TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 31st January, 2014

Petition No. 392 of 2013

Vodafone Mobile Services Ltd. and Ors. …Petitioners
Vs.
Union of India … Respondent

Petition No. 434 of 2013
with
(M.A. No.14 of 2014)

Loop Mobile India …Petitioner
Vs.
Union of India …Respondent

Petition No. 458 of 2013

Bharti Airtel Ltd. …Petitioner
Vs
Union of India … Respondent

Petition No. 23 of 2014
with
(M.A. No.15 of 2014)

M/s Idea CellularLtd. …..… Petitioner
Vs
Union of India ……Respondent

BEFORE:

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

For Petitioners (in P.No.392 of 2013)	:	Mr. Maninder Singh, Sr. Advocate Mr. Manjul Bajpai, Advocate Mr. Tarun Gulati, Advocate Mr. Sparsh Bhargava, Advocate Mr. Shashwat Bajpai, Advocate Mr. Tejveer Singh Bhatia, Advocate Ms. Disha Sachdeva, Advocate Ms. Payal Chandra, Advocate Mr. Varun Kumar Tikmani, Advocate
For Petitioner (in P.No.434 of 2013)	:	Mr. Navin Chawla, Advocate Mr. Yoginder Handoo, Advocate
For Petitioner (in P.No.458 of 2013)	:	Mr. Soli Sorabjee, Sr. Advocate Mr. Rakesh Dwivedi, Sr. Advocate Mr. Gopal Jain, Advocate Mr. Kamal Shankar, Advocate Ms. Stephanie V. Sonawane, Advocate Mr. Sansriti Pathak, Advocate Mr. Atul Menon, Advocate
For Petitioner (in P.No.23 of 2014)	:	Mr. Gopal Jain, Advocate Ms. Shally Bhasin, Advocate Mr. Chaitanya Safaya, Advocate Ms. Stephanie V. Sonawane, Advocate
For Respondent- Union of India (DoT)	:	Mr. K.V. Viswanathan, Additional Solicitor General with Mr. K. P. S. Kohli, Advocate Mr.Abhishek Kaushik, Advocate Ms.Neha Singh, Advocate for Ms.Maneesha Dhir, Advocate

O R D E R

Aftab Alam, Chairperson - The petitioners in the three connected cases are mobile telephone service providers under the Licenses[1] granted by the Central Government to them under section 4 of the Indian Telegraph Act, 1885. Their licenses, on completion of the 20 years period stipulated therein, are due to expire at the end of November 2014. On commencement of the nineteenth year of the licence period, they had approached the Central Government for taking steps for renewal of their licenses for another period of 10 years as provided in the terms of the licence. Failing to get any favourable response, the petitioners went to the Delhi High Court in writ petitions[2] seeking appropriate directions. The High Court, having noted the rival contentions disposed of the writ petitions by order dated 22.02.2013 in the following terms:

> "25. Accordingly, I deem it fit to dispose of the writ petitions with the following directions:
>
> (i) The respondent shall dispose of the pending applications of the petitioners qua their request for extension of their licenses in terms of clause 4.1 of the license.
>
> (ii) The respondent shall in this behalf give due opportunity to the representatives of the petitioners to present their

[1] Unified Access Services Licence in case of Vodafone and Bharti and Cellular Mobile Telephone Service Licence in case of Loop.

[2] i. WP(C) no.1886 of 2013 by Vodafone
ii. WP (C) no.1887 of 2013 by Bharti
iii. WP (C) no. 1888 of 2013 by Loop

case before the concerned officer. For this purpose, notice in writing would be issued to each of the petitioners informing them of the date, time and venue at which they could present themselves through their representatives.

(iii) The order disposing of the applications will contain reasons.

(iv) The exercise in this behalf will be completed on or before 07.03.2012. The decision taken will be communicated to the petitioners forthwith by post and email.

(v) In case the decision taken on the petitioners' applications is adverse to their interest, they will have the liberty to take recourse to an appropriate remedy, which may be available to them, in accordance with law."

2. Following the High Court direction, the petitioners were given the hearing on 04.03.2013, after which they also made an additional representation. But finally their applications for extension of their licences were rejected by orders dated 21.03.2013 [in case of M/s Vodafone India Ltd. and M/s Loop Mobile (India) Ltd.] and dated 22.03.2013 (in case of M/s Bharti Airtel Ltd.) passed by Director (AS-I), Department of Telecommunications, Government of India.

3. As a consequence of denial of extension of licences, all the spectrums held by the three petitioners are put in the pool of spectrums that is going to be put on auction on the coming Monday (03.02.2014). As a result, on the expiry of their licences in November 2014 the assignments and holdings of those spectrums would depend upon the result of the auction.

4. Faced with the prospect of losing the spectrums assigned to them under their respective licences, the petitioners have come to the Tribunal challenging the orders of DoT and seeking a direction to the Central Government to grant extension of their licences for a further period of 10 years on mutually agreed terms and conditions.

5. Here it may also be stated that even while pressing their claim for extension of their licences, Vodafone and Bharti are also taking part in the coming auction and are short-listed as eligible bidders. Their participation in the auction, however, is without prejudice their rights and contentions in the petitions pending before the Tribunal as directed in the order passed on 20.12.2013. Loop is not taking part in the auction.

6. In case of M/s Vodafone India Ltd., the Unified Services Access licences that are the subject matter of its petition are for (i) Delhi Service Area, (ii) Mumbai Service Area and (iii) Kolkata Service Area. In the three service areas, Vodafone is assigned spectrums as indicated in the Table below:

Service Area	**Band**	**Spectrum**	**Total Spectrum**
Delhi	(i) 900 MHz	8 MHz	
	(ii) 1800 MHz	2 MHz	10 MHz
Mumbai	(i) 900 MHz	8 MHz	
	(ii) 1800 MHz	2 MHz	10 MHz
Kolkata	(i) 900 MHz	7.8 MHz	
	(ii) 1800 MHz	2 MHz	9.8 MHz

7. M/s Loop Mobile India Ltd. is the holder of a Cellular Mobile Telephone Service licence for Mumbai Service Area. Under that licence it is assigned an aggregate of 10 MHz spectrum out of which 8 MHz is in 900 MHz band and the remaining 2 MHz is in 1800 MHz band.

8. M/s Bharti Airtel Ltd., like Vodafone is the holder of UAS licences for Delhi and Mumbai service areas. For Delhi Service Area, Bharti is assigned an aggregate of 10 MHz spectrum, out of which 8 MHz is in 900 MHz band and 2 MHz in 1800 MHz band. For Kolkata, Bharti is assigned 6.2 MHz spectrum, all of which comes from 900 MHz band.

9. Here it needs to be noted that a very large portion of the spectrums held by the three petitioners belong to 900 MHz band and a relatively very small portion to 1800 MHz band.

10. According to the petitioners, the grant of the licences to them was inextricably linked with the allocation of spectrum in 900 MHz band and the petitioners make no bones about the fact that their claim for extension of licences is aimed to secure the spectrums in 900 MHz band assigned to them. For, as long as the licences subsist following extension, the petitioners would be able to hold on to the spectrums in the 900 MHz band allocated under those licences.

11. As a matter of fact, on behalf of Bharti and Loop, an offer was made to let them keep the spectrums assigned to them in 900 MHz band on payment of market price as may be ascertained during the auction scheduled to be held on 03.02.2014. Both Bharti and Loop even agreed to limit their spectrums in 900 MHz band to 6.2 MHz, the maximum stipulated quantum under the UAS licence and to pay the market price for it and to surrender the rest of the spectrums held by them for being put to auction on. However, Mr. Vishwanathan, the learned Additional Solicitor General, representing the Union of India, on receipt of instructions from DoT expressed the inability to accept the offer. He explained that the arrangement suggested by Bharti and Loop would take the vigour out of auction and weaken the biddings that would go down and consequently it would not be possible to make any realistic assessment of the market driven prices. Secondly the auction was now in the final stages and any change at this stage would completely dislocate the auction process.

12. The anxiety of the petitioners to hold on to the spectrums in the 900 MHz band is not difficult to understand. The Telecom Regulatory authority of India has discussed the nature and the great value of the 900 MHz band in its recommendations dated 11.5.2010. In paragraph 1.65 of the TRAI report it is stated as under:

> "The 900 MHz band is one of the most used bands in the world. GSM operators all over Europe, Africa and Asia use this band extensively, which makes it one of the most "harmonized" bands in the world. All operators using the 900 MHz have started with GSM services and most of them have already acquired 3G licenses in the 2.1 GHz band. This business evolution makes UMTS 900 a most attractive option for operators and a likely follow-up technology for the future. This is primarily due to the propagation characteristics of the lower frequency band leading to lower Capex and increased mobility benefits, providing a new option, with greater service capability for operators who may wish to replace their GSM networks. The indicative coverage area increase is shown in the following Table:-
>
> **Percentage increase in coverage area**

Frequency	Percentage increase in coverage area per Node-B(Km^2)			
	Dense Urban	**Urban**	**Suburban**	**Rural**
900 MHz vs. 2100 MHz	87%	44%	60%	119%

No wonder, therefore, that the petitioners seem to be determined not to easily give up the spectrums in 900 MHz band. But then the value of 900 MHz band from the national perspective also cannot be completely disregarded.

13. We may now turn to examine the petitioners' claim for extension of their licences. The petitioners assert their claim on the basis the extension clauses in their respective licences. It is pointed out that the expression used in the relevant clauses of the licences is "extension" and not "renewal" and the use of the expression "extension" gives the petitioners a higher and superior right than the right of renewal of the licence. It is further pointed out that the extension is

stipulated to be granted on mutually agreed terms and it was, therefore, incumbent upon the Central Government to engage with the petitioners in negotiations to arrive at the mutually agreed terms. It is submitted that in denying extension of the petitioners' licences the Central Government acted in the most arbitrary and high-handed manner and in complete breach of the terms of the contract.

14. It is the case of the Central Government that under the revised Telecom Policy the allocation of spectrum can only be made by means of auction and any extension of the licences which are due to expire this year would not only hinder the implementation of the policy but effectively nullify it.

15. As the claim of the petitioners is based on the extension clauses in their respective licences we first advert to those clauses.

16. Loop holds a Cellular Mobile Telephone Service licence. On migration to the revenue sharing regime under the Telecom Policy-1999, its licence was amended vide order dated 03.04.2012 issued by DoT (VAS Cell). Clause 2(iii) of the amendment order, dealing with the period of licence and its extension, provides as under:

> "(iii) Period of Licence: The period of license shall be twenty years from the effective date of the existing license agreement unless terminated for the reasons stated therein. The Licensor may extend the period of license, if requested during 19th year from the effective date for a period of 10 years at a time on mutually agreed terms and

conditions. The decision of licensor shall be final in regard to grant of extension."

17. Vodafone and Bharti are holders of UAS licence in which the provisions regarding duration of licence and extension of licence are contained in clauses 3 and 4 which are as under:

"3. Duration of Licence

3.1 This LICENCE shall be valid for a period of 20 years from the effective date unless revoked earlier for reasons as specified elsewhere in the document.

4. Extension of Licence

4.1 The LICENSOR may extend, if deemed expedient, the period of LICENCE by 10 years at one time, upon request of the LICENSEE, if made during 19th year of the Licence period on terms mutually agreed. The decision of the LICENSOR shall be final in regard to the grant of extension."

18. The difference in the relevant clauses in the CMTS licence and the UAS licence is that the latter contains the expression "if deemed expedient" which is not there in the former but as we shall see presently that does not make any material difference in the rights and obligations flowing from the clauses regarding extension in the two licences.

19. Rival submissions were made before us in regard to the true construction of clause 4.1 of the UAS licence, some of which, from each side, tended to take extreme positions. Cutting short the matter, we may straightaway indicate how we

read and understand the rights of the parties under clause 4.1 of the UAS licence. The right to extension of the licence is undeniably a valuable right of the licensee. More so, having regard to the fact that the private operators came to the telecommunication sector on invitation by the Central Government for participation of private capital for the development of telecommunication services in the country; that the private operators, like the petitioners who were given licences under section 4 of the Telegraph Act made investments of thousands of crores of rupees for setting up enormous net-works reaching out to hundreds of millions of peoples and connecting them to each other; and that aided by the endeavours of the private operators in the last two decades the country witnessed a revolution in telecommunication service which is rightly described in the National Telecom Policy- 2012 as "a key driver in the economic and social development". Nonetheless, on the plain language of the clause, the right of extension is not an absolute right. It is a qualified right. The licensor, the Union of India is bound to grant extension only in case the grant is "deemed expedient". Conversely, it is open to the licensor to decline extension if it is not expedient. Further, "expedient" in the context can only mean one thing, that is, in public interest and for public good. It thus follows that it is open to the Central Government to refuse extension if the grant of extension would not be in public interest or sub-serve public good. Further, for the purpose of grant of extension, it is the Central Government alone

that is the judge of public interest and public good. The Central Government may frame a policy or revise an existing policy in larger public interest and in case the extension of the existing licences militates against the new policy it would be a valid and acceptable ground for refusing extension. Ordinarily, the Tribunal will not sit in appeal or interfere with the Government policy unless it is shown that the policy is arbitrary, unreasonable or discriminatory or it is based on no materials. It is also not open to the Tribunal to go into the question whether the objective(s) for which the policy was framed would be more effectively achieved by making certain changes in the policy or by replacing it by a better alternative policy.

20. It is only to be added here that what is said above in regard to clause 4.1 of the UAS licence applies equally to the extension clause in the CMTS licence even though the expression "if deemed expedient" is not expressly mentioned there.

21. It is on these premises that we proceed to consider the claims of the petitioners for extension of their licences.

22. As noted above, the Central Government relies upon the change in its policy for its decision not to accede to the petitioners' request for extension of their licences. In view of the stand taken by the Government, we are required to briefly examine the evolution of the policy regarding allocation of spectrum till it reaches to the present. It is well known that the UAS licence came 'bundled with

spectrum'. In the words of the petitioners "the issuance of licence was inextricably linked with the allocation of the spectrum to the petitioners in the 900 MHz band"[3]. By and by, however, it was realized that the linking of the licence with the spectrum was not the most efficient way of managing spectrum for optimal utilization and it was imperative to delink the licence from the spectrum.

23. On 16.06.2006 the Government constituted a Committee to review the issues of "Excess (GSM/CDMA) Spectrum and Pricing" under the chairmanship of Additional Secretary, DoT with various members, including technical experts from difference institutions, the Ministry of Defence as well as COAI and AUSPI, the two associations of the private mobile telephone service providers. The Committee (commonly called as the "Subodh Kumar Committee", after the name of the Additional Secretary who was chairing the Committee) gave its report on 13.05.2009 in which it is strongly advocated for delinking spectrum from the licence. In chapter-II of the report dealing with the background, in the opening paragraphs it was observed as under:

> "In the early stages of the evolution of the mobile industry, almost all countries including India have followed a command and control policy in respect of spectrum allocation and management. This included identifying the 'best use' of the band, choosing users (e.g. based on first-come-first-service or beauty contest method), setting prices, and achieving efficiencies/consumer benefits by intervention (e.g. roll out obligations, 'use it or lose it' conditions). The command and control approach was useful for achieving early roll out and rapid

[3] Vide order of the Delhi High Court dated 22.02.2003 in the Writ Petition filed by the petitioners.

> growth. However, there are attendant risks of regulatory failure including spectrum getting 'stuck' in lower value uses, and absence of mechanisms to put under-utilised spectrum to a better use.
>
> At the current stage of development of the mobile wireless market in India, the Committee felt that the market mechanism should be explored as an alternative approach, since such a mechanism may be more appropriate in our present context. This may give flexibility in rolling out services with different technologies in a band, subject only to ITU restrictions; allow allocation of spectrum by auction; permit trading in spectrum, and so on. The objective of the Committee is to ensure that over time spectrum will be held and used for the highest value applications, thereby maximizing the benefit to society from this resource."

24. In paragraph (a) under the marginal heading "Spectrum Assignment and Management", the report reminded the Government of its responsibilities as under:

> **"As the custodian of radio spectrum, the government must satisfactorily address a number of goals for spectrum management. These are: efficient utilization of the scarce resource, optimal revenue generation for the public exchequer, sufficient competition in the telecom market, and rapid diffusion of telecom services. These goals are synergistic as well as conflicting."**
>
> (emphasis added)

25. In paragraph (h), dealing with methods for allocation and pricing of spectrum, the report stated as under:

> "It is therefore desirable and feasible that other methods be considered for the allocation and pricing of spectrum. The way forward should be to move away from an administratively determined criteria to a market-driven approach. A market-determined mechanism for spectrum allocation will ensure that spectrum goes to the entity that

> put the highest value on spectrum, and is best placed to ensure its optimal use."

26. Under the marginal heading "Tradeoff between Efficiency and Competition", in paragraph (h) the report stated as under:

> **"In case any new UAS licenses are issued in future, they should not carry with them any eligibility for start-up spectrum**. Since there is no start-up spectrum, the licensees will not have any roll-out obligations for wireless access networks. **The licensee will have to go to the market even for start-up spectrum.**
>
> (emphasis added)

27. Dealing with the issue of market share and competition, in paragraph (i), the report stated as under:

> "……This means that no operator should hold more than 25% of the total spectrum assigned in a service area in the bands listed in Paragraph II-2(b) for the UASL/CMTS services, irrespective of technology mix deployed by the operator. Since the average amount of spectrum assigned per service area is 2 X 75 MHz, the cap allows operators to hold up to 2 X 18.75 MHz on average per service area. This is roughly similar to the international average holding per operator."

28. In chapter-IV, dealing with Merger/Transfer/Sharing of Assigned Spectrum and Future Assignments, the report suggested that the Government may not even comply with its contractual obligation to provide the additional 1.8 MHz spectrum on subscriber linked basis to a holder of a subsisting UAS licence and in paragraph (e) stated as under:

> "…….This would imply doing away with the SLC. No additional spectrum should be assigned to any licensee in future based on the Subscriber Linked Criterion. This includes licensees who may have already become eligible for additional spectrum. The interim SLC notified in the order dated 17.1.2008 need not be revised further, and assignments already made since 17.1.2008 based on it can be taken to the final. All assignments of 2G spectrum in future should be through auction……."

29. In chapter-VI the report made a number of recommendations, two of which at serials (b) and (c) are worthy of being noted here:

> "(b) In case any new UAS licenses are issued in future, they should not carry with them any eligibility for start-up spectrum. Since there is no start-up spectrum, the licensees will not have any roll-out obligations for wireless access networks.
>
> (c) **No additional spectrum should be assigned to any licensee in future based on the Subscriber Linked Criterion**. This includes licensees who may have already become eligible for additional spectrum…….**All assignments of 2G spectrum in future should be through auction…**……..."
>
> (emphasis added)

30. The Subodh Kumar Committee report though raising the important issue of delinking spectrum from the licence, in some senses took an extreme view in that it advocated that the assignment and pricing of spectrum be left completely on the play of market forces and went to the extent of suggesting that the Government should repudiate its contractual obligation of providing the additional 1.8 MHz spectrum to holders of UAS licence who might have become eligible for it under the subscriber linked criteria.

31. Apparently the Government did not accept all the views and recommendations of the Committee and on 07.07.2009 referred the matter to TRAI for its recommendations in terms of clause 11(1) (a) of the TRAI Act. In paragraph 3 of the reference letter, it was stated as under:

> "The Committee has submitted its Report on 13th May 2009 (Copy enclosed). The issues on which the Committee has given its recommendations were earlier deliberated in detail by TRAI also while giving its recommendations on "Review of licence terms & conditions and capping of number of access providers" on 28th August 2007. The recommendations of the Committee have wider implications on Telecom Sector and to public at large. Moreover, all the recommendations are inter-linked or inter-depended (sic.). Therefore, recommendations of TRAI are sought on the recommendations/comments of the Report.
>
> Further, the recommendations of the Committee also include Telecom licences to be in perpetuality as long as the licensee pays the annual licence fee and meets licence conditions. TRAI may also recommend the terms and conditions of existing UAS/CMTS licence for extending validity of these licences perpetually or otherwise vis-à-vis 2G spectrum (GSM and/or CDMA) allocated and/or 3G spectrum owned by existing licensees, as the case may be."

32. TRAI submitted a very detailed report on 11 May, 2012 under the title "Recommendations on Spectrum Management & Licensing Framework". It radically differed with the suggestion made in the Subodh Kumar Committee report in regard to allocation of the additional 1.8 MHz spectrum to the holders of subsisting UAS licenses who might have become eligible on meeting the subscriber linked criteria. But it also recommended that in future spectrum should be delinked from the licence and gave some additional and valuable reasons for the

recommendation. In chapter-I, "Spectrum requirement and availability", TRAI report, *inter alia*, discussed the issue of re-farming of some spectrum bands specially the 800 MHz and 900 MHz bands. Highlighting the need for spectrum review and re-farming, paragraph 1.33 of the report stated as under:

> "Spectrum re-farming (spectrum redeployment) is one of the tools of national spectrum management which combines administrative, financial and technical measures aimed at vacating users or equipment of existing frequency assignments either completely or partially from a particular frequency band. In view of increasing worldwide demand for radio communication services, spectrum re-farming is considered a powerful and innovative approach to manage the spectrum dynamically so as to make it available for newer applications such as 3G, broadband wireless access, digital broadcasting etc. **These new applications have a tremendous impact on the development of the countries.** The frequency band may then be allocated to the same or different radio service(s).
>
> (emphasis added)

33. The report discussed the dire need for re-farming of the spectrum in 900 MHz in paragraphs 1.66 to 1.69. Dealing with the question of the timing of re-farming, in paragraph 1.71 the report observed as under:

> "1.71 The next question is the timing of re-farming. The Authority is of the opinion that as the operators were given the spectrum as per the terms and conditions of the license and subsequent administrative orders of the Government, to take it back at this stage may not be legally tenable. **The first two licenses are due for renewal in 2014/2015, which would be the time the 900 MHz/ 800 MHz bands can be re-farmed.**
>
> (emphasis added)

And in paragraph 1.73 recommended as under:

> **"The Authority recommends that spectrum in 800 and 900 MHz bands should be re-farmed at the time of renewal of the licenses.** For holders of spectrum in 900 MHz band, substitute spectrum should only be assigned in 1800 MHz band and for licence holders of 800 MHz band, spectrum should be assigned in 450 /1900 MHz bands."
>
> (emphasis added)

34. In chapter-II, "Licensing related issues", the report advocated for delinking spectrum from the licence and in paragraph 2.62 stated as under:

> "……Accordingly, the Authority recommends that all future licences should be unified licences and that spectrum be delinked from the licence."

35. In paragraph 2.170, the report observed that though there was no legal right for spectrum at the time of renewal of the licence, the licensee applying for renewal of the licence could be considered to be assigned spectrum in the interest of continuation of service.

36. Finally, in paragraphs 2.173 to 2.175, the report made the following recommendations:

> "2.173 The Authority recommends that while renewing the licence, the Government should assign spectrum only upto the prescribed limit or the amount of spectrum assigned by it to the licensee before the renewal, whichever is less. Spectrum assigned by the Government to the licensee in excess of the Prescribed Limit shall be withdrawn.
>
> 2.174 The spectrum will be assigned at the current price, duly adjusted to the year of renewal. The Authority may review the situation and recommend to the Government the Current price from time to time.

> 2.175 Keeping in view the value of 900 MHz spectrum, the Authority recommends that on renewal of the licence, spectrum held by a licensee in the 900 MHz band shall be replaced by assignment of equal amount of spectrum in 1800 MHz. In case sufficient spectrum in 1800 MHz band is not available with the Government to replace the 900 MHz, the licensee will be allowed to retain the 900 MHz band spectrum on a purely temporary basis subject to the condition, and an undertaking by the licensee, that on availability of spectrum in the 1800 MHz, the spectrum given in the 900 MHz will be taken back by the Government at 6 months' notice. Renewal of the licence will be subject to, inter alia, this express condition. Similar action would be taken in respect of the 800 MHz band spectrum which would be replaced by spectrum in 1900 MHz/450 MHz band.

37. In chapter-VI, "Summary of Recommendations", the report summarized a large number of recommendations of which the one at 6.3 needs to be noted here:

> "Spectrum in 800 and 900 MHz bands should be re-farmed at the time of renewal of the licenses. For holders of spectrum in 900 MHz band, substitute spectrum should only be assigned in 1800 MHz band and for licence holders of 800 MHz band, spectrum should be assigned in 450 /1900 MHz bands. (Para 1.73)"

38. On 11 May, 2010, a press release on the Policy for Spectrum and Pricing was issued by the Union Minister of Communications & IT on 29 January, 2011. In the press release, the Minister unfolded the Government policy to disconnect spectrum from the licence, making it clear that in the event a licence holder would like to offer wireless services, it will have to obtain spectrum through a market driven process.

The relevant extract from the press release of the Minister dated 29 January, 2011 is as under:

> "In future, the spectrum will not be bundled with licence. The licence to be issued to telecom operators will be in the nature of 'unified licence' and the licence holder will be free to offer any of the multifarious telecom services. In the event the licence holder would like to offer wireless services, it will have to obtain spectrum through a market driven process. In future, there will be no concept of contracted spectrum and, therefore, no concept of initial or start-up spectrum. Spectrum will be made available only through market driven process."

39. On 08.02.2011, TRAI forwarded its report on the value of spectrum in 1800 MHz band as assessed for the year 2010.

40. On 15.04.2011, DoT wrote to TRAI seeking clarification in regard to its recommendations in the report dated 11.05.2010 on Spectrum Management & Licensing Framework. TRAI gave its response vide letter dated 03.05.2011.

41. On 22.06.2011, a Committee in DoT submitted its report on TRAI's recommendations dated 11.05.2010 on Spectrum Management & Licensing Framework and its report dated 08.02.2011 on the 2010 value of spectrum in 1800 MHz band.

42. On 10.10.2011, DoT made a reference back to TRAI in respect of certain recommendations made by it in its reports dated 11.05.2010 and 08.02.2011. In paragraphs 2, 3 and 4 of the reference letter it was stated as under:

> "2. The recommendations have been considered by the Government. In respect of certain recommendations, there is a preliminary conclusion that they may need modification/clarification for further action. Hence, in accordance with the proviso under Section 11(1) of TRAI Act, 1997, such recommendations are being referred back to the Authority for their reconsideration as per Annexure.
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> 3. Some of the comments in the annexure are in the nature of back ground in reference to the recommendations being referred back for reconsideration.
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> 4. Government will take a holistic view on the recommendations referred above after receipt of the reconsidered recommendations from TRAI."

43. It was at this stage that the Supreme Court pronounced its decision dated 02.02.2012 in Writ Petition(C) no.423 of 2010: Central for Public Interest Litigation & Ors. Vs. Union of India & Ors.[4](commonly called as "the 2G case"). Paragraphs 85, 89, 95 and 96 of the judgment are relevant in that a duly publicised auction conducted fairly and impartially was held by the Court to be the best method for alienation of natural resources/public property. These paragraphs are extracted below:

> **"85.** As natural resources are public goods, the doctrine of equality, which emerges from the concepts of justice and fairness, must guide the State in determining the actual mechanism for distribution of natural resources. In this regard, the doctrine of equality has two aspects: *first*, it regulates the rights and obligations of the State vis-à-vis its people and demands that the people be granted equitable access to natural resources and/or its products and that they are adequately compensated for the transfer of the resource to

[4] (2012) 3 SCC 1

the private domain; and *second*, it regulates the rights and obligations of the State vis-à-vis private parties seeking to acquire/use the resource and demands that the procedure adopted for distribution is just, non-arbitrary and transparent and that it does not discriminate between similarly placed private parties.

89. In conclusion, we hold that the State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the constitutional principles including the doctrine of equality and larger public good.

95. This Court has repeatedly held that wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition. To put it differently, the State and its agencies/instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants. When it comes to alienation of scarce natural resources like spectrum, etc. it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest.

96. In our view, a duly publicised auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like first-come-first-served when used for alienation of natural resources/public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values. In other words, while transferring or alienating the natural resources, the State is duty-bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process."

44. In the later decision of the Supreme Court dated 27.09.2012, in answer to the Presidential Reference, being Special Reference 1 of 22, it was clarified that the

observations in paragraphs 94 to 96 in the 2G case would apply to the specific case of spectrum. In paragraph 83 of the later judgment, the Court observed as under:

> "…….Therefore, we are convinced that the observations in paras 94 to 96 could not apply beyond the specific case of spectrum, which according to the law declared in 2G case, is to be alienated only by auction and no other method."

45. The binding direction of the Supreme Court would naturally reinforce the view crystalising in the Central Government that allocation of spectrum could only be made on the basis of a public auction. This is reflected in the press statement dated 15.02.2012 made by the Minister of Telecommunication & IT shortly after the pronouncement of the judgment in the 2G case by the Supreme Court. The press statement began by referring to the recommendations of TRAI on Spectrum Management & Licensing Framework dated 11.05.2012 along with its further recommendations of 08.02.2011, clarifications dated 03.05.2011 and response dated 03.11.2011 which were duly considered by the Telecom Commission and further stated that the decisions contained in the press statement were taken on consideration of the recommendations of the Telecom Commission. The press statement in question is as under:

"Press Information Bureau
Government of India
Ministry of Communications & Information Technology

15-February-2012 17:22 IST

Press Statement of Shri Kapil Sibal issued today

Shri Kapil Sibal, Union Minister for Communications and Information Technology held a Press Conference here today. Following is the text of statement given by Shri Sibal.

"Recommendations of TRAI on 'Spectrum Management and Licensing Framework' of May 11, 2010 along with its further recommendations of February 08, 2011, clarifications of May 03, 2011 and response dated November 03, 2011 were considered by the Telecom Commission. After consideration of the recommendations of the Telecom Commission, the Department of Telecommunications has taken following decisions:

1. No more UAS licences linked with spectrum will be awarded.

2. All future licences will be Unified Licences and allocation of spectrum will be delinked from the licence. Spectrum, if required, will have to be obtained separately. A final view on implementation of the Unified License Regime would be taken after receipt of detailed Guidelines and Terms & Conditions from TRAI for Unified Licence including migration path for all existing licence(s) to Unified Licence.

3. In the event of any auction of spectrum pending finalisation of the Unified Licensing Regime, UAS licence without spectrum may be issued which could be subject to a requirement to migrate to Unified licence as and when the regime is put in place. Detailed guidelines for such UAS licence without spectrum would be finalised after receipt of recommendations of TRAI in this regard.

4. There will be uniform licence fee across all telecom licenses and service areas which will progressively be made equal to 8% of the Adjusted Gross Revenue (AGR) in two yearly steps starting from 2012-13.

5. The licence fee and spectrum usage charges payable by each such licensee shall be on actual AGR, subject to a minimum presumptive AGR. This minimum figure would be reviewed by TRAI every year.

6. A decision on the recommendation to bring IP-I Service Providers under licencing regime, who are currently un-licenced passive infrastructure providers, has been deferred for further examination.

7. A rapid comprehensive techno-economic study will be carried out by DoT to examine issues relating to increase in coverage & tele-density in rural areas while at the same time ensuring sustained quality of service and also to examine the adequacy of USOF mechanism alone to achieve these objectives and the need for augmenting USOF schemes with appropriate direct incentivisation of TSPs for rural rollout.

8. The validity of existing UAS (& CMTS and Basic services) licences may be extended for another 10 years at one time, as per the provisions of the

extant licensing regime with suitable Terms & Conditions so as not to imply automatic continuance of existing license and related conditions including quantum and price of any spectrum allocated.

9. On extension, the UAS licensee will be required to pay a fee which will be Rs.2 crore for Metro and 'A' Circles, Rs.1 crore for 'B' circles and Rs.0.5 crore for 'C' circles. This fee does not cover the value of spectrum, which shall be paid for separately. While extending the licence, the licensee shall be assigned spectrum only up to the prescribed limit or the amount of spectrum assigned to it before the extension, whichever is less. Spectrum assigned by the Government to the licensee in excess of the Prescribed Limit shall be withdrawn.

10. The need for re-farming of spectrum is accepted in-principle. Further steps will be taken after receipt of TRAI's recommendations in this regard.

11. The prescribed limit on spectrum assigned to a service provider will be 2X8MHz/ 2X5MHz for GSM/ CDMA technologies respectively for all service areas other than in Delhi and Mumbai where it will be 2X10MHz/ 2X6.25 MHz. However, the licensee can acquire additional spectrum beyond prescribed limits, in the open market, should there be an auction of spectrum subject to the limits prescribed for merger of licences.

12. Decisions on all matters relating to One Time Spectrum Charge including pricing of spectrum in cases of M&A and Spectrum Sharing will be taken separately.

13. Spectrum usage charges were revised in 2010 by the Government and the matter is sub-judice. Further action will be taken by DoT after the matter is decided by the court.

14. The broad guidelines in respect of intra-service area merger of CMTS/UAS licences will, inter-alia, include:

i. For determination of market power, market share of both subscriber base and Adjusted Gross Revenue of licensee in the relevant market shall be considered. The entire access market will be the relevant market for determining the market share, and will no longer be classified separately as 'Wire line' and 'Wireless'.

ii. Merger up to 35% market share of the resultant entity will be allowed through a simple, quick procedure. However, there may be a need to consider cases of merger beyond 35% market share in certain circumstances without breaching the 25% cap on GSM spectrum/ 10 MHz for CDMA spectrum holding in any service area. Recommendation of TRAI that such cases will be considered up to a market share of 60% has been taken note of. In order to ensure clarity on the circumstances and extent to which merger above 35% limit would be permissible, detailed transparent criteria will be prescribed/ adopted after receipt of TRAI's

recommendations and after due consultation with the appropriate authorities.

iii. Consequent upon the merger of licences in a service area, the total spectrum held by the Resultant entity shall not exceed 25% of the spectrum assigned, by way of auction or otherwise, in the concerned service area in case of 900 and 1800 MHz bands. In respect of 800 MHz band, the ceiling will be 10 MHz. In respect of spectrum in other bands, relevant conditions pertaining to auction of that spectrum shall apply**.**

iv. If, as a result of the merger, the total spectrum held by the resultant entity is beyond the limits prescribed, the excess spectrum must be surrendered within one year of the permission being granted. Government may prescribe the band which will be required to be surrendered in accordance with spectrum re-farming policy to be announced separately.

v. The substantial equity and cross holding of the Resultant entity shall be in conformity with the provisions of the UAS licence.

vi. The duration of licence of the resultant entity in the respective service area will be equal to the higher of the two periods on the date of merger. This does not however entitle the resultant entity to retain the entire spectrum till the expiry of licence period.

vii. In case of renewed validity beyond the original validity of any of the merged entity, holding of spectrum in 800/900 MHz band shall be subject to the applicable spectrum re-farming guidelines to be announced in future w. e. f, the deemed date of extension of merging entity having lesser validity of licence at the time of merger or the date of spectrum re-farming guidelines whichever is later.

viii. Issues related to spectrum price, to be paid by the resultant entity, would be decided separately. The same shall also apply in case of renewal of wireless operating licence, post-merger.

ix. On the merger of the two licenses, the AGR of the two entities will also be merged and the license fee will be therefore levied at the specified rate for that service area on the resultant total AGR. Similarly, for the purpose of payment of the spectrum charge, the spectrum held by the two licensees will be added /merged and the annual spectrum charge will be at the prescribed rate applicable on this total spectrum. However, in case of holding of spectrum for various technologies by the entity subsequent to Merger, spectrum charges & license fee etc. or any other criterion being followed by the licensor shall be applicable as in case of any other UAS/CMTS licensee.

x. Existing provisions in the UAS licence relating to Lock-in period for sale of equity/merger shall continue.

15. Broad guidelines for sharing of 2G spectrum (800/900/1800 MHz bands) will, inter-alia, include:

i. Spectrum sharing will be permitted but in each case, it will be in the same licence service area and will be with the prior permission of the licensor. A simple automatic approval process will be put in place for this purpose.

ii. Permission for Spectrum sharing will be given initially for a period of 5 years. Government may renew the permission for a further one term of five years, on terms to be prescribed.

iii. Spectrum can be shared only between two spectrum holders both of which are holding spectrum either in 900/1800 MHz band or in 800 MHz band.

iv. Total quantum of spectrum, as a result of the spectrum sharing, shall not exceed the limit prescribed in case of mergers of licences.

v. In respect of spectrum obtained through auction, spectrum sharing will be permitted only if the auction conditions provide for the same.

vi. Parties sharing the spectrum will be deemed to be sharing their entire spectrum for the purpose of charging.

vii. Both the parties shall fulfill individually the roll out obligations as well as the QoS obligations prescribed under the licence.

viii. Spectrum usage charges will be levied on both the operators individually but on the total spectrum held by both the operators together. In other words, if an operator 'X' having 4.4MHz of spectrum shares 4.4 MHz of spectrum of another operator 'Y', then both 'X' and 'Y' will be liable to pay spectrum usage charges applicable to 8.8 MHz of spectrum.

ix. Spectrum sharing would involve both the service providers utilising the spectrum. Leasing of spectrum is not permitted.

x. Decision on matters related to pricing of spectrum, post sharing, would be taken separately.

xi. Spectrum sharing will not be permitted among licensees having 3G spectrum.

16. Spectrum trading will not be allowed in India, at this stage. This will be re-examined at a later date.

17. For efficient management of available spectrum, TRAI may undertake regular spectrum audit. TRAI may carry out review on the present usage of spectrum available. In both the cases, TRAI may make recommendations to the Government.

18. The judgement of the Supreme Court pronounced on 2nd February, 2012 cancelling 122 licenses has implications for some of the recommendations of the Telecom Commission. Such recommendations are being examined further with reference to legal and other aspects and decisions in this regard will be announced later."

46. On 23.04.2012, TRAI made recommendations on various issues related to the conduct of auction of the spectrum hoping that those would serve as guidelines for the spectrum auction for the next few years. In the recommendations dated 23.04.2012, TRAI also advocated that all spectrum to be assigned through the auction process in future should be liberalized. In other words, spectrum in any band could be used for deploying any services in any technology. In paragraphs 2.81 and 2.82 of the report, TRAI made the following recommendations:

> "2.81. The Authority therefore recommends that the re-farming of spectrum in the 800 MHz and 900 MHz bands should be carried out progressively at an early date but not later than the due date of renewal of the licences. The spectrum available with the service providers in the 900 MHz band should be replaced by spectrum in the 1800 MHz band, which should be charged at the price prevalent at the time of re-farming.
>
> 2.82. The Authority also recommends that the Government must actively explore the possibility of re-farming of the spectrum in the 900 MHz band immediately, by invoking the authority to change the licence conditions."

47. On 02.05.2012, DoT referred back the recommendations of TRAI dated 23.04.2012 on auction of spectrum for reconsideration as the Government came to a prima facie conclusion that some of the recommendations of TRAI could not be accepted as made and needed moderation. There was an exchange of correspondence on the issues in question between DoT and TRAI and on 26.05.2012, the Telecom Commission considered the report of the internal committee of DoT and the TRAI recommendations and made its own recommendations to the Government. On 31.05.2012, the Government approved National Telecom Policy-2012 that currently holds the field in the telecom sector.

48. From the record it is clear that even after the issuance of National Telecom Policy-2012 a lot of deliberations for its implementation and holding the auction for dispensation spectrum took place in DoT in consultation with TRAI and the matter went up-to the Empowered Group of Ministers. On the basis of the decision took by the Empowered Group of Ministers, an auction of spectrums was held on 11.03.2013, but it remained unsuccessful. After the failed auction of March 2013 TRAI made fresh recommendations on 09.09.2013 in which the valuation and the reserve price of spectrum were substantially reduced. The matter received the approval of the Empowered Group of Ministers on 22.11.2013 following which the

Notice Inviting Applications was issued on 12.12.2013, commencing the auction process which, as noted above, is scheduled to be held on 03.02.2014.

49. In light of what is noted above it is evident that, before reaching the present stage, the matter was deliberated upon, over several years, in DoT, in consultation with TRAI, which is the statutorily constituted expert body in the telecommunication sector, and the Telecom Commission. The National Telecom Policy-2012 came to be formulated and in its pursuance steps were taken for auctioning spectrum and the NIA dated 12.12.2013 was issued setting off the auction process after considerations at the highest level in the Government. It is possible to point out deficiencies and flaws in National Telecom Policy-2012; it is equally possible to argue that the manner in which the Government has proceeded in the matter does not conform with the full package and scheme for spectrum management as suggested in the recommendations of TRAI. As a matter of fact Mr. Dwivedi, learned Senior Counsel appearing for Bharti, submitted a note titled "Contiguioty, Re-farming and Market Related Price" and was at pains to persuade us that the issues of re-farming and contiguity of spectrum as suggested in the recommendations of TRAI can be well addressed by allowing extension of the petitioners' licences.

50. But that is not the issue. We discussed how the Government policy evolved and how the present NIA dated 12.12 2013 came to be issued not with a view to

judge the National Telecom Policy for its efficacy as an instrument for efficient management of spectrum or to test the legality and validity of the terms and conditions of the NIA. Those are not the issues before us. Neither the telecom policy nor the terms of NIA are under challenge. As to the manner of auction not conforming to the larger scheme of management of spectrum envisaged in the TRAI recommendations, without going into the merits of the contention, the simple answer is that the Central Government is not bound to accept all the recommendations of TRAI as provided in the first proviso to section 11 of the TRAI Act.

51. In any event the limited issue before us is the petitioners' claim for extension of their licenses and in that connection suffice to show that after deep and careful consideration of the matter, in consultation with the expert statutory authority in the sector, the Government has framed a policy for management and dispensation of spectrum in the larger public interest. Any extension of the expiring licenses is bound to undermine the implementation of the policy and that is justification enough and sufficient for the Government to decline the extension for the licenses.

52. Here, we may refer to two decisions relied upon by the learned Solicitor which are apt to the point. In Union of India & Anr. Vs. International Trading Co.

& Anr.[5], in paragraph 9 of the judgment the Supreme Court observed and held as under:

> **"**Though there can be quarrel with the proposition that renewal of a permit carries with it a valuable right, it cannot be lost sight of that for outweighing reasons of public interest, renewal can be refused. It is not in dispute that licences have not been granted for a period of 15 years. If at the time when the matter is taken up for considering whether renewal is to be granted, there is a change in policy it cannot be said that the right is defeated by introduction of a policy. In such an event, the question of applying the doctrine of legitimate expectation or promissory estoppel loses significance. It has not been disputed that in fact the policy decision exists. But the stand of the respondents is that it cannot outweigh the legitimate expectation or the inbuilt rights. Additionally it is submitted that the issue has to be considered in the background of thirty two vessels referred to above.

53. In another decision in APM Terminals B.V. Vs. Union of India[6], in paragraph 67 of the judgment the Supreme Court observed and held as under:

> **"**It has been the consistent view of this Court that a change in policy by the Government can have an overriding effect over private treaties between the Government and a private party, if the same was in the general public interest and provided such change in policy was guided by reason. Several decisions have been cited by the parties in this regard in the context of preventing private monopolisation of port activities to an extent where such private player would assume a dominant position which would enable them to control not only the berthing of ships but the tariff for use of the port facilities."

[5] (2003) 5 SCC 437
[6] (2011) 6 SCC 756

54. In light of the discussions made above, the inescapable conclusion is that the denial of extension of the licences to the petitioners is based on good reasons as envisaged under clause 4.1 of the UAS licence and the relevant provision in the CMTS licence and the petitioners can claim no right for extension of their licences under the aforesaid provisions of their licences.

55. We would, however, like to take note of two points made on behalf of the petitioners. It was stated on behalf of all the three petitioners that the refusal to extend their licences and consequent possibility of their discontinuation as mobile telephone service providers would result in a complete break-down of the mobile telephone service in the country and would leave hundreds of millions of their subscribers in the lurch for a very long time that may extend to several months or years before their subscribers could be provided the service by operators replacing them. We asked Mr. Vishwanathan to take an unequivocal stand on the issue of continuity of service and to file an affidavit in that regard. In pursuance of our direction, an affidavit is filed on behalf of the Union of India, in paragraph 12 of which it is stated as under:

> "That under the Mobile Number Portability ('MNP') a subscriber can port to other operators. As per TRAI, customer guide for availing the facility of MNP, from the date of application, the change-over takes place on the 7th working day (15th working day in case of Jammu & Kashmir, Assam and North East Service Areas) and the service disruption time shall be around 2 hours during night time of the date/time of porting. A copy of TRAI customer guide for availing the

facility of Mobile Number Portability are annexed as ANNEXURE-A."

56. We accept the averments made in the affidavit in the hope and trust that DoT has fully gone into the technological aspects of the transitional period and arrangements are in place to ensure that there is no dislocation in the mobile telephone service in the country.

57. It was also argued on behalf of one of the petitioners that having been induced to make huge investments running into thousands of crores, it had the legitimate expectation of the extension of the term of the licence and the denial of extension was not only illegal and unreasonable but also reflected upon the uncertainties of doing business in the country. The claim for extension of licence was also sought to be buttressed in the name of investor-friendly-environment. We would only like to observe that the holder of a UAS licence has no right of allocation of spectrum beyond 6.2 MHz. As against that, all the petitioners have been holding, for years, spectrums far in excess of the contracted quantum and that too in the most premium band and that on payment of entry fee at rates fixed in 2001. Hence, we are not impressed by this submission.

57. Having regard to the view taken by us, all the criticisms of the order of DoT rejecting the application for extension made by Mr. Maninder Singh, learned senior counsel appearing for Vodafone lose all relevance. Some of the reasons assigned

in the DoT order may or may not hold good but since the petitioners have failed to establish their right for extension in terms of the relevant provisions in their licences, the matter ends there.

58. In the result, we find no merits in the petitions which are accordingly dismissed.

Sd/-

…..……J
(Aftab Alam)
Chairperson

Sd/-

……..
(Kuldip Singh)
Member

/sks/