that in deciding the question whether a particular deed is a mortgage by conditional sale or an out and out sale, oral evidence of the intention is inadmissible under section 92 of the Evidence Act for construing the deed nor can evidence of an agreement at variance with the terms of the deed admitted, but the case must be decided on a consideration of the contents of the document with such extrinsic evidence of other circumstances as may show in what manner the language of the document is related to existing facts. We do not think it necessary to consider or decide in this case the exact reach of that decision. Nor is it necessary to advert to the various decisions of the High Courts where the ratio of that case has been interpreted. It is enough to say that there is nothing in that decision which

> would prevent a court from looking into the subsequent conduct or actings of parties to find out the meaning of the terms of a document when there is latent ambiguity.
>
> 19. In these circumstances, we do not think we will be justified in not following the decision of this Court in Abdulla Ahmed v. Animendra Kissen Mitter, 1950 SCR 30 at p.46 = (AIR 1950 SC 15 at p. 21) , where this Court said that extrinsic evidence to determine the effect of an instrument is permissible where there, remains a doubt as to its true meaning and that evidence of the acts done under it is a guide to the intention of the parties, particularly, when acts are done shortly after the date- of the instrument."

We are respectfully of the view that the observations made by the Supreme Court apply with greater force to the facts of this case than in the case of Godhra Electric Co.

It may be noted here that Mr. Chandiok and Ms. Maneesha Dhir tried to explain away the Government's answer to query no. 48 by submitting that intra-circle 3G roaming is permissible subject however to the condition that the services available to the 2G subscriber, roaming on the 3G network, may not exceed the services that the subscriber's home network is in a position to deliver. To our mind the submission has no force or merit. First, the Government response does not indicate any such limitation and it is clearly an afterthought. Secondly, any user of the 3G network must have a 3G enabled handset and the necessary permissions must be defined in the HLR of the roaming subscribers 2G operator. Unless these conditions are satisfied, the subscriber of a 2G operator will not be able to roam on the network of a 3G operator and the reply given by the Government in response to query no. 48 would be meaningless.

It was next contended by Mr. Chandiok and Ms. Dhir that in the intra-circle roaming arrangement entered into by the petitioners the subscriber of the 2G operator shall be permanently on the visited network i.e. the network of the 3G operator. However, there is no prohibition to this technically and this is a matter of commercial arrangement. Moreover, depending upon the technical parameter the subscriber may fall back on the network of 2G operator specially in the areas where there is no or poor 3G coverage.

TRAI's views:

In the Notes of Submissions on behalf of the Union of India, reliance is also placed [under head no. (vi)] on the TRAI's views with regard to intra-circle 3G roaming. It is submitted that TRAI is a specialist body and its views must be given due weightage and respect.

We have carefully examined, the TRAI's advisory to the DoT dated 20 October 2011. In its advisory, TRAI observed that the operators' case in support of intra-circle 3G roaming agreements primarily rested on (i) clause 2.2(a) of the UAS licence and (ii) the affirmative answer given by the DoT to query no.48 regarding permissibility of intra-circle 3G roaming arrangement between a 2G operator and a 3G operator.

As regards the reply by the DoT, the Authority said it would refrain from making any comments as it was not aware of the circumstances and the background in which the reply was given. In our view, the circumstances and the background in which the questions were asked and answers were given are quite evident. Further, the answer given by the DoT clearly showed how the licensor understood and interpreted the provisions of the licence while the process of auction for 3G spectrum was already underway. And after the auction was over the action of the operators was fully in accord with that understanding. In our considered view, it would be incorrect to dismiss the DoT's reply or to understate its value by saying that the circumstances and background in which it was given is not known.

Coming to clause 2 of the licence, the Authority observed that the amendment dated 12 June 2008 by which the Note was added to clause 2.2(a)(i) was carried out by the DoT without any recommendations from TRAI and the amendment was, therefore, not in conformity with Section 11(1)(a)(ii) of the TRAI Act, 1997. The Authority further observed that the amendment was made at a time when there were only 2G operators in all the telecom circles and the amendment did not absolve the operators from carrying out their respective roll-out obligations. According to the Authority, it implied that intra-service roaming arrangement is allowed only between those service providers who have spectrums

for the same service and technology. We are unable to agree with the Authority. The Note appended to clause 2.2(a)(i) cannot be wished away or deleted from the licence. Its validity is not in issue before us. It is not the case of the Union of India that the Note is not to be treated as part of clause 2.2(a)(i) and the limitations put on it by TRAI, with reference to the time it was incorporated, is not borne out from its plane language. An amendment made in the licence is good not only for the time it is incorporated but it would operate as long as it remains part of the terms of the licence.

TRAI having rejected the case of the petitioners has given two reasons for coming to the 'prima facie conclusion' that intra-circle 3G arrangement 'is a prima facie violation of the terms and conditions of the licence'. It pointed out that in the licences of the 2G operators (who were one of the sides to the bilateral agreement) no amendment was made in clause 23. Secondly, it expressed the view that the arrangement entered into by the service providers is similar to the Mobile Network Operator (MNO) and Mobile Virtual Network Operator (MVNO) relationship which is not permitted in this country.

We have already discussed the ambit of clause 23 and shown that the scope of the licence and the range of the services permissible under it are governed by

clause 2 and not clauses 23 and/or 43. So far as calling the 2G operators as MVNO, we think the description is quite unkind and grossly inaccurate[25].

In the advisory, TRAI also observed that intra-circle 3G roaming arrangement will create non-level playing conditions among different service providers who had obtained 3G spectrums through the auction. It explained that in any telecom circle there would be more than one operator who had got 3G spectrums. If one of them entered into intra-circle 3G arrangement with a 2G operator in that circle, it would put the other 3G operator in that circle in a disadvantageous position as the latter would have to incur higher operational costs. In our view the reasoning is incorrect for reasons more than one. The question of non-level playing field would arise only if by this arrangement, the 3G operator entering into the arrangement could manage to get a higher quantum of spectrum. But that is not the position; all the 3G operators in the circle, whether or not they enter into intra-circle 3G roaming arrangement, have the same quantum of 3G spectrums as allocated to them through the auction. The analogy that comes to mind is of two persons allocated exactly the same kind of accommodation with identical area. One might prefer to occupy the entire accommodation and the other might let out a portion of it on rent. It cannot be said that the one who is letting out the accommodation is deriving undue advantage and the one not letting out the

[25] The standard definition of MVNO is given earlier in the judgment under the heading "some technical issues".

accommodation is in a disadvantageous position. Secondly, in terms of clause 8 of the NIA, all the queries and their responses by the DoT were made public in the form of a document published before the auction. In other words, the permissibility of intra-circle roaming arrangement was made known to all concerned and it was a matter of choice for a 3G operator to enter or not to enter into this arrangement later on; hence, no one can complain of being put to any disadvantageous position.

In conclusion, we are constrained to observe that on the question of permissibility of intra-circle 3G roaming arrangement under the UAS licence the Government was right (as appears from its responses to the queries and the reference to TRAI dated 10 October 2011) and unfortunately TRAI has taken an erroneous stand.

In the TRAI's advisory it also observed that this kind of arrangement might affect future auctions of spectrums and it is also speculated that it might cause loss of revenue to the Government. We are unable to agree with TRAI as we discuss the matter further in the following part of the judgment.

Loss of Revenue:

On behalf of the Union of India, it is contended in the end that permitting intra-circle 3G roaming would cause considerable revenue loss to the Government.

On the issue of revenue loss, in the Notes of Submissions filed on behalf of the Union of India it is stated as under:

> "Revenue loss: License Condition 18 provides that License fee payable includes both License fee and the Radio Spectrum Charges. The Radio Spectrum Charges are payable as a percentage of Annual Gross Revenue (AGR) of a Licensee. However, in terms of interim order dated 22.10.2010 passed by Hon'ble Supreme Court in Civil Appeal No. 9236/2010 – Idea Cellular Limited Vs. Deptt. Of Telecommunications and Others, at present the percentage of AGR paid towards Radio Spectrum Charges by most of the 2G Licensees is less than the percentage of AGR paid towards Radio Spectrum Charges by 3G Licensees. Due to such intra-service area roaming arrangements, which enables a 2G Service Provider to illegally provide 3G services, there is huge loss to the Public Exchequer and undue gain to the Telecom Service Providers."

We have already decided the issue on merits and hence, nothing much depends on the issue of loss of revenue but we can't help observing that even in the assumption regarding loss of revenue the stand of TRAI and the Union of India is incorrect. A 3G operator would allow the subscribers of the 2G network to roam on its 3G network only and only in case its network is not fully geared for the optimal utilization of spectrums held by it. Hence, the prohibition of intra-circle 3G roaming would have the direct result of under-utilization of 3G spectrums which is plainly not in national interest. Conversely, allowing intra-circle 3G roaming would result in a much fuller and better utilization of the 3G spectrums. This would also increase the gross revenue of both the provider and the seeker of the 3G network and the Government having a percentage share in the adjusted gross revenue of the licence holders would thus be able to get a larger sum as

licence fee. The arrangement is thus beneficial to the consumer – the ordinary man, the operators and the State.

We have also examined the impugned orders passed by the Committee constituted at the DoT against which the three petitions in the second batch are filed by Bharti, Vodafone and Idea and we find that all the reasons given in those orders for holding the intra-circle 3G roaming arrangement being in violation of the licence and imposing maximum penalty on the three petitioners are unsustainable in view of the discussions made above.

We have also carefully examined the Notes of Submissions filed on behalf of Reliance, MTNL and BSNL that appeared in opposition to the petitioners and in support of the prohibition imposed by the DoT. All those submissions too are fully covered by the discussions made above in this judgment.

For the reasons discussed above, we find and hold that the intra-circle 3G roaming arrangement does not violate any provision of the UAS licence held by the two sides and it is not open to the Government to prohibit the petitioners from carrying out the services in terms of the agreements. We accordingly quash the orders passed by the Committee at the DoT on 15 March 2013 in case of Bharti and on 5 April 2013 in case of Vodafone and Idea. We also quash the

communication issued by the Central Government against Aircel and Tata Teleservices Ltd. dated 23 December 2011.

Here we may clarify that it will be equally open to MTNL, BSNL and Reliance to enter into similar arrangements with other operators.

In the result all the petitions are allowed but with any order as to costs.

…….J
(AftabAlam)
Chairperson

……
(Kuldip Singh)
Member

/sks/