

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

Dated 31st January, 2014

**Petition No.360 of 2012
(M.A. No. 348 of 2013)**

M/s Dishnet Wireless Ltd., ChennaiPetitioner
Vs
Union of India, DoTRespondent

**Petition No.361 of 2012
(M.A. No. 349 of 2013)**

M/s Aircel Limited, ChennaiPetitioner
Vs
Union of India, DoTRespondent

**Petition No.381 of 2012
(M.A.Nos.234, 261 of 2012 and 345 of 2013)**

Tata Teleservices Ltd. & Anr.Petitioners
Vs.
Union of India & Anr.Respondents

Petition No.382 of 2012

Tata Teleservices Ltd. & Anr.Petitioners
Vs.
Union of India & Anr.Respondents

Petition No.364 of 2012
(M.A. No. 346 of 2013)

Reliance Communication Ltd.

....Petitioner

Vs.

Union of India & Anr.

....Respondents

BEFORE:

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

For Petitioners
(P.Nos.360 and 361 of 2012)

: Mr.Meet Malhotra, Sr. Advocate
Mr.Ravi S.S. Chauhan, Advocate
Mr.Kirat Singh Nagra, Advocate
Mr.Monish Panda, Advocate
Mr.Pranav Vyas, Advocate
Mr.Kshitiz Karjee, Advocate

For Petitioners
(In P.Nos.381, 382 & 364 of 2012)

: Mr.Ramji Srinivasan, Sr.Advocate
Mr.Shoket Ali, Advocate
Ms. Shally Bhasin, Advocate
Mr. Lakshmeesh, Advocate
Mr.Chaitanya Safaya, Advocate

For Respondent
Union of India(DoT)
(In P.Nos.360, 361, 381, 382 & 364 of
2012)

: Mr.K.V. Viswanathan, ASD
Mr.Ruchir Mishra, Advocate
Mr.Abhishek Kaushik, Advocate
Mr.Ramneek Mishra, Advocate

For Intervenor-Unitech Wireless
(In P.No.s381, 382 & 364 of 2012)

: Mr.Meet Malhotra, Sr. Advocate
Mr.Ravi S.S. Chauhan, Advocate

For Intervenor-COAI
(In P.Nos.381, 382 & 364 of 2012)

: Mr.Maninder Singh, Sr. Advocate
Mr.Manjul Bajpai, Advocate
Mr.Tejevveer Singh Bhatia, Advocate
Mr.Shashwat Bajpai, Advocate
Ms. Disha Sachdeva, Advocate

ORDER

Aftab Alam, Chairperson - Does the Unified Access Services Licence have a definite contracted quantum of spectrum which the licensor, the Union of India is obliged to provide to the licensee? In case the answer to the question is in the affirmative, what is the amount/extent of spectrum assured under the UAS licence to a mobile phone service operator using the GSM technology? Is the licensor, the Union of India committed to provide 6.2 MHz spectrum in aggregate (indeed, on the licensee meeting the prescribed criteria) or in terms of the licence the entitlement of the licensee does not exceed 4.4 MHz band and the Union of India is not obliged to give the additional spectrum of 1.8 MHz? Further, in case the assured quantum under the UAS licence is 6.2 MHz spectrum, whether the allocation of the 1.8 MHz additional spectrum beyond the initial 4.4 MHz spectrum is covered by the entry fee paid at the time of grant of the licence or the additional allocation of spectrum, (on meeting the prescribed criteria) is subject to payment for the additional spectrum at the market rate? These are the questions that arise for consideration in this batch of cases.

2. A final adjudication on these petitions acquired some urgency as the Central Government proceeded to put spectrum on auction. We were informed that spectrum was going to be put on auction but how the auction would affect the

claims of the petitioners in the petitions pending before the tribunal was not quite clear. These petitions were filed in the year 2012. On 5 September, 2012 when, on behalf the Union of India, the maintainability of the petitions before the Tribunal was questioned in view of the order of the Supreme Court passed on 27 August, 2012 in I.A. no. 8-10 of 2010 in Writ Petition (c) no. 410 of 2010, the Tribunal directed the Central Government to file a short reply by 14 September, 2012 clarifying also whether the entire spectrum available with it was being put on auction. No affidavit was filed clarifying the issue but the Government proceeded to hold the auction that was earlier fixed for 23 January, 2014 and is now to be held on 3 February, 2014. We, therefore, took up the hearing of the matter lest the petitions be rendered infructuous. However, at the end of hearing an affidavit is filed on behalf of Union of India that discloses that actually all the available spectrums are being put on auction and if all goes well and the auction is fully successful no spectrum may be left after the auction is over.

3. The five petitions comprising this batch are filed by four petitioners. M/s Dishnet Wireless Ltd. and M/s Aircel Ltd., which are group companies, have filed Petitions no.360 of 2012 and 361 of 2012 respectively. Dishnet seeks additional allocation of 1.8 MHz spectrum in the service areas of Bihar, North-East, West Bengal, J & K, Kolkata, Orissa, UP (East) and three districts (Sonitpur, Nagaon and Morigaon) of the Assam service area. Dishnet had taken out UAS licences

under section 4 of the Indian Telegraph Act, 1885 for the aforesaid service areas in December, 2006 on payment of entry fees fixed under the Unified Access Services Licence Guidelines, dated 14.12.2005 (that had continued without any change from 2001). According to its case, on the basis of the start-up spectrum of 4.4 MHz initially allocated, it was able to meet the subscriber linked criteria (SLC) fixed under the order dated 17January, 2008 issued by the Government of India in the Department of Telecommunication and made applications for allocation of the additional 1.8 MHz spectrum as stated in paragraph 13 of the petition. Despite repeated requests, no heed was paid to its claim for additional spectrum and it was forced to come to the Tribunal for appropriate directions.

4. Aircel similarly seeks allocation of additional 1.8 MHz spectrum in the service areas of Delhi, Mumbai and Rajasthan. It had taken out UAS licences under section 4 of the Indian Telegraph Act, 1885 for the three circles in December, 2006 on payment of Entry fees fixed under the Unified Access Services Licence Guidelines, dated 14. 12. 2005. According to its case, on the basis of the start-up spectrum of 4.4 MHz initially allocated, it was able to satisfy the SLC fixed under the order dated 17January, 2008 issued by the DoT and made the first application for allocation of additional spectrum on 15.02.2010 for Delhi, on 10.10.2011 for Mumbai and on 25.05.2012 for Rajasthan. Despite repeated requests no heed was paid to its claim and thus it was compelled to come to this Tribunal.

5. Both Dishnet and Aircel are pan-India operators and have licences covering all the 22 circles in which the country is divided. It is their case that for circles other than those forming the subject matter of the two petitions, they were duly allocated 1.8 MHz spectrum in addition to the start-up spectrum of 4.4 MHz. It is further their case that almost all other operators and holders of UAS licences are allocated the additional 1.8 MHz spectrum adding up to the aggregate of 6.2 MHz, while some of the private operators are allocated as much as 10 MHz spectrum. It is contended on their behalf that the action of the Central Government in denying to them the additional spectrum of 1.8 MHz in service areas as indicated above is patently arbitrary, discriminatory and in flagrant violation of the terms of the licence.

6. The other two petitioners in the remaining three petitions are M/s Reliance Communications Ltd. and M/s Tata Teleservices Ltd. In petition no.364 of 2012, Reliance seeks allocation of additional spectrum of 1.8 MHz in service areas of Delhi, Mumbai, Kolkata, Maharashtra, Gujarat, Andhra Pradesh, Karnataka, Tamil Nadu, Punjab, Haryana, UP(West), UP(East), Rajasthan, Madhya Pradesh, West Bengal, Himachal Pradesh, Bihar and Orissa. According to its case, on the basis of the start-up spectrum of 4.4 MHz, it was able to satisfy the subscriber linked criteria fixed under the order dated 17th January, 2008 issued by DoT and made applications for allocation of additional 1.8 MHz spectrum as stated in paragraph 2

of the petition. Despite repeated requests, no heed was paid to its claim for additional spectrum and it was forced to come to the Tribunal for appropriate directions.

7. Tata has filed two petitions being petition nos.381 and 382 of 2012 respectively. In petition no.382 of 2012, like Dishnet, Aircel and Reliance, it seeks allocation of additional 1.8 MHz spectrum in service areas of Andhra Pradesh, Mumbai, Maharashtra, Karnataka, Tamil Nadu, Madhya Pradesh, U.P.(East), U.P.(West), Punjab, Haryana, Gujarat, Kolkata, Kerala, Bihar, Orissa and Rajasthan. According to its case, on the basis of the start-up spectrum of 4.4 MHz, it was able to satisfy the subscriber linked criteria fixed under the order dated 17th January, 2008 issued by the DoT and made the first applications for allocation of additional 1.8 MHz spectrum as stated in paragraph 3 of the petition. Despite repeated requests, no heed was paid to its request for additional spectrum and it was forced to come to the Tribunal for appropriate directions.

The second petition by Tata (Petition no.381 of 2012) is a little different from the other four petitions. In this case it seeks allocation of the initial 4.4 MHz start-up spectrum itself which has not been allocated to it in the service areas of Delhi and in 39 districts in 9 service areas as stated in detail in paragraph 21 of the petition.

8. The cases of the four petitioners appear to be similar in that each of them want additional spectrum in terms of the UAS licence as mobile telephone service line on GSM platform. (Tata, of course, in addition seeks allocation of the 4.4 start-up spectrum in its second petition). But the case of Aircel and Dishnet differs from the case of Reliance and Tata in one respect. Aircel and Dishnet are original GSM operators. Reliance and Tata on the other hand were initially basic service operators. In pursuance of the decision of DoT dated 17.10.2007, they were given permission for use of “dual technology” following which amendments were made in their UAS licences and they were allocated “dual spectrum” under the same UAS licence. Then only they started employing GSM standard for their operations as mobile telephone service provider. According to Reliance and Tata, once they got the permission to operate on GSM technology and consequent amendments were made in their UAS licences they stand at-par not only with Aircel and Dishnet but all the other GSM operators who as noted above were allocated the additional 1.8 MHz spectrum, some of them being allocated spectrum far in excess of 6.2 MHz.

9. Aircel and Dishnet claim that they are entitled to the additional 1.8 MHz spectrum in terms of UASL licences granted to them and they strongly rely on clauses 43.5(i) and 43.5(ii) of the licence which are as under:

“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 up-to 4.4 MHz + 4.4 MHz **shall** be allocated in the case of TDMA based systems @ 200 KHz per carrier or 30 KHz per carrier **or** a maximum of 2.5 MHz + 2.5 MHz shall be allocated in the case of CDMA based systems @ 1.25 MHz per carrier, **on case by case basis subject to availability**. While efforts would be made to make available larger chunks to the extent feasible, the frequencies assigned may not be contiguous and may not be the same in all cases or within the whole Service Area. For making available appropriate frequency spectrum for roll out of services under the licence, the type(s) of Systems to be deployed are to be indicated.

43.5(ii) **Additional spectrum beyond the above stipulation may also be considered** for allocation after ensuring optimal and efficient utilization of the already allocated spectrum taking into account all types of traffic and guidelines/ criteria prescribed from time to time. **However, spectrum not more than 5 + 5 MHz in respect of CDMA system or 6.2 + 6.2 MHz in respect of TDMA based system shall be allocated to any new Unified Access Services Licensee**. The spectrum shall be allocated in 824-844 MHz paired with 869-889 MHz, 890-915 MHz paired with 935-960 MHz, 1710-1785 MHz paired with 1805-1880 MHz.”

(emphasis added)

10. Reliance and Tata equally rely upon clauses 43.5(i) and 43.5(ii) but as indicated above, in their licences these clauses were not there from the beginning and came to be incorporated in a somewhat circuitous way. Initially, Reliance and Tata had got licences for provision of Basic Telephone Service in which the allocation of frequencies was dealt with in clause 32.5 that read as under:

“For wireless operations in SUBSCRIBER access network, the frequencies shall be allocated by WPC from the designated bands prescribed in National Frequency Allocation Plan – 2000 (NFAP 2000) in coordination with various users. However, the frequency in GSM band of 890-915 MHz paired with 935-960 MHz and 1710-1785 MHz paired with 1805-1880 MHz will not be allocated under any circumstances to the LICENSEE. For Wireless Access Systems in local area not more than 5 + 5 MHz in 824-844 MHz paired with 869-889 MHz band shall be allocated to any Basic Service OPERATOR including the existing ones on first come first served basis. The same principle shall be followed for allocation of frequency in 1880-1900 MHz band for Micro cellular architecture based system. The detailed procedure for Wireless Access System frequency allocation linked with roll out obligations, is enclosed as ANNEXURE-IX.”

On the basis of the Basic Telephone Service licence, Reliance and Tata provided fixed line phone service with limited mobility by means of Wireless Local Loop (WLL) on CDMA platform.

11. With the introduction of the migration policy by the Government, both Reliance and Tata migrated to Unified Access Service License (UASL) regime and obtained licences for provision of unified access services. They, however, continued to operate on CDMA platform and were consequently allocated 2.5 MHz + 2.5 MHz spectrum. It needs to be noted here that clause 43.5(ii) in the UAS licences originally granted to Reliance and Tata were markedly different from clause 43.5(ii) in the UAS licence to a GSM operator as seen above in case of Aircel and Dishnet. In case of Reliance and Tata, clauses 43.5(ii) and 43.5(iii) of their UAS licences originally read as under:

“43.5(ii) The Licensee operating wireless services will continue to provide such services in already allocated/contracted spectrum. At present contracted spectrum allocation is 5+5 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.”

12. On 6 February, 2006 Reliance made an application for permission to use “dual technology”, a euphemism for permission to use GSM technology. While its application was pending, on 13 April, 2007 DoT made a reference to Telecom Regulatory Authority of India (TRAI) for its recommendations on a number of issues enumerated in paragraph 2 of the letter making reference which is reproduced below:

“2. Fast changes are happening in the Telecommunication sector. In order to ensure that the policies keep pace with the changes/ developments in the Telecommunication sector, the Government is contemplating to review the following terms and conditions in the Access Provider (CMTS/UAS/Basic) licence.

- (i) Substantial equity holding by a company/legal person in more than one licence company in the same service area (clause 1.4 of UASL agreement).
- (ii) Transfer of licences (clause 6 of the UASL)
- (iii) Guidelines dated 21.02.2004 on Mergers and Acquisitions. TRAI in its Recommendations dated 30.01.2004 had opined that the guidelines may be reviewed after one year.

- (iv) **Permit service providers to offer access services using combination of technologies (CDMA, GSM and/or any other) under the same licence.**
- (v) Roll-out obligations (Clause 34 of UASL).
- (vi) Requirement to publish printed telephone directory.

Certain issues are applicable to other licences (NLD/ILD etc.) also.”

(emphasis added)

TRAI was requested to give its recommendations in terms of clause 11(1)(a) of the TRAI Act on the issue of limiting the number of access providers in each service area and review of terms and conditions in the Access provider licence mentioned in paragraph 2 of the letter.

TRAI submitted its recommendations on 28.08.2007 on which DoT took certain decisions on 17.10.2007.

13. On 18.10.2007, DoT addressed a letter to Reliance giving in-principle approval for use of GSM technology under the UAS licences held by it in different circles. It also stated that the date of receipt of payment of prescribed entry fee shall determine the date of priority of allocation of spectrum. It was also indicated that separate revenue streams shall be maintained for different technology – GSM and CDMA, for calculation of licence fee and spectrum charges.

14. On 19.10.2007, DoT issued a press release that announced certain major decisions taken by the Government one of which was to permit the existing private UAS licensees to expand their network by using alternate wireless technology, i.e., a UAS licensee that was using GSM technology for wireless access would be permitted to use CDMA technology and vice-versa.

15. On the same day, Reliance deposited the amount of entry fee (that came to around Rs.1650 crores for pan-India licences in 22 service areas). Following the payment of the one-time non-refundable fees for use of GSM technology in addition to CDMA technology, amendments were made in the UAS licence held by Reliance on 06.12.2007 incorporating the clauses 43.5(i) and 43.5(ii) in the same terms as in the UAS licence of other GSM operators like Aircel and Dishnet. The incorporation of clause 43.5(i) in the licence of Reliance was though with one significant difference. In the Reliance's licence in clause 43.5(i) the word "or" was replaced by the word "and". As a result, while the earlier holders of the UAS licence could operate either in the CDMA **or** GSM technology, Reliance was given the greater choice of operations in that it was free to operate both in CDMA **and** GSM technologies at the same time. Clause 43.5(i) in Reliance's UAS licence reads as under:

“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 up-to 4.4 MHz + 4.4 MHz shall be allocated in the case of TDMA based systems (@ 200 KHz per carrier or 30 KHz per carrier) **and** 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.

(emphasis added)

16. Tata, similarly, made an application for permission for dual technology on 19.10.2007, the date on which the press release was issued. Its application lay in DoT till 10.01.2008 when another press release was issued asking the applicants for new ASL licences to collect letters from the DoT. In that press release, the companies who had applied for dual technology spectrum were also asked to collect the response of DoT. Tata whose application was also pending appeared before at DoT and received in-principle approval of its request for use dual technology on the same day. On that very day (10.01.2008), it made payment of the entry fee and on March 4, 2008 amendments similar to those as in the case of Reliance were made in its UAS License. On 05.03.2008, Tata submitted application for grant of the start-up GSM spectrum and allocations of the start-up GSM spectrum were made in its favour during the period between 22 April, 2008 and 9 March, 2009.

17. The Government decision to permit use of dual technology and the in-principle approval granted to Reliance on 18.10.2007 and the press release issued on 19.10.2007 were promptly challenged before the Tribunal by Cellular Operators Association of India (COAI) and its members, cellular operators in petition no.286 of 2007 filed on 23.10.2007. In this petition, Reliance Communications Ltd. was impleaded as respondent no.3 and Tata Teleservices Ltd. as respondent no.5. The COAI and its members challenged the Government decision permitting the use of dual technology, inter alia, on grounds that the provisions of UAS licence did not allow the use of dual technology and the permission granted to Reliance was in contravention of the terms of the licence and further that the introduction of the new players on GSM platform by this means was an invasion of the rights of the earlier operators as it would jeopardize the chances of their getting additional allocation of spectrum on subscriber linked basis since spectrum was not only limited but a scarce resource.

18. Failing to get any interim relief from the Tribunal, COAI took the matter to the Delhi High Court in Writ Petition no.9654 of 2007. In the High Court, DoT filed its counter affidavit on 14.01.2008, resisting the claims of COAI. In the counter affidavit DoT also disclosed its stand in regard to the quantum of spectrum which a holder of UAS licence was entitled to and in paragraph 12 of the counter affidavit, it stated as under:

“(i) Spectrum is to be allocated based on TRAI’s recommendation dated 28th August 2007.

(ii) For UAS licensees, the GSM spectrum allocation from initial allocation of 4.4 MHz to the contracted spectrum of 6.2 MHz shall be in a single step i.e. 1.8 MHz allocation as per eligibility.

(iii) Additional GSM Spectrum beyond the contractual allocation (i.e. 6.2 MHz) is to be allocated in multiple of 1 MHz as per eligibility.

It is submitted that as per the decision above, as on the verifiable available data on date, there is no applicant who is eligible for allotment of Spectrum above 10 MHz.”

19. The Delhi High Court, by judgment dated 22.08.2008, dismissed the writ petition filed by COAI. In paragraph 91 of the judgment, the High Court noted the submissions of the Additional Solicitor General as under:

“Mr. Vikas Singh, learned Additional Solicitor General has pointed out that in view of the applicable policy and in terms of the licence, the petitioners were entitled to only 6.2 + 6.2 MHz whereas they are presently enjoying a spectrum allocation of 10 + 10 Mhz. Such allocation was possible as frequency spectrum was available and the number of operators was limited.

In paragraph 92 of the judgment, the High Court observed as under:

“It appears that the UASL licences granted to the GSM operators also contained the same clause. Only the stipulation with regard to a claim of parity with regard to the quantum of spectrum was not to be found in their UASL licences. This was for the reason that CDMA operators were within the limits of the contractually fixed spectrum allocation, while the GSM operators had been allocated varying quantities of spectrum beyond their **contracted maximum amount of 6.2 MHz** even as was noticed by the TRAI as well.”

(emphasis added)

20. As the matter proceeded before the Tribunal for final disposal on merits, DoT filed its reply in which, in regard to the quantum of spectrum which a holder of UAS licence was entitled to, it made exactly the same statement as in the counter affidavit filed in the High Court which is quoted above.

21. The petition was finally disposed of by the Tribunal by a long and detailed judgment dated 31.03.2009. This judgment is of considerable importance and needs to be referred to in some detail.

22. At the beginning of the judgment, having regard to the contentions of the different parties, the Tribunal framed the following issues for determination:

“I. Issue of vested right – whether the Cellular Operators have a legal and vested right for optimum/ adequate spectrum?”

“II. Issues involving dual technology – whether use of dual technology and allocation of dual spectrum are permitted? Whether the decision on dual technology/ dual spectrum was taken properly?”

“III. Issues of subscriber-linked criteria – whether the Subscriber-linked criteria were properly recommended and adopted?”

“IV. Whether discrimination was shown in favour of BSNL and MTNL in allocation of additional spectrum, violating the principle of level playing field?”

“V. What relief, if any, are the Petitioners entitled to?”

23. Of the five issues framed in that case, the first three are of special relevance for the present. On the first issue, the Tribunal firmly rejected the case of COAI and its members and held that the earlier GSM operators, all of whom were

allocated 6.2 MHz spectrum and some of whom were allocated as much as 10 MHz spectrum, had no right, vested or contingent, to claim any further allocation of spectrum in their favour. In paragraph 42 of the judgment, the Tribunal held as under:

“From the above, it is apparent that the various letters/orders cited by the Petitioners essentially relate to spectrum charging and where they refer to allocation of spectrum, it is made clear that any allocation of spectrum would be subject to its availability and on consideration on a case by case basis. **Clause 43.5 of the UAS Licence conditions stipulates that the maximum assured quantum of spectrum is 6.2 + 6.2 MHz in case of GSM.** We hold that there is thus nothing in either the NTP-99 document or the licence conditions or the correspondence/orders to support the contention of the Petitioners that they have a vested right beyond 6.2 MHz. In its judgment dated 22.8.2008, the Delhi High Court has concluded that “there is no element of fairness in the claimed vested right to allocation of additional spectrum which is urged on behalf of the Petitioners”.”

(emphasis added)

24. Likewise on the issue of use of dual technology and allocation of dual spectrum under the same licence, the Tribunal rejected the case of COAI and in paragraph 84 of the judgment recorded a finding that the UAS licence is technology neutral and that the technology choice is not confined to one technology for all times. While discussing the issue of the use of dual technology, the Tribunal also considered the question whether DoT was wrong in allowing Reliance and two other CDMA operators to make payments of the entry fees and

complete the formality before announcing the decision on 19.10.2007. On this question, the Tribunal came to hold (vide paragraph 76) that there was no ground to level the charge of mala-fide intention on the part of the DoT and accordingly, held that the issue of early completion of formality was not a matter that required intervention by the Tribunal.

25. On the issue of subscriber-linked criteria for allocation of additional spectrum, the earlier GSM operators expressed strong grievance and submitted that following the TRAI's recommendations dated 28 August, 2007, the subscriber-linked criteria fixed by DoT by order dated 17 January, 2008, as an interim measure, was arbitrary and set unreasonably high numbers with a view to deny any additional GSM spectrum to them. It was contended on their behalf that TRAI fixed the criteria for GSM operators without having been asked to do so by DoT; that TRAI fixed the criteria without following the due procedure and as a result the GSM operators were denied additional spectrum by an arbitrary and ad-hoc enhancement of the subscriber-linked criteria.

26. Dealing with the issue, the Tribunal in paragraph 100 of the judgment held as follows:

“.....Accordingly, we hold that the DOT, particularly given the background brought out above, was right in adopting the criteria recommended by TRAI as an interim measure. We would however direct DOT to appropriately revise these figures within one

month of the receipt of the report of the Committee constituted by it in June 2008, and apply the same to all the allotments that were made in pursuance of the 17.1.2008 order.”

27. In conclusion, the Tribunal made the following findings and directions on the three issues in question:

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

II. On technology neutrality, we hold that the concept of technology neutrality was very clearly enunciated as early as 1999 and definitely after November 2003.....We hold that in taking the decision reflected in the letter dated 18.10.2007 or the Press Release dated 19.10.2007, no impropriety was committed by DOT. We do not find any ground to level mala-fide intention on the part of DoT and accordingly hold that the issue of early completion of formalities is not a matter that would require intervention at our level.....

III.We hold that DOT, given the background of the Recommendations of TRAI, TEC and the DOT Spectrum Review Committee was right in adopting the criteria recommended by TRAI as an interim measure. We however direct the DOT to appropriately revise these figures within one month of the receipt of the report of the Committee constituted by it in June 2008, and apply the same to all the allotments that were made in pursuance of the 17.1.2008 order.”

28. Against the judgment of the Tribunal, COAI has preferred an appeal (Civil Appeal no.3472 of 2009) that remains pending before the Supreme Court. Admittedly, there is no interim order passed in that appeal.

29. Aircel and Dishnet, as noted above, contend that under clauses 43.5(i) and 43.5(ii) of their UAS licences, the promised quantum of spectrum is 6.2 MHz, in two tranches of 4.4 MHz as the start-up spectrum and the additional 1.6 MHz, on satisfying the subscriber-linked criteria, and in support of their contention they reply upon a number of materials to which we shall advert presently. Reliance and Tata rely on all the materials referred to by Aircel and Dishnet in support of their claim. Additionally, they place great reliance on the judgment of the Tribunal in petition no.286 of 2007. It is submitted on behalf of Reliance and Tata that their entry onto the GSM platform was permitted and approved by DoT and the decision of DoT was upheld by the Tribunal. The legality and enforceability of their UAS licences that, after amendment, incorporate the same provisions in clauses 43.5(i) and 43.5(ii) as the licences of all other operators like Aircel and Dishnet is thus beyond question and DoT is bound to honour the contract and allocate to them the additional spectrum as provided to other GSM operators.

30. The claims of the four petitioners are opposed by the Union of India, and in case of Reliance and Tata even more vociferously by (i) Cellular Operators Association of India, (ii) Bharti Airtel Ltd., (iii) Idea Cellular Ltd., (iv) Vodafone India Ltd. and (v) Unitech Wireless (Tamil Nadu) Pvt. Ltd. (hereinafter collectively referred to as 'Intervenors') who were permitted to intervene in the matter by order dated 11 July, 2012.

31. The Union of India has filed identical replies in petitions nos.360 (Dishnet), 361(Aircel), 364(Reliance) and 382 (Tata). Curiously, it has not cared to file any reply in petition no.381 in which Tata asks for allocation of the initial start-up spectrum of 4.4 MHz.

32. Even in the four petitions, in which the Union of India has responded, its reply appears to be sketchy, disjointed and without much application of mind. An ineffective attempt is made to hide behind the order of the Tribunal in petition no.286 of 2007. It is stated that by its order dated 31.03.2009 in petition no.286 of 2007 the Tribunal asked DoT to revise the criteria (for allocation of additional spectrum) in terms of the recommendations made by the Subodh Kumar Committee. It is then stated that the Subodh Kumar Committee observed that even the licensees who had already become eligible for additional spectrum should not be given any additional spectrum and recommended that allocation of spectrum should be done only through auction. It is further stated that most of the applications made by the petitioners for allocation of additional spectrum were received after 31.03.2009. Hence, those applications would be governed by the final decision taken by DoT based on the recommendations of the Subhodh Kumar Committee's report. Even in cases where the applications were made before the date of the Tribunal's judgment, the claims of the petitioners in regard to the subscriber-linked criteria would have to be verified and the judgment of the

Tribunal came before the verification was completed. Hence, those applications too would be governed by the decision taken by DoT on the basis of the Subodh Kumar Committee's report. The reply then extracts, (completely out of context), a few lines from the recommendations of TRAI dated 11 May, 2010 and also quotes some passages from the judgment of the Supreme Court dated 2 February, 2012 in Writ Petition (C) no.423 of 2010 (commonly called the "2G case"). In substance, the Union of India, in its reply, takes the stand that no claim for allocation of any additional spectrum can now be entertained and in view of its decision based on the recommendations by the Subodh Kumar Committee and TRAI and the observations and directions of the Supreme Court in 2G case, the only mode of allocation of spectrum is through auction which is going to be held shortly and all the petitioners are free to take part in it, as per the applicable rules.

33. The reply can be hardly said to be satisfactory. As noted above, the Tribunal in its judgment in petition no.286 of 2007, while repelling the claim of COAI and its members for allocation of spectrum, beyond 6.2 MHz and even beyond 10 MHz had found and held that the contracted quantum of spectrum under the UAS licence is 6.2 MHz. Then, while dealing with the contentions of COAI and its members that the subscriber-linked criteria fixed under order dated 17 January, 2008 was arbitrary and unreasonably high, it had directed DoT to review the SLC in light of the recommendation of the Committee already constituted by it in June, 2008.

There is nothing in the judgment of the Tribunal to suggest that while redefining the criteria for allocation of the second tranche of 1.8 MHz spectrum it would be open to DoT to unilaterally alter the basic substratum of the contract and to renounce the promise for allocation of the additional spectrum.

34. Mr. K.V. Vishwanathan, learned Additional Solicitor General appearing for the Union of India, perhaps conscious of the ineffectualness of the reply filed by DoT, made his submissions completely independent of the pleas taken in the reply. Mr. Vishwanathan laid great stress on the issue of exclusive privilege. He submitted that section 4 of the Telegraph Act provides that the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs. But it can part with the privilege in terms of the first proviso to the section by granting licence to any person to establish, maintain and work a telegraph within any part of the India. According to him, therefore, the licence only means that the Government has parted with the privilege which it had in the matter. He referred to paragraph 3 of the preamble to the licence where it is stated as under:

“WHEREAS by virtue of the provisions of Section 4 of the Indian Telegraph Act, 1885, the LICENSOR enjoys privilege to grant Licence and the LICENSEE has requested to grant Licence for providing Unified Access Services in service area. Whereupon and in pursuance to the said request, the LICENSOR has agreed to grant this Licence to provide Unified Access Services in

..... service area as per terms and conditions described in SCHEDULE appended hereto.”

Expounding the above, the learned Solicitor submitted that licence is given to provide service only and the entry fee is not a price paid for spectrum but only for parting with the privilege under section 4 of the Telegraph Act. He referred to the definitions of ‘entry fee’ (at serial no.19 in Annexure-I to the UAS licence) and ‘licence fee’ (at serial no.31 in Annexure-I to the UAS licence) and submitted that the fee paid by the licensee was only for parting with the privilege and it had no co-relation to grant of spectrum. The charges for radio spectrum would arise only on allocation. Hence, the licensee could not claim any right to allocation of spectrum only on payment of entry fee and licence fee. The learned solicitor maintained that even after the grant of licence, the licensee had no right to allocation of any spectrum whatsoever and the allocation of spectrum would be governed by the government policy that might be in force at the time the decision is taken for allocation of spectrum to any individual licensee. Mr. Vishwanathan presented the concept of exclusive privilege almost as if it was a licence to the Government to act at will and to break a concluded contract without any accountability. Mr. Vishwanathan, in support of his submissions, relied upon the decision of the Supreme Court in Union of India Vs. Association of Unified

Telecom Service Providers of India¹ and referred to paragraph 37 of the judgment where it is observed and held as under:

“A bare perusal of sub-section (1) of Section 4 of the Telegraph Act shows that the Central Government has the exclusive privilege of establishing, maintaining and working telegraphs. This would mean that only the Central Government, and no other person, has the right to carry on telecommunication activities.”

35. We are unable to agree with Mr. Vishwanathan and we see no application of the decision in Association of Unified Telecom Service Providers in the facts of this case. The ratio of the decision is that it is not open to the licensee or the Tribunal to go behind the terms of the licence and to challenge or to examine the validity of any terms and conditions of the licence. In the case in hand, the petitioners do not question any term or condition of the licence. On the contrary, they rely upon the stipulation and promise made in the licence and contend that in denying the additional allocation of spectrum to them, the government was acting in violation of the terms of a licence.

36. Mr. Vishwanathan further submitted that the licence fee which the Government charged for the licence need bear no quid-pro-quo to the services rendered to the licensee. Referring to the cases relating to grant of licence for liquor vend, learned counsel submitted that the expressions ‘licence fee’ or ‘fixed

¹(2011) 10 SCC 543

fee' are used to mean the price or consideration which the Government realizes from the licensee for parting with its privilege and granting the privilege to the licensee. In support of the submission he relied upon the decisions of the Supreme Court in *Har Shankar Vs. Excise & Taxation Commr*², *State of Orissa Vs. Narain Prasad*³ and *Govt. of A.P. Vs. Anabeshahi Wine and Distilleries (P) Ltd.*⁴

37. We are unable to accept the submission of Mr. Vishwanathan and in the facts of the present case we see no application of the decisions referred to by him. In our view what more appropriately applies to the facts of the present case is the observation made by the Supreme Court in *State of M.P. Vs. Nandlal Jaiswal & Ors.*⁵ where after giving the fullest latitude to the State in matters of exclusive privilege and in laws relating to its economic activities the Supreme Court in paragraph 33 of the judgment said as under:

“.....But when the State decides to grant such right or privilege to others the State cannot escape the rigour of Article 14. It cannot act arbitrarily or at its sweet will. It must comply with the equality clause while granting the exclusive right or privilege of manufacturing or selling liquor. It is, therefore, not possible to uphold the contention of the State Government and respondent Nos.5-11 that Article 14 can have no application in a case where the licence to manufacture or sell liquor is being granted by the State Government. The State cannot ride roughshod over the requirement of that Article.”

² (1975) 1 SCC 737 paragraphs 8, 12, 25, 55, 56 and 57

³(1996) 5 SCC 740 paragraph 33

⁴ (1988) 2 SCC 25

⁵ (1986) 4 SCC 566

38. As an alternate to the submission discussed above, the learned Additional Solicitor General contended that there was nothing in the licence to suggest any assurance or commitment on the part of the licensor to provide the additional 1.8 MHz spectrum to the licensee. He pointed out the difference in the languages used in clause 43.5(i) and clause 43.5(ii). In clause 43.5(i), it is stated that “initially a cumulative maximum upto 4.4 MHz + 4.4 MHz **shall** be allocated.....” whereas in clause 43.5(ii) it is stated that “additional spectrum beyond the above stipulation may also be considered for allocation.....”. Learned counsel submitted that the difference of connotation in the words ‘shall’ and ‘may’ is well known. While the former may indicate obligation, the latter meant nothing more than discretion. In support of the submissions, he relied upon the decisions of the Supreme Court in *Member, Board of Revenue Vs. Arthur Paul Benthall*⁶ and *Excise Commr. Vs. Issac Peter*⁷.

39. In the abstract the proposition advanced by the learned solicitor cannot be said to be incorrect. The words ‘shall’ and ‘may’ of course mean differently and it can be said that the use of the word “shall” in clause 43.5(i) makes it obligatory for the licensor to provide to the licensee the start-up spectrum of 4.4 MHz whereas the use of the word ‘may’ puts the grant of the additional spectrum of 1.8 MHz in the realm of the discretion of the licensor. But we are not examining the matter in the

⁶ 1955 (2) SCR 842 paragraph 4

⁷ (1994) 4 SCC 104

abstract and it is obvious that the same clause cannot mean differently in case of two licensees. It is undeniable that almost all the GSM operators were granted the additional spectrum of 1.8 MHz on the basis of clause 43.5(ii) and that being the position, when the turn comes of the present petitioners it cannot be said that the grant of additional spectrum is on the discretion of the licensor and it can deny the allocation to the petitioners, without any good reason, even though they satisfy the criteria. There is also the question, how the courts and the expert body in the telecom sector and, more importantly, the licensor itself have understood the meaning of clause 43.5(ii) and whether it is now open to the licensor to turn around and say that in case of the petitioners it would read clause 43.5(ii) to mean differently.

40. Mr. Vishwanathan next submitted that it is open to the licensor to modify the terms and conditions of the licence and referred to clause 5 which reads as under:

“The LICENSOR reserves the right to modify at any time the terms and conditions of the LICENCE, if in the opinion of the LICENSOR it is necessary or expedient to do so in public interest or in the interest of the security of the State or for the proper conduct of the telegraphs. The decision of the LICENSOR shall be final and binding in this regard.”

He also referred to clause 43.5(iv) that lays down as under:

“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.”

The learned Solicitor submitted that in exercise of its right under clause 43.5(iv), DoT had modified the procedure of allocation of spectrum and under the current policy the allocation of spectrum could only be made through public auction. He further submitted that the claim of the petitioners can only be decided in accordance with the policy applicable on the date on which the consideration takes place. In support of this submission, he relied upon some decisions of the Supreme Court relating to sanctioning of building plans.

41. We are once again unable to accept the submission of the learned solicitor. Reliance on clause 5 of the licence is of no help as no modification has been introduced in the terms and conditions of the licence. As regards clause 43.5(iv) is concerned, it gives the licensor the right to modify and/or amend the procedure of allocation of spectrum but not to repudiate the obligation itself to allocate spectrum as stipulated in a concluded contract.

42. Having discussed the submissions made by the learned Additional Solicitor General in opposition to the claims of the petitioners, we now proceed to examine the facts and circumstances and the materials relied upon by the petitioners in support of their claims.

43. We have seen the stand taken by the Union of India in its counter affidavit and the reply filed before the Delhi High Court and the Tribunal respectively in

petition no.286 of 2007 and the Writ Petition that had gone to the High Court on the issue of interim relief in that case. We have also seen the observations and findings made by the High Court and the Tribunal that under the UAS licence the licensee did not have a vested right to receive any GSM spectrum beyond 6.2 MHz. In that regard it may, however, be said that neither the stand of the Government nor the findings of the High Court and the Tribunal amount to a positive assertion that 6.2 MHz was the assured and committed quantum of spectrum under the UAS licence. The statements in the counter affidavit and the reply and the findings of the courts were made to repel the claim of COAI and its members who were the earlier GSM operators and who claimed a vested right for allocation of spectrum far in excess of 6.2 MHz and in some cases even beyond 10 MHz.

44. Apart from the stand of the Union of India and the findings of the High Court and the Tribunal in the proceedings of petition no.286 of 2007, the other facts and circumstances and materials relied upon by the petitioners in support of their claim may be catalogued as under:

(i) It is an undeniable fact that almost all the GSM operators holding UAS licences like the petitioners have been allocated an aggregate of 6.2 MHz spectrum. Some of the private operators, like the petitioners, have even been allocated as much as 10 MHz spectrum. BSNL and MTNL which are government owned telecom companies providing mobile telephone service on GSM platform

have been allocated even more than 10 MHz under the same UAS licence. Excepting the circles for which the present petitions are filed, the petitioners too are allocated the additional 1.8 MHz spectrum in the rest of the 22 circles in the country.

(ii) A large number of GSM operators, including BSNL and MTNL were allocated 6.2 MHz spectrum directly and not in two tranches. A list of 39 such instances, relating to six operators is given at Annexure-IX to the recommendations of TRAI on Spectrum Management and Licensing Framework dated 11 May, 2010.

(iii) Around the time Reliance was given permission for the use of dual technology, a meeting between the Finance Secretary and the Secretary, DoT took place on 24 April, 2008 in regard to several issues of importance, including the pricing of spectrums beyond 4.4 MHz that were allocated to a number of GSM operators. On 29 April, 2008, the Finance Secretary prepared a hand-written note in light of the meeting with the DoT, Secretary. The note of the Finance Secretary has been taken note of by the Supreme Court in its order dated 24 August, 2010 in SLP(Crl.) no.1688 of 2012 and IA no.34 of 2010 in Civil Appeal no.10660 of 2010⁸. In paragraph 60 of the order, the Supreme Court quoted from the note of the Finance Secretary as under:

“60. The Finance Secretary, as instructed by the Finance Minister, met the Secretary, DoT on 24.4.2008 and a hand-written note was prepared by the Finance Secretary on 29.4.2008 on all outstanding issues. The recommendations of the MoF were as follows:

“Pricing of Spectrum

⁸ (2012) 9 SCC 257

3. We may recommend the following principles for pricing of spectrum –

(i) The start-up spectrum of 4.4 MHz for GSM (2.5 MHz for CDMA) may be exempted from upfront pricing both for new and existing operators.

(ii) Under the UASL licensing regime, there appears to be an implicit, indirect contractual obligation to allow further allotment of spectrum, beyond 4.4 MHz for GSM (2.5 MHz for CDMA), and up-to 6.2 MHz for GSM (5 MHz for CDMA) after payment of 1% additional spectrum usage charges and ensuring that already allocated spectrum has been optimally and efficiently utilized. This may effectively protect operators who have existing allocations up to 6.2 MHz for GSM (5 MHz for CDMA) from payment of any other charges, including the ‘upfront’ spectrum price. Since it may not be possible to charge operators already having allocations up to this range, the principle of equity and ‘level playing field’ would require that the operators, who get fresh allotment of spectrum up to 6.2 MHz for GSM (5 MHz for CDMA) too should not be charged for spectrum up to 6.2 MHz for GSM (5 MHz for CDMA).

(iii) Spectrum beyond 6.2 MHz in case of GSM (5 MHz in case of CDMA) should be priced. This is defensible on the following grounds. First, as per the terms of the UAS licence, there is no contractual obligation on the part of the Government to necessarily allot spectrum beyond 6.2 MHz (beyond 5 MHz in case of CDMA); and, secondly, the Government retains the sovereign right to modify the terms of licence as also the procedure for allocation of spectrum, including quantum of spectrum, at any point of time without assigning any reason.”

Great reliance is placed by the petitioners on the note of the Finance Secretary and it is submitted that in the meeting with the Secretary, DoT, the Finance Secretary also came to the view that there appears to be an implicit, indirect contractual obligation to allow further allotment of spectrum, beyond 4.4 MHz for GSM and up-to 6.2 MHz for GSM after payment of 1% additional spectrum usage charges and ensuring that already allocated

spectrum has been optimally and efficiently utilized and for this reason he did not recommend any additional pricing for spectrum up-to 6.2 MHz.

(iv) On 16 June, 2008, the Government had constituted a Committee to review the issues of allocation of access (GSM/CDMA) spectrum and pricing under the Chairmanship of Additional Secretary, DoT with various Members including technical experts from different institutions, the Ministry of Defence as well as COAI and AUSPI. The report from the Committee was awaited at the time the Tribunal had given its judgment on petition no.286 of 2007. In that judgment as seen above, the Tribunal had directed the Government to appropriately revise the figures for the subscriber-linked criteria in light of the report of this Committee. It may also be clarified here that it is the same Committee which, in the reply filed by Union of India in the present case, is referred to as the Subodh Kumar Committee (presumably after the name of the Additional Secretary, DoT who was chairing the Committee). The Committee submitted its report on 13May, 2009 in which it took the view that under the UAS licence the Government was not obliged to provide to the licensee the additional spectrum of 1.8 MHz. Apparently, however, the Government did not accept the views and the recommendations of the Committee and on 7 July, 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-dependend(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 perpetuity 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.”

TRAI submitted a very detailed report on 11 May, 2010 under the title “Recommendations on Spectrum Management & Licensing Framework”. In the report, TRAI radically differed from the views taken by the June, 2008 Committee that under the UAS licence the Government’s obligation did not extend to allocation of the additional 1.8 MHz spectrum to the licensee. In paragraph 2.44 and 2.45 referring to the view taken by the Committee, TRAI observed as under:

“2.44 In Chapter IV of its report submitted in May 2009, the Second Committee has examined the licence conditions and held that the contention of some of the service providers that they have a right to receive the contracted spectrum of 6.2 MHz free of cost, as per clause 43.5 is not correct. Having examined the clauses, the Second Committee concluded as follows:

“Condition 43.5 (i) clearly states that initially a cumulative maximum spectrum of 4.4 MHz +4.4 MHz in case of GSM or 2.5 MHz +2.5 MHz in case of CDMA will be allocated. Condition 43.5 (ii) clarifies that additional spectrum beyond 4.4 MHz and up-to 6.2 MHz may be considered for allocation after ensuring optimal and efficient utilisation of the already allocated spectrum taking into account all types of traffic and guidelines/criteria prescribed from time to time. Currently the criteria for additional allocation is rolling out the network and achieving specified subscriber numbers as stipulated in subscriber linked criteria dated 17.1.2008. This makes it clearly

beyond doubt that initial start-up spectrum which is received with licence free of cost is only 4.4 MHz +4.4 MHz for GSM and 2.5 MHz +2.5 MHz for CDMA. The additional 1.8 MHz +1.8 MHz for GSM and 2.5 MHz +2.5 MHz for CDMA may be considered for allocation after efficient utilisation of initial spectrum and after fulfilling the guidelines/criteria prescribed from time to time. Condition 43.5 (iv) further stipulates that Government has a right to modify and/or amend the procedure for allocation of spectrum including quantum of spectrum at any point of time without assigning any reason. From reading of all the three conditions together, it is clear beyond doubt that licensee has a right to receive initial spectrum (4.4 MHz +4.4 MHz or 2.5 MHz +2.5 MHz, as the case may be) and government is within its right to change the procedure for further spectrum assignment. Government is under no obligation to assign spectrum beyond this free of cost, or, without auction.”

2.45 The Authority is unable to agree with the conclusions of the Second Committee. For reasons clearly explained, the contracted spectrum is 6.2/5 MHz (GSM/CDMA). It is incorrect to state that the existence of subscriber linked criteria for assignment of 6.2 MHz is an indication of the fact that the entitlement is only 4.4 MHz. It is equally incorrect, in the opinion of this Authority, to draw an artificial distinction between the words ‘shall’ and ‘may’. The committee relies on the ‘right’ of the government to change the licence conditions including the amount of contracted spectrum. But nowhere is there any indication that the Government has chosen to modify the contracted spectrum. Even recently, Government on affidavit stated that the contracted spectrum is 6.2 MHz. The provisions of clause 43.5 of the licence for Unified Access Service make it very clear that subject to availability and as per guidelines issued from time to time, a licensee is entitled to an initial allocation of 4.4 + 4.4 MHz in case of TDMA-

based systems (and 2.5 + 2.5 MHz in the case of CDMA based systems) and additional spectrum, after ensuring optimal and efficient utilisation of the already allocated spectrum, upto a maximum of 6.2 + 6.2 MHz or 5 + 5 MHz (GSM/CDMA). It is true that clause 43.5(iv) stipulates that the licensor has the 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. But this was never invoked to limit the spectrum available under the licence to 4.4 MHz of TDMA and 2.5MHz of CDMA. Apart from a mere statement regarding what they consider is the eligibility as per the licence, the Second Committee has not given any justification for its statement. The committee seems to suggest that Government should effect a change in the contracted spectrum using the power given in clause 43.5 (iv) of the licence. It appears to the Authority that the effort of the Second Committee was more to place all spectrum under auction. In any case, clause 43.5 (iv) refers to the power to modify and/or amend the procedure for allocation of spectrum including the quantity of spectrum. This cannot be taken to authorise the Government to reduce the quantity of committed spectrum. As such, this Authority is unable to agree with the comment of the Second Committee that the eligibility under the licence is only 4.4MHz of GSM technology or 2.5 MHz in CDMA technology.”

Learned counsel for the petitioners referred to a large number of passages from this report that include, (from Chapter II: licensing related issues) paragraphs 2.24, 2.25, 2.27, 2.29, 2.30, 2.32, paragraph 2.34 in which the report takes note of clause 43.5, 43.5(i) and 43.5(ii) of the UAS licence and paragraph 2.36 where it states as under:

“2.36 A reading of the licence conditions clearly reveals that the committed spectrum, as per the licences issued prior to 2001, was 4.4MHz of GSM spectrum. It is only by virtue of the UAS licence issued on migration, wherever such migration has taken place that the licensees were allowed to continue with their allocated/contracted spectrum. Otherwise, the additional allocations beyond 4.4 MHz were

by virtue of administrative orders issued in September 2001, February 2002 and thereafter. In respect of all the UAS licensees issued from 2003 onwards however, Government is contractually obliged to give spectrum upto 6.2 +6.2 MHz for GSM technology and 5 +5 MHz for CDMA technology. It is true that spectrum beyond the initial start up spectrum is subject to its availability and efficient utilization. But there cannot be any doubt that the contracted spectrum is 6.2MHz in respect of GSM and 5 MHz in respect of CDMA.”

In paragraph 2.39 the report states as under:

“2.39 While awarding the 3rd and 4th cellular licences, the Government has assigned 6.2 + 6.2 MHz of spectrum at the initial stage itself to a number of service providers. The list of service providers who received 6.2MHz of spectrum directly is given at **Annexure IX**. The question as to why the initial start-up spectrum of 4.4 MHz was not given and why these licensees were given 6.2 MHz of spectrum directly would be relevant but not in this particular context when we are examining the question of committed spectrum. The assignment of 6.2 MHz of spectrum clearly demonstrates once again that the Licensor also considered this to be the contracted spectrum for a given entry fee.”

On behalf of the petitioners, reference was also made to paragraph 3.28 (under Chapter III: Spectrum Assignment and Pricing) which reads as under:

“3.28 Accordingly, the Authority recommends that the limit on spectrum to be assigned to a service provider will be 2X8MHz for all service areas other than in Delhi and Mumbai where it will be 2X10MHz. Similarly for CDMA spectrum the Authority recommends that the limit on spectrum will be 2X5MHz for all service areas and 2X6.25 MHz in the Metro areas of Delhi and Mumbai. **As concluded in chapter-II, the contracted Spectrum as per the licence is 6.2MHz/5 MHz (GSM/CDMA) only.** Therefore, even though the service provider will be assigned spectrum up-to the prescribed limit, Spectrum assigned beyond contracted amount will be paid for at the current price. This will be equally applicable to the service providers

who are already holding the excess spectrum and those who will be assigned beyond the contracted amount in future.”

On behalf of Aircel and Dishnet a reference was also made to paragraphs 3.53 and 3.54. In those two paragraphs TRAI, while recommending a different set of criteria for allocation of spectrum, specially recommended that operators who had earlier satisfied the subscriber-linked criteria adopted by the Government in January, 2008 should be allocated the additional 1.8 MHz spectrum on that basis. In paragraph 3.53 and 3.54 the report states as under:

“3.53 Having suggested the above, the Authority is conscious of the fact that the service providers have not been assigned additional spectrum by the DoT since March 2009. During this interim period, it is possible that some operators would have qualified to receive additional spectrum based on the present Subscriber linked criteria. Since the Authority is now recommending a different set of criteria than what is currently existing, the Authority recommends that the present subscriber linked criteria be continued to be operational only for a period of six months after which it would automatically lapse and replaced by the criteria now. This would enable all the service providers to adjust to the changed criteria.

3.54 The Authority accordingly recommends that the subscriber linked criteria, as adopted by the Government in January 2008 be kept operational only for a period of six months to enable all operators who are already qualified for the additional spectrum based on the prevalent SLC or those who would be qualified within the next six months, to be assigned additional spectrum subject to availability and the Prescribed limit recommended earlier (Para 3.27). Assignment of additional spectrum to such service providers will be subject to the condition that they shall complete the 2 years’ roll out obligation within a period of six months from the date of assignment of additional spectrum.”

Discussing the issue of spectrum pricing in paragraph 3.72, the report of TRAI states as under:

“3.72 The entry fee for acquiring a UASL licence enables the licensee to be eligible for spectrum assignment up to a limit in certain specified bands without any additional fee for acquisition of spectrum. In so far as cellular licence is concerned (CMTS/UAS), it has been brought out in Chapter-II that the contracted quantum is 6.2/5 MHz (GSM/CDMA). In addition, the licensee pays to the Government licence fee towards the cellular mobile handsets and cellular mobile base stations and also for possession of wireless telegraphy equipment. Spectrum usage charges are paid towards royalty payment for the use of cellular spectrum. Both licence fee and spectrum usage charges are paid as a percentage of the Adjusted Gross Revenue, and the Government has the right to change these rates from time to time.

Finally in the summary of recommendations in Chapter VI, in paragraph 6.8, 6.10 and 6.11 the TRAI report observes and recommends as under:

“6.8 The contracted spectrum for all the access licences issued in or after 2001, is 6.2 MHz / 5 MHz in respect of GSM/CDMA respectively. (Para 2.47)

6.10 The Authority would like the Government to note that the recommendation made by the Authority in para 2.51 above is subject to the court decisions in this regard. The applicants will however be free to apply for or opt for a Unified licence, which is being recommended for future licences separately. (Para 2.52)

6.11 All future licences should be unified licences and that spectrum be delinked from the licence. (Para 2.62)”

A reading of the report leaves little doubt that according to TRAI, which is an expert body in the telecommunication sector, constituted under an Act of Parliament, the contracted quantum of spectrum under UAS licence is 6.2 MHz and not 4.4 MHz and it is the obligation of the Government to allocate the additional spectrum of 1.8 MHz on the licensee satisfying the subscriber linked criteria.

Clearly over the years the opinion among the experts was gaining ground to separate the spectrum from the licence and the TRAI report of 11 May, 2010, reinforcing the view, also made recommendations on the same lines. Nevertheless, TRAI made it clear that its recommendations were prospective and the holders of the existing UAS licences should be allocated the additional 1.8 MHz spectrum, provided they had earlier satisfied the subscriber-linked criteria fixed under the Government order dated 17 January, 2008.

(v) After the submission of the TRAI report 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 unbundle the 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 press release of the Minister dated 29 January, 2011 is as under:

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

29-January-2011 15:42 IST

**Text of the Press Statement of Shri Kapil Sibal on the Policy for
Spectrum Assignment and Pricing**

Following is the text of the Press Statement given by the Union Minister of Communications & IT, Shri Kapil Sibal here today on Policy for Spectrum Assignment and Pricing:

“Currently, there is a considerable debate regarding the assignment of licences in the year 2008 in which spectrum was bundled with the licences. I have already indicated that this was done following the then existing policy and the recommendations received by the

Government. This policy was in the context of Government's effort to increase the teledensity and reduce tariffs through increased competition thereby extending the reach of telecom services to all sections of society. There is no doubt that this policy has paid rich dividends and today, India is in the enviable position of being the fastest growing market as well as the second largest market in the world. Telecom services are being availed by all sections of society and the tariffs are the lowest in the world. There is adequate and healthy competition among the service providers bringing the benefits of competition to the consumers at large. The introduction of Mobile Number Portability has heightened and reinforced the element of competition for the benefit of the consumers at large. We are now at a stage when our subscriber base is increasing rapidly and the teledensity is of the order of 62.5%. People in the rural areas too are increasingly accessing the telecom services with the growth rate in the rural areas outpacing the growth rate in the urban areas.

“At the beginning of this year, I had indicated that we would be making a change in the direction of the telecom policy. That exercise is now well under way. The effort in the earlier policies has been to increase teledensity and competition with a focus on voice communications. With improvement in the telecom technology, and provision of Broadband services with increasing speeds, it is now possible for the telecom services to play a significant role in the realization of key development goals. I am keen that we use these technological advancements for ushering in a truly inclusive society. Spectrum continues to be a critical resource in this endeavour given the preponderance of wireless services in India. The time has now come to review the policy regarding spectrum assignment.

“It is in this area that Government would like to make a directional shift from past practice and bring in a fresh policy regarding spectrum. It is important that we ensure adequate availability of spectrum for telecom services. For this, we would be seeking a plan of action from the Regulator i.e. TRAI. Our aim is to make available adequate spectrum to meet the entire requirement of the telecom sector, with due regard to the requirements of other sensitive sectors while at the same time ensuring that there are adequate measures in place to ensure that operators use allocated spectrum efficiently and optimally.

“The assignment process would also need to undergo a major change from the past practice. Given the current level of competition and availability of spectrum, the time has come to review the need to allocate spectrum bundled with the licence at a fixed fee. This policy was adopted in the past in order to introduce more competition while providing a level playing field between old and new players. It has not been revised as yet. We believe that the stage has been reached where there is enough of competition to warrant a market driven process for allocation of 2G spectrum.

“**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.

“While moving towards a new policy dispensation, it is necessary to ensure a level playing field between all players. Hence going forward, any new policy of pricing would need to be applied to equally to all players. **Additionally, assignment of balance of contracted spectrum may need to be ensured for the existing licensees who have so far been allocated only the start up spectrum of 4.4 MHz.** It may be recalled that showcause notices have been issued to certain licensees for cancellation. Only in respect of the licences that will be found valid after the process is completed, *the additional 1.8 MHz will be assigned on their becoming eligible, but the spectrum will be assigned to them at a price determined under the new policy.*

“We need to seriously consider the adoption of an auction process for allocation and pricing of spectrum beyond 6.2 MHz while ensuring that there is adequate competition in the auction process.

“TRAI had made recommendations in May 2010 and indicated that it would apprise the Government of the findings of a study on the question of pricing of 2G spectrum in future. This is expected shortly.

We would examine their recommendations speedily as soon as they are received, keeping the perspectives that I have outlined, while finalizing our new policy. I am confident that we will be able to design a policy that ensures that existing licence holders get the spectrum they need and are entitled to, while simultaneously, ensuring that the Government also receives revenues commensurate with the current market value of spectrum”.

On behalf of the petitioner it is pointed out that in the press release, the Minister was careful to point out that the new policy would come into force in future and under the existing licence the contracted quantum of spectrum was 6.2 MHz in two tranches of 4.4 MHz and 1.8 MHz. This is indicated by the highlighted portions of the press release quoted above.

(vi) Another press release was issued by the Union Minister for Communications and IT on 15 February, 2012. This press release was issued on consideration of the recommendations of TRAI on ‘Spectrum Management & Licensing Framework’ of 11 May, 2010 along with its further recommendations of 8 February, 2011, clarifications of 3 May, 2011 and response dated 3 November, 2011 and the recommendations of the Telecom Commission, DoT had taken the decisions which were enumerated at serial nos. 1 to 18. The decisions at serial nos.1 and 2, which are of relevance, are as under:

- “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.”

On behalf of the petitioners it is pointed out that this press statement also makes it clear that the new policy would apply in future.

(vii) The Public Accounts Committee set-up by the Parliament to examine the issues of “Recent developments in the telecom sector including allocation of 2G and 3G spectrum”, had issued a questionnaire dated 4 March, 2011. Question no. 11 of the questionnaire was as under:

“At what level the decision was taken to change the Terms of References of the Cabinet Decision of 2003 to associate the Ministry of Finance in the discussion for efficient allocation of Spectrum & price fixation?”

In its reply to the question, it was stated by DoT as under:

“The issue of spectrum pricing was independently discussed at length between MoF and DoT between January and July, 2008 (the spectrum allocations for the licences issued in 2008 took place between April, 2008 and March, 2009). Meetings were held between the then Finance Minister and the Minister of Telecom on January 30, 2008, May 29, 2008 and June 12, 2008; the then Finance Secretary and the then Secretary, DoT also met a number of times between February and June, 2008. Finally, it was agreed between DoT and MoF that the base price of spectrum would be adopted by taking the entry fee of Rs.1,650 crore (pan India) as the price of spectrum for 6.2 MHz of bandwidth for GSM operators; spectrum allocations beyond 6.2 MHz were to be charged from the existing and new allottees after indexing the base price with the growth that had taken place in the prime lending rate (PLR) of the SBI; and, that the current practice of levying spectrum usage charges on the basis of varying percentages of adjusted gross revenues (AGR) for different bandwidths of spectrum would be continued, albeit with an across the board increase in the rates.

The consensus arrived at between DoT and MoF was formally conveyed to the full telecom commission (FTC) in its meeting held on November 11, 2008.”

45. In light of the facts and circumstances and the materials relied upon by the petitioners and enumerated from serials (i) to (vii) (besides the statements made by the DoT and the findings recorded by the High Court and the Tribunal in proceedings relating to petition no.286 of 2007), it is difficult to avoid the conclusion that the UAS licence is understood by the Government to mean that the licence holder was entitled to an aggregate of 6.2 MHz in two tranches of 4.4 MHz as the start-up spectrum and the additional spectrum 1.8 MHz on satisfying the subscriber-linked criteria and further that the Government all through acted on that premise.

46. That being the position the stand taken by the Union of India in the present petition and the submissions made on its behalf in opposition to the claims of the petitioners appear to be a repudiation of how it understood and acted on the basis of the terms of the licence. The submissions are no more than a justification and rationalisation for a change of mind.

47. In view of the discussions made above the conclusion is inescapable that Aircel and Dishnet are entitled to the additional 1.8 MHz spectrum, provided on verification they are found to have satisfied the subscriber-linked criteria fixed under the Government order dated 17 January, 2008.

48. But does the same apply to Reliance and Tata?

49. On this issue, DoT and the intervenors take completely divergent stands. The Additional Solicitor General, while strongly opposing the claims of all the four petitioners, in reply to a pointed question said that he saw no distinction in the claims of Aircel and Dishnet on one hand and Reliance and Tata on the other. According to him, all the four petitioners stood at the same footing since Reliance and Tata too were holders of the UAS licences. The intervenors on the other hand strongly contended that the decision of DoT in pursuance of which Reliance and Tata were permitted the use of dual technology and were allotted dual spectrum under the same licence had come under severe criticism and was held to be vitiated by the Supreme Court and hence, on the basis of their amended licences, Reliance and Tata must not be allowed to claim any additional spectrum. The intervenors base their contention on the decisions of the Supreme Court in the 2G case and in view of the observations made in that decisions, the objections raised by the intervenors cannot be said to be inconsequential. We, therefore, proceed to consider whether in view of the judgments passed by the Supreme Court amended licences of Reliance and Tata can form the basis for allocation of the additional 1.8 MHz spectrum.

50. We are conscious that the decision of the Tribunal in petition no.286 of 2007 (which is considered in some detail in the earlier part of this judgment) has fully upheld the decision of DoT to allow the use of dual technology to Reliance and

Tata and the consequent amendments in their UAS licences and the allocation of dual spectrum to them for employing GSM technology under the same licence. We are also alive to the fact that in a later decision, in petition no.299 of 2010 the Tribunal held that the earlier decision in petition no.286 of 2007, in the absence of any stay granted by the Supreme Court was binding on it. But while passing the judgments in petition nos.286 of 2007 and 299 of 2010 the Tribunal did not have before it the judgment of the Supreme Court in 2G case that was rendered on 2 February, 2012⁹. The Tribunal is bound to pay heed to the observations and directions made in this judgment which are highly relevant for taking a view on the claim of additional spectrum made on behalf of Reliance and Tata. We, therefore, propose to re-examine the matter not in order to judge the legality and validity of the approval given to them to use dual technology and the amendments incorporated in their licences (which are due to be considered by the Supreme Court in Civil Appeal no.3472 of 2009 arising from the judgment in petition no.286 of 2007) but for the limited purpose to find whether they are entitled to the additional spectrum claimed by them.

51. In regard to the approval given to Reliance and Tata for use of dual technology and the consequent amendment in their UAS licences and the allocation of dual spectrum to them, it is crucial to recall that on 13 April, 2007,

⁹ (2012) 3 SCC 1

DoT had made a reference to TRAI (earlier referred to in paragraph 12 of this judgment). TRAI made its recommendations on 28 August, 2007. On the basis of TRAI's recommendations DoT had taken certain decisions in pursuance of which the in-principle approval for use of GSM technology was communicated to Reliance on 18 October, 2007, even before the press release was issued on the following day, 19 October, 2007. As a matter of fact, Reliance had deposited the entry fee in the fore-noon of 19 October, 2007 before the press release was issued in the afternoon that day. In other words, all formalities allowing Reliance to come onto the GSM platform was completed before the decisions taken by the DoT were made public.

52. In case of Tata, the approval for use of dual technology is connected with the press release dated 10 January, 2008 issued by DoT. On that day, DoT had issued two press releases. In the first press release it was declared that DoT had decided to issue LoI (for grant of new licences) to all the eligible applicants on the date of application, who applied up-to 25 September, 2007. In that press release, it was also stated that DoT was implementing a policy of first-come-first-served for grant of UAS licences under which initially an application that is received first would be processed first and thereafter if found eligible would be granted LoI and then whosoever complied with the conditions of LoI first will be granted UAS licence. On the same day, a second press release was issued asking all applicants (for UAS

licence) to assemble at the departmental headquarters within 45 minutes to collect the responses of DoT. In the second press release, the companies who had applied for usage of dual technology spectrum were also requested to collect the DoT's response. Tata was able to appear at the departmental headquarters of DoT as advised in the press release within 45 minutes of its issuance and to collect the in-principle approval of its request. On the same date it made payment of the entry fee and in March, 2008 amendments were incorporated in its UAS licence.

53. In this regard, it would also be relevant to refer to the reply given by DoT to the Public Accounts Committee constituted for examining the issue of "Recent Development in the Telecom Sector including Allocation of 2G and 3G Spectrum". Question no.5 in the PAC's questionnaire was as under:

"In November, 2007, did the Department of Economic Affairs (DEA) not write to DoT asking for confirmation if proper procedure has been followed for grant of dual Technology licences to the CDMA operators at the entry fee fixed in 2001 for Pan India Operations? Was DoT not advised by the DEA to stay all further actions to issue the above licences? Please explain."

To this question, DoT gave its reply as under:

"The permissions for usage of dual technology spectrum under the existing licences at the entry fee discovered in 2001 were granted based on the recommendation dated 28.08.2007 of TRAI, the report of the Committee of DoT which examined the recommendation of TRAI, approval of the Internal Telecom Commission and decision of the then Hon'ble MOC&IT. Vide letter dated 29.11.2007, DoT responded the letter dated 22.11.2007 of DEA. There was no further correspondence received from DEA with respect to the permissions granted for usage of dual technology spectrum. Permissions for usages of dual

technology spectrum to private companies were issued by DoT on 10/30.01.2008.”

54. All these aspects of the case, (i) the recommendations of TRAI dated 28 August, 2007, (ii) the decision taken by DoT on the basis of those recommendations, (iii) the issuance of in-principle approval to Reliance and completing the formalities, paving the way for its entry onto GSM platform even before the issuance of the press release the following day and (iv) grant of spectrum to Reliance on 10/11 January, 2008 and to Tata during 22 April, 2008 to 9 March, 2009 at the rates of 2001 came under the scrutiny of the Supreme Court. The Supreme Court, in the two cases before it, was primarily examining the illegalities committed in grant of UAS licences during the period September, 2007 to March, 2008. It considered the matter from a very broad perspective and put to scanner the various reports of the committees and the reports of TRAI, the exchange of notes and communications at the highest level in the government and the decision making process at DoT. In the first decision dated 16 December, 2010 in Civil Appeal no.10660 of 2010: Centre for Public Interest Litigation & Others Vs. Union of India &Ors. ¹⁰, the Supreme Court directed institution of criminal cases and to conduct thorough investigation also on the issue of allowing use of dual technology by some service providers even before the decision was made public. In the second decision dated 2 February, 2012 in Centre for Public Interest

¹⁰ (2011) 1 SCC 560

Litigation & Others Vs. Union of India & Ors.¹¹, the Court quashed the licence granted to the private respondents on or after 10.01.2008 pursuant to the two press releases issued on that date. It also declared as illegal the subsequent allocation of the spectrum to those licensees.

55. On behalf of Reliance and Tata, it was argued that the later decision of the Supreme Court had resulted, as maintained by the Central Government, in the quashing of 122 licences but that did not in any way affect the pre-existing UAS licences of Reliance and Tata. In regard to Tata, it was clarified that indeed three UAS licences for service areas Assam, North-East and J&K which were granted to Tata in pursuance of the first press release of 10 January, 2008 were included in the list of 122 quashed licences but that would have no effect on its pre-existing UAS licence under which it was given approval for use of dual technology and was allocated spectrum and which are the subject matter of its two petitions presently before the Tribunal.

56. We see no reason to read the decisions of the Supreme Court in the highly restricted and narrow way as suggested on behalf of Tata and Reliance. It is true that according to the Central Government, 122 UAS licences were quashed as a result of the later decision of the Supreme Court. We may also accept that the 122 quashed licences do not include the UAS licences of Reliance and Tata which are

¹¹ (2012) 3 SCC 1

the subject matter of the present petitions. But that would not in any manner take away the force of the observations, findings and directions made by the Supreme Court in its decisions some of which have direct relevance to the issues under consideration.

57. In the first decision that was rendered on 16 December, 2010 the Supreme Court, while narrating the facts presented before it, in paragraph 5 (xviii) of the judgment, took note of the reference made by DoT to TRAI on 13 April, 2007 and in paragraph 5(xx) to the recommendations of TRAI dated 28 August, 2007. The Court then noted how the recommendations of TRAI were dealt with by DoT and in paragraphs 5(xxi) and 5(xxii) observed as under:

“(xxi) The recommendations of TRAI were placed before the Telecom Commission sometime in October, 2007. However, none of the four non-permanent members of the Telecom Commission i.e. the Finance Secretary; Secretary, Department of Industrial Policy and Promotion; Secretary, Department of Information Technology and Secretary, Planning Commission were even informed about the meeting of the Telecom Commission. In that meeting, a committee of 6 officers all belonging to DoT was constituted and the committee submitted its report on 10-10-2007 virtually dittoing the recommendations of TRAI.

(xxii) Three of the four companies¹², which were providing CDMA based mobile services under the UAS licence, had applied in 2006 for permission to use GSM technology. **At the relevant time, combination of technologies (CDMA, GSM and/or any other) was not permitted.** Therefore, DoT did not accept their request. **After receipt of the recommendations of TRAI, a decision was taken by**

¹² One of them being Reliance

DoT on 17.10.2007 for use of alternate technology albeit without referring the matter to full Telecom Commission. DoT issued press release on 19.10.2007 on the issue of use of alternate technology. However, a day before that, i.e., 18.10.2007, three operators, who had applied for use of alternate technology, were given “in principle” approval for using GSM technology.”

(emphasis added)

58. In paragraph 6, 7 and 8 of the judgment the Court noted the submissions made by the counsel for the applicant who urged the Court to direct investigation by the CBI on various issues, including grant of permission for use of dual/alternate technology to three operators (that included Reliance) a day before the policy decision was announced to the public by means of the press release dated 19 October, 2007. The Court also noted the counsel’s submission that the grant of licences on the basis of 2001 price, in the garb of implementing the recommendations made by the TRAI, had resulted in loss to the public exchequer to the tune of more than 1,76,000 crores and that the grant of licences on the basis of 2001 price was ex facie contrary to public interest and was a mala-fide action on the part of the Minister of Telecommunication & IT, then in office, and the officers of DoT who had connived with the private operators. On a consideration of the rival submissions, the Court then issued a number of directions of which direction (iii) is as under:

“CBI shall, if it had already not registered first information report in the context of the alleged irregularities committed in the

grant of licences from 2001 to 2006-2007, now register a case and the conduct thorough investigation with particular emphasis on the loss caused to the public exchequer and corresponding gain to the licensees/ service providers **and also on the issue of allowing use of dual/ alternate technology by some service providers even before the decision was made public vide press release dated 19.10.2007.”**

(emphasis added)

59. On behalf of the intervenors, it was strongly contended that in case of Reliance the Supreme Court had found that the grant of approval in its favour for use of dual technology was tainted with criminality and expressly directed the CBI to register a First Information Report in case it had not already registered one.

60. This judgment of the Supreme Court was relied upon by one of the parties before the Tribunal in petition no.299 of 2010 and two other analogous petitions. In those cases, the Tribunal was dealing with the claims of priority for allocation of spectrum raised by different GSM operators, including Tata (the petitioner in petition no.299 of 2010). In that case on behalf of one of the rival operators, it was urged that the approval of dual technology granted to Tata was quite illegal and the earlier decision of the Tribunal dated 13 March, 2009 in petition no.286 of 2007 must be held to have been displaced by the order of the Supreme Court passed on 16 December, 2010 in CPIL Vs. Union of India. The Tribunal repelled the argument, observing that the appeal against the Tribunal's judgment in petition no.286 of 2007 was pending before the Supreme Court and was to be heard

separately. It further observed that if the submission based on the order of the Supreme Court in CPIL is accepted, it would result in stay of all proceedings before the Tribunal relating to 2G or 3G spectrum with which the Supreme Court was not concerned in CPIL. The Tribunal said that it was preposterous to argue that the Tribunal should wait indefinitely till the criminal cases came to an end; that the logical corollary of such an argument would be that allocation of spectrum would remain at a standstill and that in turn would adversely affect the growth of telephone industry and cause harm to public interest. The Tribunal went on to hold that its earlier judgment in petition no.286 of 2007 was binding on the parties concerned. However, even while making all those observations, the Tribunal was careful to make it clear that it was not dealing with the question of malice of fact on the part of the DoT. In paragraph 51 of the judgment, it made the following observation:

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

61. The proceedings before the criminal court is yet to reach conclusion but in the matter before the Supreme Court in Writ Petition(C) 423 of 2010: Centre for Public Litigation & Ors Vs. Union of India, judgment was pronounced on 2 February, 2010 and some of the observations and directions made in the judgment

are highly relevant for the present. In paragraph 1 of the judgment, the Supreme Court enumerated the questions arising before it and in sub-paragraphs (ii) and (iii) stated as under:

“(ii) Whether the recommendations made by the Telecom Regulatory Authority of India (TRAI) on 28.8.2007 for grant of Unified Access Service Licence (for short ‘UAS Licence’) with 2G spectrum in 800, 900 and 1800 MHz at the price fixed in 2001, which were approved by the Department of Telecommunications (DoT), were contrary to the decision taken by the Council of Ministers on 31.10.2003?”

(iii) Whether the exercise undertaken by the DoT from September 2007 to March 2008 for grant of UAS Licences to the private respondents in terms of the recommendations made by TRAI is vitiated due to arbitrariness and malafides and is contrary to public interest?”

62. In paragraph 27 of the judgment, the Court took note of the reference made by DoT to TRAI vide its letter dated 13 April, 2007 and in paragraph 28, to the TRAI’s recommendations dated 28 August, 2007 as also extracted a number of passages from the recommendations. In paragraph 30 of the judgment the Court dealt with the irregular way, in which the Minister of Communications & IT proceeded to accept the recommendations of TRAI on 17 October, 2010. In paragraph 34, the Court noted that on 2 November 2007 the Minister of Communication & IT approved the note prepared by Director (AS-I) that contained a number of issues, including the one relating to the application of Tata for dual

technology. In paragraph 40 of the judgment the Court referred to the letter of the Finance Secretary dated 22 November, 2007 to the Secretary, DoT expressing his doubt as to how the rate of Rs.600 crores determined in 2001 could apply without any indexation for a licence to be given in 2007. In paragraph 44 the Court referred to the press release dated 10 January, 2008 by which Tata was asked to come to DoT headquarters to collect the response to its request for use of dual technology. In paragraph 45, the Court noted that Tata Teleservices transferred 27.31% of equity worth Rs.12,924 crores in favour of NTTDOCOMO and Tata Teleservices(Maharashtra) transferred 20.25% of equity worth Rs.949 crores in favour of NTT DOCOMO. After considering the submissions made by the different parties, the Court in paragraph 90 and 91 of the judgment observed and held as under:

“90. Although, while making recommendations on 28.8.2007, TRAI itself had recognised that spectrum was a scarce commodity, it made recommendation for allocation of 2G spectrum on the basis of 2001 price by invoking the theory of level playing field. Paragraph 2.40 of the recommendations dated 28.8.2007 shows that as per TRAI's own assessment the existing system of spectrum allocation criteria, pricing methodology and the management system suffered from number of deficiencies and there was an urgent need to address the issues linked with spectrum efficiency and its management and yet it decided to recommend the allocation of spectrum at the price determined in 2001. All this was done in the name of growth, affordability, penetration of wireless services in semi urban and rural areas, etc. Unfortunately, while doing so, TRAI completely overlooked that one of the main objectives of NTP 1999 was that spectrum should be utilised efficiently, economically, rationally and optimally and there

should be a transparent process of allocation of frequency spectrum as also the fact that in terms of the decision taken by the Council of Ministers in 2003 to approve the recommendations of the Group of Ministers the DoT and Ministry of Finance were required to discuss and finalise the spectrum pricing formula.

91. To say the least, the entire approach adopted by TRAI was lopsided and contrary to the decision taken by the Council of Ministers and its recommendations became a handle for the then the Minister of Communications and Information Technology and the officers of the DoT who virtually gifted away the important national asset at throw away prices by willfully ignoring the concerns raised from various quarters including the Prime Minister, Ministry of Finance and also some of its own officers. This becomes clear from the fact that soon after obtaining the licences, some of the beneficiaries off-loaded their stakes to others, in the name of transfer of equity or infusion of fresh capital by foreign companies, and thereby made huge profits. We have no doubt that if the method of auction had been adopted for grant of licence which could be the only rational transparent method for distribution of national wealth, the nation would have been enriched by many thousand crores.”

63. In paragraph 93 of the judgment, the Court observed as under:

“93. We may also mention that even though in its recommendations dated 28.8.2007, TRAI had not specifically recommended that entry fee be fixed at 2001 rates, but paragraph 2.73 and other related paragraphs of its recommendations state that it has decided not to recommend the standard option for pricing of spectrum in 2G bands keeping in view the level playing field for the new entrants. It is impossible to approve the decision taken by the DoT to act upon those recommendations. We also consider it necessary to observe that in today's dynamism and unprecedented growth of telecom sector, the entry fee determined in 2001 ought to have been treated by the TRAI as wholly unrealistic for grant of licence along with start-up spectrum. In our view, the recommendations made by TRAI in this regard were contrary to the decision of the Council of Ministers that the DoT shall discuss the issue of spectrum pricing with the Ministry of Finance along with the issue of incentive for efficient use of spectrum as well as disincentive for sub-optimal usages. Being an expert body, it was

incumbent upon the TRAI to make suitable recommendations even for the 2G bands especially in light of the deficiencies of the present system which it had itself pointed out. We do not find merit in the reasoning of TRAI that the consideration of maintaining a level playing field prevented a realistic reassessment of the entry fee.”

64. In paragraph 97 of the judgment, the Court observed as under:

“The exercise undertaken by the officers of the DoT between September, 2007 and March 2008, under the leadership of the then Minister of Communications and Information Technology was wholly arbitrary, capricious and contrary to public interest apart from being violative of the doctrine of equality. The material produced before the Court shows that the Minister of Communication and Information Technology wanted to favour some companies at the cost of the Public Exchequer and for this purpose, he took the following steps:

(i)

(ii) The recommendations made by TRAI on 28.8.2007 were not placed before the full Telecom Commission which, among others, would have included the Finance Secretary. The notice of the meeting of the Telecom Commission was not given to any of the non-permanent members despite the fact that the recommendations made by TRAI for allocation of spectrum in 2G bands had serious financial implications. This has been established from the pleadings and the records produced before this Court that after issue of licences, 3 applicants transferred their equities for a total sum of Rs.24,493 crores in favour of foreign companies. Therefore, it was absolutely necessary for the DoT to take the opinion of the Finance Ministry as per the requirement of the Government of India (Transaction of Business) Rules, 1961.”

65. Finally, in paragraph 102, the Court allowed the writ petitions with a number of directions and quashed the licences granted to the private operators on or after 10.01.2008 pursuant to the two press releases issued on 10.01.2008 and subsequent allocation of spectrum to those licensees.

66. Thus, in the two decisions the Supreme Court expressly held *inter alia* that at the time, Reliance made application for use of GSM technology, combination of technologies (CDMA, GSM and/or any other) was not permitted. The Court strongly disapproved the recommendations of TRAI dated 28 August, 2008. It equally strongly disapproved the decision of the Minister dated 17 October, 2007 accepting the TRAI recommendations and also the manner in which the decision was arrived at by-passing the proper and regular procedure. The Court further castigated the grant of allocation of spectrum in 2007 at prices fixed in 2001. All the observations and findings on these issues and the directions relating thereto directly impact on the claims of Reliance and Tata for allocation of additional spectrum on the basis of their amended UAS licence.

67. Mr. Ramji Srinivasan, learned senior counsel appearing for both Reliance and Tata strongly submitted that the objections raised by the intervenors were fallacious and misleading and any reference to the decisions of the Supreme Court in the 2G case was completely misplaced for the purposes of the present proceedings. Learned counsel repeatedly referred to those parts of the later judgment (dated 2 February, 2012) that relate to the licences that were quashed by the Court and submitted that according to the Central Government, the number of the quashed licences was 122 which did not include the UAS licences of Reliance and Tata on the basis of which the present claims were made. Learned counsel

further submitted that COAI and some of the rival operators had repeatedly moved the Supreme Court, in separate writ petition as well as in interlocutory application filed in the 2G case, with a view to somehow get the licences of Reliance and Tata embroiled among the quashed licences. He referred to the orders passed by the Supreme Court in the writ petition and in the IA after the judgment dated 2February, 2012 and submitted that all the efforts by COAI and the rival operators had remained unsuccessful. He also submitted that COAI had even sought that its appeal against the Tribunal's judgment in petition no. 286 may also be transferred before the bench hearing the 2G case but the Court had declined to accede to the request. Learned counsel submitted that the approval for use of dual technology granted to Reliance and Tata was upheld by the Tribunal in a well-reasoned judgment. An appeal against the judgment was pending before the Supreme Court. But as long as the Tribunal's judgment is not set aside, Reliance and Tata must be held to be lawful holders of their licences and their claims in the present petitions was simply for enforcement of a lawful contract.

68. As already discussed above, we proceed on the premise that the UAS licences of Reliance and Tata and the amendments incorporated therein were not directly quashed by the Supreme Court. We also accept that the validity of the grant of approval for use of dual technology and the consequent amendments in their UAS licences are due for consideration before the Supreme Court in a

separate appeal arising from the Tribunal's decision in petition no.286 of 2007. Hence, we do not go so far as to hold that the Supreme Court's judgments in the 2G case shall directly nullify the approval for dual technology granted to Reliance and Tata and undo the amendments in their UAS licences but at the same time we have no hesitation in holding that the approval for dual technology granted in their favour and the consequent amendments in their licences have come under cloud and it will be highly unsafe to make those licences the basis for allocation of additional spectrum which is scarce natural resource and an invaluable national asset. We accordingly hold that Reliance and Tata are not entitled to a direction by the Tribunal for allocation of any additional spectrum.

69. In light of the finding arrived at in the earlier part of the judgment, Aircel and Dishnet are held entitled to allocation of additional 1.8 MHz spectrum as the contracted quantum under their licences. The concerned authorities in DoT are accordingly directed to make available to Aircel and Dishnet the additional 1.8 MHz spectrum in the service areas as indicated in the opening part of the judgment, subject of course to the availability of spectrum in the respective service areas.

70. The question, however, remains whether the allocation of additional 1.8 MHz spectrum will be covered by the entry fees initially paid by them or it would be subject to payment of current market-discovered price. The very question arises

squarely in petition no.392 of 2012: Vodafone India Ltd. Vs. Union of India.
Hence, we leave that question open for the present.

71. As the matter remains pending before the court, Aircel and Dishnet must file undertakings both before the Tribunal and DoT that their liability to make payment or otherwise for the additional 1.8 MHz spectrum shall abide by the outcome of the decision in the aforesaid petition no.392 of 2012 and the allocation of the spectrum to them as directed above would be subject to their filing the undertakings on affidavit. Aircel and Dishnet though not parties to petition no.392 of 2012 would be permitted to place their views on the question when the hearing of that case takes place.

72. In the result petition nos.360 of 2012 and 361 of 2012 are allowed to extent indicated above. Petition nos.364 of 2012, 381 of 2012 and 382 of 2012 are dismissed.

Sd/-

.....**J**
(Aftab Alam)
Chairperson

Sd/-

.....
(Kuldip Singh)
Member