TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Reserved on: 01.05.2025

Pronounced on: 30.05.2025

TELECOM PETITION/1/2023

Reliance Jio Infocomm Ltd. …Appellant

Versus

Union of India …Respondent(s)

WITH

TELECOM PETITION/22/2024

Bharti Airtel Ltd. & Ors. …Appellant

Versus

Union of India …Respondent(s)

BEFORE:

HON'BLE MR. JUSTICE DHIRUBHAI NARANBHAI PATEL (CHAIRPERSON)

HON'BLE MR. SUBODH KUMAR GUPTA (MEMBER)

FOR APPELLANT(S)	FOR RESPONDENT(S)
In T.P. No. 1 of 2023 For **Reliance Jio Infocomm Ltd.** Mr. Ramji Srinivasan, Sr. Adv. with; Mr. Aditya Swarup, Mr. KR Sasiprabhu, Mr. Vishnu Sharma AS, Ms. Namrata Saraogi, Mr. Parth, Mr. Ribhav Pande, Mr. Madhav Aggarwal, Mr. Rajagopal Venkatakrishnan, Mr. Arjun Bhatia, Ms. Shefali Munde Advocates.	**In T.P. No. 1 of 2023** For **UOI** Mr. Vikramjit Banerjee, Sr. Adv., Ld. ASG, with; Mr. Chandrashekhar A. Chakalabbi, Mr. Varnik Kundaliya, Kartik Dey, Advocates.
In T.P. No.22/2024 For **Bharti Airtel Ltd.** Mr. Ramji Srinivasan, Sr. Adv. with; Ms. Suman Yadav, Ms. Nikhita Suri, Ms. Payal Nayak, Advocates.	**In T.P. No.22/2024** For **UOI** Mr. Vikramjit Banerjee, Sr. Adv., Ld. ASG, with; Mr. Chandrashekhar A. Chakalabbi, Mr. Varnik Kundaliya, Kartik Dey, Advocates.

INDEX

ABBREVIATIONS INVOLVED

AGR	Adjusted Gross Revenue
CCAs	Controller of Communication Accounts
DCC	Digital Communication Commission
DoT	Department of Telecommunications
LSA	Licensed Service Area
MA	Miscellaneous Application
OM	Office Memorandum
RJIL	Reliance Jio Infocomm Ltd.
SUC	Spectrum Usage Charges
TDSAT	Telecom Disputes Settlement & Appellate Tribunal
TRAI	Telecom Regulatory Authority of India
TSP	Telecom Service Provider
UoI	Union of India
DoT Method	Department of Telecommunication Method
PB Method	Particular Band Method

JUDGEMENT

TELECOM PETITION NO. 1 OF 2023 AND TELECOM PETITION NO. 22 OF 2024

Per Justice D.N. Patel, Chairperson

1. T. P. No. 1 of 2023 is treated as the lead matter. T.P. No.1 of 2023 has been preferred by Reliance Jio Infocomm Ltd. and T.P. No. 22 of 2024 has been preferred by Bharti Airtel Ltd. They are Telecom Service Provider (hereinafter referred to as **"TSP"** for the sake of brevity). Department of Telecommunications (**DoT**) has issued Unified License under Section 4 of the Indian Telegraph Act, 1885. Thus, DoT is a licensor. TSP - Petitioners have to pay license fees which is a certain percentage of Adjusted Gross Revenue (**AGR**) for each licensee. Similarly, licensee has also to pay Spectrum Usage Charges (**SUC**) for the use of Spectrum allocated by the licensor - DoT. Both these Appeals have been preferred under Sec. 14 read with Sec. 14A of The Telecom Regulatory Authority of India Act, 1997 challenging Demand Notices which are at **Annexure P-1** based upon Office Memorandum dated 11.10.2022 at **Annexure P-2**.

2. Thus, SUC is also levied as percentage of AGR, nonetheless different rates of SUC have been prescribed for different bands of Spectrum.

3. Spectrum is an essential resource of the Government of India and required for telecommunication services. There are different bands of spectrum i.e. 700 MHz, 800 MHz, 900 MHz, 1800 MHz, 2100 MHz, 2300 MHz, 2500 MHz, 3300 MHz and 26 GHz etc. which are being used to deploy and offer mobile telecommunication services.

4. In both the aforesaid Telecom Petitions, mainly, the following issues have been raised for the adjudication by this Tribunal:

I. Whether the impugned office memorandum dated 11.10.2022 (**Annexure P-2**) & the impugned demand notices (**Annexure P-1**) have been issued in violation of Sec. 11 (1) of TRAI Act, 1997?

II. Whether, in terms of Spectrum Sharing Guidelines, the increase of 0.5% on SUC rate should apply on the SUC rate for the particular spectrum band(s) which are being shared or should the weighted average of SUC rates increased by 0.5%?

III. Whether the impugned Office Memorandum dated 11.10.2022 (**Annexure P-2**) & the impugned demand notices (**Annexure P-1**) are liable to be quashed & set aside?

FACTUAL MATRIX

A. On 24.09.2015, DoT issued the Spectrum Sharing Guidelines ("Sharing Guidelines") [**ANNEXURE-P-8**] permitting sharing of spectrum between two TSPs in a Licensed Service Area ("LSA").

B. Spectrum sharing is a process where TSPs share the spectrum allotted / purchased by each of them. The basic objective of spectrum sharing is to reduce the cost and to enhance spectral efficiency by combining/pooling the spectrum holding of two licensees.

C. Consequently, apart from these two levies, i.e. license fee and SUC, in case TSPs sought to share spectrum, DoT prescribes that SUC rate of each of the licensees post-sharing shall increase by "*0.5% of the AGR*" as per the Sharing Guidelines and more particularly Clause 12 & Clause 13 thereof ("**Additional SUC**").

D. Initially, on 21.07.2014, TRAI issued **"Recommendations on Guidelines on Spectrum Sharing"** whereby TRAI stated that considering the fact that Spectrum Sharing results in additional quantity of Spectrum with both licensees to serve higher number of consumers in that Spectrum Band, SUC rate of each of the licensees post-sharing, shall increase by 0.5% of AGR.

E. Since various bands of spectrum have different SUC rates, it is not possible to segregate the revenues earned by TSPs from the use of different bands of spectrum. Therefore, on 31.10.2014 DoT prescribed the concept of arriving at a "Weighted Average of SUC Rates" for a TSP and applying that weighted average to the overall AGR earned by a TSP to determine the total SUC payable by the TSP. The DoT further modified weighted average of SUC rate in 2015 and 2016.

F. On 27.04.2015, DoT disagreeing with TRAI's first recommendation (21.07.2014) in exercise of powers under Section 11 of TRAI Act, referred back the first recommendations and requested TRAI "to reconsider the SUC

to be applicable in case of sharing", in view of weighted average of SUC rates.

G. On 21.05.2015, TRAI reiterated its first recommendation. In spite of a specific query namely, 'In view of the above applicable SUC rates (various rates for various bands), particularly the weighted average SUC prescribed rates, TRAI is requested to consider the SUC to be applicable in case of sharing', the TRAI did not specify that the weighted average of the SUC rates will increase by 0.5%.

H. On 24.09.2015, after considering TRAI's recommendations, DoT issued Guidelines for Sharing of Access Spectrum by Access Service Providers (Sharing Guidelines). Clause 2, Clause 12, and Clause 13 of the aforesaid Spectrum Sharing Guidelines (**Annexure P-8** to the memo of T.P. No. 1 of 2023) have been relied upon by the counsels for both the sides.

I. Telecom Service Provider - Reliance Jio Infocomm Ltd.- Petitioner in T.P. No.1 of 2023, though has different Spectrum Bands like 800 Mhz., 1800 Mhz. and 2300 Mhz., but, it has shared only 800 Mhz. spectrum. There are certain Spectrum Bands which are not common. Thus, the only common

Spectrum Band between the aforesaid two TSPs is 800 Mhz. spectrum band which is being shared as per sharing guidelines between June 2016 to early 2021.

J. As per petitioner, Spectrum Usage Charges payable by the petitioner has to be determined by adding 0.5% to the applicable SUC rate for 800 Mhz, namely 5%. Thus, SUC rate for the shared spectrum i.e. 800 Mhz wil become 5.5% instead of 5%. As per Department of Telecommunications, 0.5% addition will be to the weighted average of SUC Rates. Detailed calculations in form of Table No. 1, Table No. 2, Table No. 3, Table No. 4 and Table No. 5 have been provided during the course of arguments which have been referred to in the reasoning part of this judgment.

K. The petitioner has calculated SUC rates as per **"Particular Band Method" (PB Method)** whereas DoT has issued demands for the period from the years 2016 to 2020 charging Additional SUC of 0.5% on the **Weighted Average of SUC Rates (DoT Method).**

L. Thus, there are two methods of calculation of SUC Rates. As per petitioner, it should be as per **Particular Band Method** meaning thereby

the 0.5% Additional SUC rate will be added to the SUC rate of the **Shared Spectrum** whereas as per DoT, 0.5% Additional SUC Rate will be added to **Weighted Average of SUC Rates (DoT Method)**.

M. Because of the aforesaid two types of possible interpretations, DoT made a reference to TRAI under Section 11 of TRAI Act, 1997 requesting TRAI to provide:

> "Recommendations, under section 11(1) of the TRAI Act 1997, as amended by TRAI Amendment Act, 2000, on whether the incremental 0.5% in SUC rate in cases of sharing of spectrum should be applied only on the specific band in which sharing is taking place; or to the overall Weighted Average Rate of SUC, which has been derived from all bands."
>
> [**Emphasis Supplied**]

N. DoT also forwarded the representations addressed by RJIL to TRAI. DoT also forwarded the representations addressed by petitioner - TSPs to TRAI. This reference was made on 15.01.2020.

O. On 17.08.2020, TRAI after carrying out a comprehensive consultation process and receiving comments from all stakeholders, published its recommendations stating, inter alia:

> "2.6… Spectrum-sharing arrangement results in an enhanced efficiency resulting into increased capacity. Since the guidelines permit intra-band spectrum sharing only, capacity would be enhanced only in the spectrum bands being shared. Increment in SUC by 0.5% of the overall weighted average SUC would be justified only in a situation wherein a TSP is sharing spectrum in all the spectrum bands held by it. Therefore, the Authority is of the view that as per the existing spectrum sharing guidelines, which were based on the Recommendations of the Authority, the incremental SUC should apply to the spectrum band which is being shared and not on the overall weighted average SUC, which includes all the spectrum bands held by the TSP."

3.1 The Authority clarifies that as per the existing spectrum sharing guidelines, an increment of 0.5% on SUC rate should apply on the spectrum holding in specific band in which sharing is taking place, and not on the entire spectrum holding (all bands) of the Licensee."

P. DoT, in supersession of the Sharing Guidelines issued revised Spectrum Sharing Guidelines dated 11.10.2021 (**Annexure P-21**) in which it is stipulated that the Spectrum sharing shall not attract any increase in the rate of Spectrum Usage Charge (SUC) with effect from 01.10.2021. Thus, the dispute in both the aforesaid Telecom Petitions is only for the period running from the year 2016 to 2021.

Q. On 11.10.2022, DoT issued an office memorandum setting out a methodology imposing that the incremental SUC Rate of 0.5% will be added to the Weighted Average of SUC Rates, before Spectrum sharing. (**Annexure P-2** to the memo of T.P. No.1 of 2023).

R. This Office Memorandum issued by DoT dated 11.10.2022 has been challenged in these two telecom petitions. The demand notices have also been issued by the DoT- respondent based on **Annexure P-2**. **These**

demand notices are at Annexure P-1 (Colly) are also under challenge in these telecom petitions.

S. Vide our order dated 9.01.2023, we have granted stay against the operation, implementation and execution of the impugned order dated 11.10.2022 (**Annexure P-2**) and we have also stayed all the consequential steps sought to be initiated by the respondent in pursuance of **Annexure P-2**, thus, the demand notices have also been stayed. The stay granted has been extended and continued during the pendency and final hearing of these Telecom Petitions. This order was passed in T.P. No.01 of 2023, similar order was passed in T.P. No. 22 of 2024 and subsequently vide order dated 17.5.2024, stayed the impugned order and the demands from Bharti Airtel Ltd.

T. DoT finally, yet again, referred back to TRAI on 27.01.2023 on the same issue & in response thereto, TRAI reiterated its recommendations vide communication dated 02.05.2023 that the Additional Rate of 0.5% should be added only to the SUC rate of the particular band of spectrum being shared and not on the weighted average of SUC rates of all the bands in the

area. TRAI stated "In the absence of any new facts and considering the above discussion, the Authority has nothing to add further".

U. Petitioner in T.P. No.01 of 2023 has deposited Rs.75.41 Crores. This payment was made subject to the outcome of the present petition.

V. DoT issued an Office Memorandum dated 16.07.2024 refusing the petitioner of T.P. No. 01 of 2023 to allow the adjustment of Surplus SUC payments against subsequent years.

W. Therefore, petitioner of T.P. No. 01 of 2023 filed M.A. No. 301 of 2024 in the present Telecom Petition seeking stay against O.M. dated 16.07.2024.

X. Vide our order dated 30.09.2024, we directed the respondent that no coercive steps be taken against the petitioner in pursuance of the O.M. dated 16.07.2024.

ARGUMENTS OF PETITIONERS IN BOTH THE TELECOM PETITIONS

5. It is submitted by learned Senior Advocate Mr. Ramji Srinivasan on behalf of the petitioners that while passing the impugned order – Office Memorandum (**Annexure P-2**) as well as while raising the impugned

demands [**Annexure P-1 (Colly)**], the respondent has not appreciated Section 11(1) of the TRAI Act as well as recommendations of TRAI.

6. It is submitted by learned senior counsel for the petitioners that as per 5th Proviso to Section 11(1) of the TRAI Act, if DoT does not wish to accept TRAI's recommendations, it shall refer back the same to TRAI and if the recommendations are reiterated by TRAI, the DoT has to take a final decision. It is submitted by counsel for the petitioners that even in this eventuality, due weightage must be given by the respondent to the recommendations of TRAI. The recommendations of TRAI cannot be arbitrarily ignored by the respondent.

7. Learned Senior Counsel appearing for the petitioners have placed reliance upon the judgment reported in ***Reliance Telecom Ltd. & Anr. Vs. UOI & Anr.*** **(2017) 4 SCC 269** as well as upon the judgment reported in ***Bharti Airtel Ltd. Vs. UOI*** **(2015) 12 SCC 1**.

8. On the basis of the aforesaid decisions, it is submitted by the learned senior counsel appearing for the petitioners that recommendations of TRAI,

which is an expert body, have to be given due weightage by the Central Government.

9. It is also submitted by learned senior counsel for the petitioners that TRAI has reiterated that the additional SUC rate of 0.5% must be added only on the particular band of spectrum which is being shared. These three recommendations are dated 21.5.2015 (**Annexure P-7**), 17.8.2020 (**Annexure P-19**) and recommendations dated 2.5.2023 (**Annexure A** of rejoinder filed in T.P. No.1 of 2023).

10. It is also submitted by learned senior counsel for the petitioners that the respondent has not referred back these recommendations to TRAI.

11. It is submitted by learned senior counsel for the petitioners that for the first time, DoT attempted to justify the same by purporting to provide some reasons in its counter affidavit that the TRAI Recommendation dated 17.8.2020 was purportedly considered and rejected by the Standing Committee on 10.08.2022 and the Digital Communication Commission ("**DCC**") on 29.09.2022. *None of these documents have been disclosed.*

12. It is submitted by learned senior counsel for the petitioners that while passing the impugned order dated 9.1.2023 it was observed that *prima facie* there is a violation of statutory provision by the petitioner and therefore, during the pendency of this litigation, DoT tried to overcome this fatal defect, and almost three years after the TRAI recommendations dated 17.08.2020, referred back TRAI's recommendations dated 17.08.2020. This fact of referral back is an admission and, on this ground alone, the Impugned OM is required to be set aside. This back reference at this stage cannot cure the fatal violation of the statutory provisions.

13. It is submitted by learned senior counsel for the petitioners that this belated attempt by DoT to cure this fatal defect during the pendency of the present matter cannot come to the aid of the DoT and legitimize its illegal Impugned Office Memorandum and the demands on that basis.

14. It is further submitted by learned senior counsel for the petitioners that without assigning any reason, DoT has disagreed with the recommendations of TRAI, thus DoT has not given any weightage to the recommendations of TRAI. Even in the counter affidavit filed by DoT, no reasons for disagreeing

with the recommendations of TRAI have been given, thus, the approach of the respondent **"Read and Reject"** is in violation of the pith and substance of 5th Proviso to Section 11(1) TRAI Act as well as this approach of the respondent is in violation of the aforesaid two decisions rendered by Hon'ble the Supreme Court of India.

15. Learned senior counsel for the petitioners has also submitted that the DoT has not disclosed the complete **Minutes of the Meeting dated 21.7.2023** which is being referred in further short affidavit filed by the respondent dated 24.4.2024.

16. Learned senior counsel for the petitioners has also placed reliance upon the decisions rendered by this Hon'ble Tribunal in case of ***Internet Service Providers Association of India & Ors. Vs. UOI*** reported in **2019 SCC OnLine TDSAT 1756.**

17. It is submitted by Learned senior counsel for the petitioners that in view of this decision, TDSAT has set aside the demands issued by DoT on the ground of failure of DoT to consider the recommendations of TRAI and not followed the procedure set out in Section 11(1) of TRAI Act and hence,

the impugned demands (**Annexure P-1**) as well as O.M. issued by the respondent (**Annexure P-2**) deserves to be quashed and set aside.

18. Learned senior counsel for the petitioners has also placed reliance upon the decision in **Cellular Operators Assn. of India v. UOI, *(2003) SCC Online TDSAT 37***, wherein this tribunal held that DoT cannot consign TRAI's recommendations to "a waste paper basket"*.* DoT has done exactly that in issuing the Impugned Office Memorandum– by consigning TRAI's recommendations dated 17.08.2020 to a waste paper basket.

19. Similarly, Hon'ble The Supreme Court of India has also elucidated the principles of transparency and has held subordinate legislation can be struck down if transparent process is not followed. This decision is reported in ***Cellular Operators Association of India Vs. TRAI & Ors.*** **(2016) 7 SCC 703**.

20. It is submitted by Learned senior counsel for the petitioners that in any case the impugned demands (**Annexure P-1**) and O.M. (**Annexure P-2**) are contrary to Spectrum Sharing Guidelines. It is submitted by learned senior counsel for the petitioners that DoT has issued Spectrum Sharing

Guidelines and Spectrum Usage Charges is leviable for the shared spectrum in a particular band.

21. Learned senior counsel for the petitioners has placed reliance upon different Clauses of Spectrum Sharing Guidelines especially Clause Nos. 2,3,12 and 13 and other Clauses of Spectrum Sharing Guidelines (**Annexure P-8** to the memo of T.P. No.1 of 2023).

22. It is submitted by Learned senior counsel for the petitioners that even before the issuance of the Sharing Guidelines, DoT's specific query and suggestion that the incremental rate of 0.5% should be added to the Weighted average of SUC Rates has been expressly rejected by the TRAI in its recommendations dated 21.05.2014. DoT has thereafter accepted the recommendations and issued the Sharing Guidelines. DoT, being fully aware of the issue, decided to not charge the incremental rate of 0.5% on the Weighted average of SUC Rates and did not refer to the Weightage Average SUC Rate in Clauses 12 and 13 of the Sharing Guidelines. In these circumstances, DoT cannot now contend to the contrary.

23. It is submitted by Learned senior counsel for the petitioners that as per Clause No.3 of Spectrum Sharing Guidelines, there is a total prohibition on the part of Telecom Service Providers from sharing spectrum in different bands and, therefore, there cannot be incremental SUC for unshared Spectrum. Thus, incremental 0.5% cannot be added in weighted average otherwise it will tantamount to addition of 0.5% in all the spectrums shared as well as unshared. This proposition has been explained by the learned senior counsel for the petitioners by referring to Table Nos. 1,2,3,4 and 5 which are referred hereinbelow in detail.

24. It is submitted by Learned senior counsel for the petitioners that the O.M. (**Annexure P-2**) is unreasoned. As stated hereinabove, there are three separate instances of TRAI's recommendations dated 21.5.2015 (**Annexure P-7**), 17.8.2020 (**Annexure P-19**) and 02.05.2023 (**Annexure-A** to the rejoinder affidavit filed by the petitioner in T.P. No.1 of 2023). TRAI - an independent regulator, has pointed out that the additional SUC rate of 0.5% must be added only on a particular band of spectrum which is being shared. Without assigning any reasons, the DoT has brushed aside these

recommendations of TRAI and, therefore, O.M. at **Annexure P-2** deserves to be quashed and set aside.

25. For the first time, an attempt has been made by the respondent in its counter affidavit dated 19.04.2023 to give reasons for adopting DoT method instead of "Particular Band Method" (PB Method). Petitioners have pointed out that as per the decision rendered by Hon'ble the Supreme Court of India in the matter of ***Mohinder Singh Gill Vs. Chief Election Commissioner*** reported in **(1978) 1 SCC 405***,* the impugned unreasoned order cannot be justified by supplying reasons, subsequently in the counter affidavit. Otherwise, an order bad in the beginning may by the time it comes to the Court, can get validated by additional grounds, later brought out in the counter affidavit.

26. It is submitted by Learned senior counsel for the petitioners that the recommendations of TRAI are explicitly clear and unambiguous. TRAI has provided unimpeachable reasons for applying PB Method and till date DoT has not commented or responded to these justifications. Learned senior counsel for the petitioners has placed reliance upon paragraph 2.2 and 2.6

of TRAI's recommendation dated 17.8.2020 (**Annexure P-19** to the memo of Telecom Petition No.1 of 2023). These reasons given by TRAI have not been set aside by DoT by giving separate reasons and hence also the impugned O.M. (**Annexure P-2**) deserves to be quashed and set aside.

27. It is submitted by Learned senior counsel for the petitioners that demand for interest and penalty is also without any basis. Learned senior counsel for the petitioners has placed reliance upon the decisions reported in ***Akbar Badruddin Giwani Vs. Collector of Customs, Bombay*** **(1990) 2 SCC 203** as well as reported in ***Hindustan Steel Ltd. Vs. State of Orissa*** **(1969) 2 SCC 627**. On the basis of these two decisions, learned senior counsel for the petitioners has stated that in case of bona-fide belief, imposition of heavy fine is not warranted. In the facts of the present case, petitioner of T.P. No.1 of 2023 had written a letter dated 18.10.2016 addressed to DoT (**Annexure P-15** to the memo of T.P. No.1 of 2023) especially looking to paragraph 5 of the aforesaid communication. It was a bona-fide belief of the petitioner. No reply has been given by the respondent and, therefore, penalty and interest are not leviable.

28. Learned senior counsel for the petitioners has submitted that even after the filing of the petition and the Interim Order dated 09.01.2023 of this Hon'ble Tribunal, DoT demanded Rs. 75.41 Crores (principal of Rs. 46.76 Crores and interest) alleging that these amounts form part of RJIL's AGR dues under the 2019 Judgement of Hon'ble the Supreme Court. RJIL after a series of representations was given to understand that DoT had erroneously adjusted this amount towards the 0.5% shared spectrum dues during the relevant period and alleged the AGR dues remain unpaid.

29. It is submitted by Learned senior counsel for the petitioners that RJIL made the payment of the amount of Rs. 75.41 Crores under protest. It specifically stated that the payment is being made subject to the outcome of the present petition and in case it is successful, then it will be entitled to refund / adjustment.

30. It is further submitted by Learned senior counsel for the petitioners that thereafter DoT has issued another O.M. dated 16.7.2024 refusing adjustment of surplus SUC payment made by the petitioner. This O.M. was challenged in M.A. No. 301 of 2024. The stay was granted by this Tribunal

vide order dated 30.9.2024 and respondent was directed not to take coercive steps against the petitioner in pursuance of O.M. dated 16.7.2024.

31. Thus, it is further submitted by Learned senior counsel for the petitioners that O.M. dated 11.10.2022 (**Annexure P-2**) as well as the demand notices at **Annexure P-1** and O.M. subsequently issued dated 16.7.2024 (challenged in M.A. No.301 of 2024) deserves to be quashed and set aside.

ARGUMENTS CANVASSED BY THE RESPONDENT - UNION OF INDIA

32. It is submitted by Learned Senior Counsel Mr. Vikramjeet Banerjee, learned ASG on behalf of Union of India that impugned O.M. dated 11.10.2022 (**Annexure P-2**) is within the policy domain of Union of India. Sharing of spectrum is a subject matter of policy which does not fall within the domain of judicial review. It is further submitted by learned ASG that as per Proviso to Section 4 of Telegraph Act, 1885, the Central Government may grant license on such considerations and in consideration of such payments as it thinks fit. Learned ASG on behalf of Union of India has placed

reliance upon Clause 16 of Spectrum Usage Charges enshrined in the license agreement.

33. It is further submitted by learned ASG on behalf of Union of India that Technologically and even otherwise, it is admitted that revenue generated from a particular band cannot be segregated, neither the format of the AGR statement provides for it nor does the licensee have the means to derive the exact revenue generated from the use of a particular band.

34. It is further submitted by learned ASG on behalf of Union of India that as a licensor, the Union of India has allowed the licensees to share their Spectrums, subject to certain conditions as stipulated in the Sharing Guidelines dated 24.09.2015. The decision to allow sharing is taken with a clear understanding that the Spectrum is a scarce natural resource and also that the licensees can leverage their Spectrum holdings to provide better services and also generate higher revenues.

35. It is further submitted by learned ASG on behalf of Union of India that since 2014, the SUC rate is calculated by employing Weighted Average Rate mechanism. Any additional SUC in a spectrum sharing arrangement is bound

to affect the Weighted Average SUC rate. All the Telecom Service Providers [TSPs], including the petitioner were aware of the weighted average rate of SUC since 2014 as the same was prescribed in the SUC charging orders of 2014, 2015 and 2016 etc.

36. It is further submitted by learned ASG on behalf of Union of India that even in absence of the sharing arrangement, the licensees are charged SUC on the rate calculated employing Weighted Average Rate mechanism. Irrespective of what revenue is generated in a particular band, the SUC rate derived after employing Weighted Average Rate mechanism is applied to the AGR generated by the licensees. The Band specific revenue generation is not available even in absence of sharing arrangement between the licensees. Therefore, it is exclusively within the domain of the Union of India to determine the SUC rate payable by licensees, additional SUC rate payable by the licensees involved in sharing arrangement, and also the mechanism to determine the SUC rate.

37. It is further submitted by learned ASG on behalf of Union of India that as per the Sharing Guidelines, there is no restriction that licensees can share

only a particular Band. So long as licensees are holding the same Bands, the said licensees can share more than one Band. Even then, the additional SUC rate of 0.5 % would be added to the SUC rate arrived after employing Weighted Average Rate mechanism.

38. It is further submitted by learned ASG on behalf of Union of India that in any case, between clause 12 and clause 13, it is the clause 13 which is capable of being treated as a charging provision of the SUC guidelines. The key terms being 'SUC rate', shall increase by 0.5% 'of AGR' will go to show the clear application of judgement and discretion on the part of DoT to charging additional SUC of 0.5% on the SUC rate which in any case is derived post application of Weighted Average Rate mechanism. The licensees cannot selectively enforce the recommendations of TRAI. The licensees cannot abandon the portions which were otherwise burdensome. The DoT had deliberately left out the recommendation of the TRAI which had stipulated adding of the quantum of shared band on both the licensees in a sharing arrangement. Giving full effect to the said recommendations would have meant that licensees would have been burdened with much more liability. Accordingly, a conscious decision was taken by the respondent/Union to

increase the SUC rate by 0.5% post sharing. Reference may be made to DoT's reasoning in its back reference dated 27.01.2023. Rational SUC sharing regime, policy stability along with clarity have been the key objectives of the respondent/Union since beginning.

39. It is further submitted by Mr. Vikramjit Banerjee, learned ASG on behalf of Union of India that there is no violation of Section 11 of TRAI Act, 1997 while issuing O.M. dated 11.10.2022 (**Annexure P-2**) and while issuing the demand notices which are at **Annexure P-1**.

40. Learned ASG on behalf of Union of India has placed reliance upon first Proviso to Section 11(1) of TRAI Act, 1997 and also placed reliance upon decision rendered by Hon'ble the Supreme Court of India in ***Bharti Airtel Vs. Union of India*** reported in **(2015) 12 SCC 1**. Learned ASG on behalf of Union of India has also placed reliance upon the decision rendered by this Tribunal in case of ***Clear Media Private Limited Vs. Ministry of Information and Broadcasting*** reported in **(2015) SCC OnLine TDSAT 1311** decided on 1.7.2015.

41. On the basis of the aforesaid decision, it is submitted by learned ASG on behalf of Union of India that 5th Proviso to Section 11(1) of TRAI Act stipulates the procedure to be followed by both the bodies - TRAI and Government of India – in decision making process, but, it does not whittle down the vigor of first proviso. **As per the first Proviso, Government of India is not bound by opinion of TRAI.** Hence, in the facts of the present case, the decision of Union of India by way of impugned O.M. (**Annexure P-2**) is absolutely just, proper, legal and equitable and hence, these petitions deserve to be dismissed.

42. It is further submitted by learned ASG on behalf of Union of India that while passing the impugned order at **Annexure P-2**, the respondent has already given due weightage to the recommendations of TRAI. The first recommendation of TRAI has been referred by learned ASG which is at **Annexure A-5** of Written Submission submitted by Union of India dated 22.4.2025.

43. Learned ASG on behalf of Union of India has also placed reliance upon the first, second and third recommendation of TRAI dated 11.5.2010,

3.11.2011 and 21.7.2014 respectively. Similarly, learned ASG on behalf of Union of India has also placed reliance upon Spectrum Sharing Guidelines Clause 2.3.

44. It is further submitted by learned ASG on behalf of Union of India that DoT made back reference to TRAI on 27.4.2015 against the previous recommendations of TRAI dated 21.7.2014 and TRAI gave its recommendations on 21.5.2015. Thus, at all the levels of decision-making process, due weightage has been given to recommendations of TRAI.

45. After the SUC guidelines, DoT sought recommendations from TRAI vide communication dated 15.1.2020. Thereafter, TRAI issued another set of recommendations dated 17.8.2020 and for the first time, TRAI recommended that additional 0.5% SUC would apply **"on the particular band wherein spectrum sharing is taking place and not on the entire spectrum".**

46. Thus, TRAI has given the aforesaid recommendations for the first time thereafter and DoT made a back reference to TRAI on 27.1.2023.

47. It is further submitted by learned ASG on behalf of Union of India that after reference was made by DoT on 23.1.2023, TRAI reiterated its earlier recommendations on 2.5.2023.

48. In view of the aforesaid facts, it cannot be said that due weightage has not been given by Union of India to the recommendations of TRAI. **Thus, there is no violation of 5th Proviso to Section 11(1) of TRAI Act while issuing O.M. dated 11.10.2022 (Annexure P-2) nor there is any illegality in issuing demand notices which are at Annexure P-1 annexed with the memo of T.P. No.1 of 2023.**

49. It is further submitted by learned ASG on behalf of Union of India that these are arguments for both the Telecom Petitions because they involve the same questions of law.

REASONS & ANALYSIS

The Impugned Demands & Office Memorandum are in violation of Sec. 11(1) of the TRAI Act, 1997

50. Petitioner is a Telecom Service Provider and has a unified license under Section 4 of Telegraph Act, 1885 issued by DoT – licensor.

51. The license fee is a fixed percentage of Adjusted Gross Revenue (AGR) for the unified license. DoT also prescribes Spectrum Usage Charges for the use of spectrum allocated to the Telecom Service Provider. There are different bands of spectrum. Petitioner in T.P. No.1 of 2023 is having 800 MHz., 1800 MHz. and 2300 MHz. spectrum band.

52. Thus, DoT- Respondent recovers license fees as well as Spectrum Usage Charges. It may happen that some of the Telecom Service Providers do not have adequate number of subscribers or it may happen that there may not be sufficient traffic for a particular spectrum band and, therefore, to that extent the spectrum band will go waste.

53. To avoid this waste of an essential resource of Government of India, Spectrum Sharing Guidelines have been issued by DoT on 24.09.2015. Clause 2,3,12 and 13 of the Spectrum Sharing Guidelines have been read and re-read during the course of arguments by counsels for both the sides. This Spectrum Sharing Guidelines are at **Annexure P-8** to the memo of T.P. No.1 of 2023.

54. Earlier, based on a reference by TRAI (first reference), TRAI issued "Recommendations on Guidelines on Spectrum Sharing". These recommendations are made by TRAI on 21.7.2014 (**Annexure P-3**).

55. Since various bands of Spectrum have different SUC rates, it is not possible to segregate the revenue earned by Telecom Service Providers from the use of different bands of spectrum. Therefore, DoT prescribed a concept of arriving at **"Weighted Average of SUC Rates"** for the Telecom Service Providers – Petitioners. This order was issued by DoT on 31.10.2014 which is at **Annexure P-4** to the memo of this petition (i.e. T.P. No.1 of 2023). DoT was not agreeing to TRAI's first recommendation and thereafter, in exercise of powers under Section 11 of the TRAI Act, 1997, the first

recommendation of TRAI (**Annexure P-3**) was referred back by DoT, requesting TRAI to reconsider the SUC to be applicable in case of sharing in view of the **"Weighted Average of SUC Rates".** This back reference by DoT is dated 27.04.2015.

56. Thereafter, TRAI considered DoT's referral and reiterated its 1st Recommendation stating, inter alia:

> *"As far as SUC in case of spectrum sharing is concerned, the Authority has recommended that the SUC rate of each of the licensees post-sharing shall increase by 0.5% of AGR. Keeping the SUC regime simple and unambiguous is one of the foremost objectives of this recommendation.*
>
> *In view of the above, the Authority reiterates its recommendations."*

These recommendations are dated 21.5.2015 (**Annexure P-7** to the memo of T.P. No.1 of 2023).

It is pertinent to note that in this back referral, DoT specifically posed a query, 'In view of the above applicable SUC rates (various rates for various

bands), particularly the Weighted Average SUC prescribed rates, TRAI is requested to reconsider the SUC to be applicable in case of sharing'. It is to be noted that the TRAI's recommendations never specifically stated that the Weighted Average of SUC rates have to be increased by 0.5%.

57. Based on the afore-mentioned TRAI's recommendations, DoT issued Guidelines for sharing of Access Spectrum by the Access Service providers (Spectrum Sharing Guidelines). These Spectrum Sharing Guidelines are issued on 24.09.2015 (**Annexure P-8** to the memo of this petition).

58. By virtue of Spectrum Sharing Guidelines (**Annexure P-8**), **spectrum sharing was permitted between two Telecom Service Providers utilizing the spectrum in the same band.** Moreover, as per **Clause – 3** of the **Spectrum Sharing Guidelines**, spectrum sharing is **not permitted** when both the licensees are **having spectrum in different bands.** As per **Clause -12** thereof, for the purpose of charging spectrum usage charges (SUC), it shall be considered that the licensees are sharing their entire spectrum holding in the particular band in the entire LSA. Moreover, as per **Clause -13** of the Spectrum Sharing Guidelines, SUC rate of each of the

licensee post sharing shall increase by 0.5% of **Adjusted Gross Revenue (AGR).** Thus, Spectrum Sharing was permitted in the same band and sharing of spectrum in different bands is prohibited. For the purpose of charging SUC, spectrum holding in a particular band shall be considered.

59. Thereafter, pursuant to representations by RJIL and other TSPs, DoT made a reference to TRAI under Section 11 of the TRAI Act requesting TRAI to provide:

> *"Recommendations, under section 11(1) of the TRAI Act 1997, as amended by TRAI Amendment Act, 2000, on whether the incremental 0.5% in SUC rate in cases of sharing of spectrum should be applied only on the specific band in which sharing is taking place; or to the overall Weighted Average Rate of SUC, which has been derived from all bands."*
>
> *DoT also forwarded the representations addressed by RJIL to TRAI."*

This second reference was made by DoT on 15.01.2020 which is a communication by DoT to TRAI (**Annexure P-16** to the memo of T.P. No.1 of 2023).

60. Thereafter, after carrying out a comprehensive consultation process and receiving comments from all stakeholders, TRAI published its recommendations stating, inter alia,

> *"**2.6**… Spectrum-sharing arrangement results in an enhanced efficiency resulting into increased capacity. Since the guidelines permit intra-band spectrum sharing only, capacity would be enhanced only in the spectrum bands being shared. Increment in SUC by 0.5% of the overall weighted average SUC would be justified only in a situation wherein a TSP is sharing spectrum in all the spectrum bands held by it. Therefore, the Authority is of the view that as per the existing spectrum sharing guidelines, which were based on the Recommendations of the Authority, the incremental SUC should apply to the spectrum band which is being shared and not on the overall weighted average SUC, which includes all the spectrum bands held by the TSP."*

3.1 *The Authority clarifies that as per the existing spectrum sharing guidelines, an increment of 0.5% on SUC rate should apply on the spectrum holding in specific band in which sharing is taking place, and not on the entire spectrum holding (all bands) of the Licensee."*

The recommendation of TRAI dated 17.8.2020 (second recommendation) is annexed at **Annexure P-19** to the memo of T.P. 1 of 2023.

61. DoT issued revised Spectrum Sharing Guidelines stipulating that there would be no additional SUC for spectrum sharing. These revised Spectrum Sharing Guidelines are dated 11.10.2021 (**Annexure P-21** to the memo of this petition). Thus, the dispute is only for the period from the year 2016 to 11.10.2021.

62. Thereafter, on 11.10.2022, DoT disagreed with the recommendations of TRAI and issued an O.M. setting out a methodology imposing the incremental SUC rate of 0.5% to be calculated on **"Weighted Average of SUC Rates".** This O.M. dated 11.10.2022 is at **Annexure P-2** to the memo

of this petition (i.e. T.P. 1 of 2023) which is under challenge in these Telecom Petitions.

63. Thus, in view of these facts, learned senior counsel Mr. Ramji Srinivasan on behalf of the petitioners has submitted that the impugned demands (**Annexure P-1**) and O.M. (**Annexure P-2**) are contrary to **Section 11 (1) of the TRAI Act, 1997** and is also contrary to TRAI's recommendations. For the ready reference, **Section 11(1) of the TRAI Act, 1997** reads as under:

> ***"11. Functions of Authority**.- (1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to—*
>
> *(a) make recommendations, either suo motu or on a request from the licensor, on the following matters, namely:—*
>
> *(i) need and timing for introduction of new service provider;*
>
> *(ii)terms and conditions of licence to a service provider;*
>
> *(iii)revocation of licence for non-compliance of terms and conditions of licence;*

(iv)measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;

(v)technological improvements in the services provided by the service providers;

(vi)type of equipment to be used by the service providers after inspection of equipment used in the network;

(vii)measures for the development of telecommunication technology and any other matter relatable to telecommunication industry in general;

(viii)efficient management of available spectrum;

(b) discharge the following functions, namely:—

(i) ensure compliance of terms and conditions of licence;

(ii)notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;

(iii)ensure technical compatibility and effective inter-connection between different service providers;

(iv)regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

(v)lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;

(vi)lay-down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;

(vii)maintain register of interconnect agreements and of all such other matters as may be provided in the regulations;

(viii)keep register maintained under clause (vii) open for inspection to any member of public on payment of such fee and compliance of such other requirement as may be provided in the regulations;

(ix)ensure effective compliance of universal service obligations;

(c) levy fees and other charges at such rates and in respect of such services as may be determined by regulations;

(d) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act:

Provided that the recommendations of the Authority specified in clause (a) of this sub-section shall not be binding upon the Central Government:

Provided further that the Central Government shall seek the recommendations of the Authority in respect of matters specified in sub-clauses (i) and (ii) of clause (a) of this sub-section in respect of new licence to be issued to a service provider and the Authority shall forward its recommendations within a period of sixty days from the date on which that Government sought the recommendations:

Provided also that the Authority may request the Central Government to furnish such information or documents as may be necessary for the purpose of making recommendations

under sub-clauses (i) and (ii) of clause (a) of this sub-section and that Government shall supply such information within a period of seven days from receipt of such request:

Provided also that the Central Government may issue a licence to a service provider if no recommendations are received from the Authority within the period specified in the second proviso or within such period as may be mutually agreed upon between the Central Government and the Authority:

Provided also that if the Central Government having considered that recommendation of the Authority, comes to a prima facie conclusion that such recommendation cannot be accepted or needs modifications, it shall, refer the recommendation back to the Authority for its reconsideration, and the Authority may within fifteen days from the date of receipt of such reference, forward to the Central Government its recommendation after considering the reference made by that Government. After receipt of further recommendation if any, the Central Government shall take a final decision."

[**Emphasis Supplied**]

64. In view of the First Proviso to be read with Fifth Proviso to Section 11(1) of TRAI Act, 1997, if the Central Government (through DoT) does not

wish to accept the recommendations of TRAI, it shall refer the recommendations back to the authority (TRAI). If the recommendations thereafter are reiterated by the Authority (TRAI), Central Government is free to form its own decision. The recommendations of the independent regulatory body – TRAI must be given due weightage. The recommendations of TRAI cannot be arbitrarily ignored or dismissed without due application of mind.

65. It has been held by Hon'ble the Supreme Court of India in ***Reliance Telecom Ltd. Vs. Union of India*** reported in **(2017) 4 SCC 269** in **Para No. 32 & 33,** as under:

> ***"32.*** *In* ***Assn. of Unified Telecom Service Providers of India****, the Court has held that notwithstanding sub-section (1) of Section 4 of the Telegraph Act* ***vesting exclusive privilege*** *in the Central Government in respect of telecommunication activities and notwithstanding the proviso to sub-section (1) of Section 4 of the Telegraph Act vesting in the Central Government the power to decide on the conditions of license*

including the payment to be paid by the licensee for the license, ***TRAI has been conferred with the statutory power to make recommendations*** *on the terms and conditions of the license to a service provider and the* ***Central Government is bound to seek the recommendations of TRAI on such terms and conditions at different stages****, but the recommendations of TRAI are not binding on the Central Government and the final decision on the terms and conditions of a license to a service provider rests with the Central Government. The legal consequence is that if there is a difference between TRAI and the Central Government with regard to a particular term or condition of a license, as in the present case, the recommendations of TRAI will not prevail and instead the decision of the Central Government will be final and binding.*

33. *The Court in* ***Assn. of Unified Telecom Service Providers of India case*** *has* ***further laid down that TRAI, being an expert body****, discharges recommendatory functions*

under clause (a) of sub-section (1) of Section 11 of the TRAI Act and discharges regulatory and other functions under clauses (b), (c) and (d) of sub-section (1) of Section 11 of the TRAI Act ***and it being an expert body, the recommendations of TRAI under clause (a) of sub-section (1) of Section 11 of the TRAI Act have to be given due weightage by the Central Government*** *but the recommendations of TRAI are not binding on the Central Government. The Court has further ruled that the regulatory and other functions under clauses (b), (c) and (d) of sub-section (1) of Section 11 of the TRAI Act have to be performed independent of the Central Government and are binding on the licensee subject only to an appeal in accordance with the provisions of the TRAI Act.* ***Thus, the interpretation made in the said case makes it clear that the recommendations given by TRAI are not binding but deserve to be given due weightage****. Certain areas have been separated regard being had to the nature of the language employed in the TRAI Act where the Authority can act*

independent of the Central Government. We are only concerned with the part that pertains to recommendation. In the case at hand, the Central Government had ***sought the recommendation and then referred it back****. Ultimately, it formulated the policy for auction of the spectrum. Therefore, the criticism that is advanced that once there is a reference back, the Central Government should have been guided by the recommendations has no justification inasmuch as the Central Government has the ultimate authority to take a decision.* ***Of course, such a decision, especially a decision relating to frame a policy for NIA has to be in accord with the norms of Article 14 of the Constitution****."*

(Emphasis Supplied)

66. It appears that the respondent no.1 cannot exercise powers hurriedly and reject the recommendations abruptly or brush aside recommendations of regulatory body-TRAI which is an expert body. The **"read and rejected"** approach cannot be adopted by Central Government (through DoT) when

recommendations are made by independent regulatory body-TRAI for the second time. Due weightage should be given by DoT to the recommendations of TRAI while taking the final decision, meaning thereby to, reasons should have been recorded by DoT before brushing aside reiterated recommendations by TRAI, otherwise, the whole process of recommendations by TRAI will be meaningless or will merely be an eye wash if nothing is to be read and understood from the recommendations of TRAI.

67. It has been held by Hon'ble the Supreme Court of India in ***Bharti Airtel Vs. Union of India*** reported in **(2015) 12 SCC 1** in **Para No. 68** as under:

> ***"68.*** *The only other part of Section 11 which is relevant in the context of the present issue is the* ***fifth proviso to Section 11(1)*** *which reads as follows:*
>
> > *"Provided also that if the Central Government, having considered that recommendation of the Authority, comes to a prima facie conclusion that such recommendation cannot be accepted or needs modifications,* ***it shall refer***

the recommendation back to the Authority for its reconsideration*, and the Authority may, within fifteen days from the date of receipt of such reference, forward to the Central Government its recommendation after considering the reference made by that Government. After receipt of further recommendation if any, the Central Government shall take a final decision."*

From the tenor of the said proviso*, it can be seen that* ***once recommendation is made by TRAI*** *[with reference to matters enumerated in clause (a)], the Government of India* ***may either accept the recommendation*** *or may come to a prima facie conclusion that such* ***a recommendation cannot be accepted or needs certain modifications. Upon reaching such prima facie conclusion,*** *the Government of India is required to refer the matter back to TRAI and TRAI is obliged to reconsider its earlier recommendation and forward its opinion to the Government of India.* ***On receipt of such a reconsidered opinion of TRAI, the Government of India***

is required to take a final decision. *In our opinion, the fifth proviso only stipulates the procedure to be followed by both the bodies -TRAI and the Government of India-in the decision-making process* ***but it does not whittle down the vigor of the first proviso which in no certain terms declares that the Government of India is not bound by the opinion of TRAI insofar as the recommendations made by TRAI with respect to matters falling under Section 11 (1)(a) are concerned****."*

(Emphasis Supplied)

68. In view of the aforesaid two decisions, it is explicitly stated that in the decision making process by the Central Government, if the Central Government is not agreeing with the recommendations of TRAI, the back reference is a must and if TRAI reconsiders the same recommendations or reiterates the same recommendations or if TRAI has modified recommendations, thereafter, Central Government is at liberty to have its final decision, but, Central Government has to give due weightage to the

recommendations of TRAI or Central Government should consider recommendations of TRAI. Meaning thereby to, the recommendations of TRAI cannot be rejected arbitrarily and in violation of Article 14 of the Constitution of India. Thus, the final decision of the Central Government should be in accordance with the norms of the Article 14 of the Constitution of India which means that:

(a) The "final decision" cannot be arbitrary;

(b) It should be reasonable;

(c) Due weightage to be given to the recommendations; &

(d) Reasons should be given for disagreeing with the recommendations of TRAI.

69. TRAI has given detailed reasons/rationale set out in their recommendations. In **paragraph 2.2 and 2.6 of TRAI's recommendations dated 17.8.2020 (Annexure P-19),** TRAI has given appropriate reasons for their recommendations that additional SUC rate of 0.5% should be added only on a particular band of spectrum which is being shared. For the ready reference, **paragraph nos. 2.2 and 2.6 of recommendations of TRAI dated 17.8.2020** read as under:

*"2.2 TRAI in its recommendations dated 21st July 2014 had, inter alia, mentioned that all the access spectrum will be sharable provided that both the licensees are having spectrum in the same band. It was also mentioned that SUC rate of each of the licensee post sharing shall increase by 0.5% of AGR. Further, considering the fact that it is not possible to monitor quantum of spectrum being shared at each site and segregate the AGR site-wise/area-wise, TRAI recommended that for the purpose of charging SUC, it shall be considered that the licensees are sharing entire spectrum holding in the particular band in the entire LSA**. It can be inferred that since spectrum sharing benefits the TSPs by pooling of their spectrum holding in a spectrum band in an LSA, benefit of spectrum sharing would also accrue only in that specific band and not in other spectrum bands; therefore, the incremental SUC of 0.5% also applies to that particular spectrum band, in which sharing is taking place, in the specified LSA**.*

2.6 As already discussed, ***Spectrum-sharing arrangement results in an enhanced efficiency resulting into increased capacity. Since the guidelines permit intra-band spectrum sharing only, capacity would be enhanced only in the spectrum bands being shared. Increment in SUC by 0.5% of the overall weighted average SUC would be justified only in a situation wherein a TSP is sharing spectrum in all the spectrum bands held by it. Therefore, the Authority is of the view that as per the existing spectrum sharing guidelines, which were based on the Recommendations of the Authority, the incremental SUC should apply to the spectrum band which is being shared and not on the overall weighted average SUC, which includes all the spectrum bands held by the TSP.*** *"*

(Emphasis Supplied)

70. Thus, in view of the aforesaid two decisions by Hon'ble the Supreme Court of India to be read with First Proviso and Fifth Proviso to Section 11(1) of the TRAI Act, 1997, when the recommendations of independent statutory body (i.e. TRAI) are not to be accepted, then, rejection of those recommendations by Central Government (through DoT) should be vide a reasoned order. The recommendations of independent statutory body cannot be rejected arbitrarily.

71. Looking to the impugned order which is at **Annexure P-2** dated 11.10.2022, no reasons have been given as to why the recommendations of TRAI have been rejected and hence, there is a violation of Fifth Proviso to Section 11(1) of the TRAI Act, 1997 in decision making process by the Central Government (through DoT). Hence, the impugned order dated 11.10.2022 is hereby quashed and set aside.

DoT has not given weightage to recommendations of TRAI dated 07.08.2020 nor the Government has made back reference to TRAI before taking final decision dated 11.10.2022 (**Annexure P-2**). Thus, there is a clear violation of Fifth Proviso to Section 11(1) of the TRAI Act, 1997.

72. It ought to be kept in mind that after first recommendation of TRAI (dated 17.08.2020 – **Annexure P-19**), if Central Government is not agreeing with the recommendations of TRAI, at this stage, Central Government shall not form a final opinion. The Central Government must make back reference to TRAI. In the facts of the present case, without back reference (after First recommendation dated 17.8.2020–**Annexure P-19**) the Central Government has taken a final decision dated 11.10.2022 (**Annexure P-2**) and hence, also impugned order (**Annexure P-2**) is hereby quashed and set aside.

73. Interim order was passed by this Hon'ble Tribunal in the present case on 09.01.2023 and it was observed by this Tribunal that there is a *prima facie* case in favor of the petitioner. It was also observed in paragraph 7 of the interim order in the present case dated 09.01.2023 that after receiving recommendations of TRAI (**Annexure P-19**) dated 17.8.2020, there was a need to follow mandatory procedure as envisaged in Fifth Proviso to Section 11(1) of TRAI Act, 1997. It was further observed by this Tribunal that prima facie this has not been complied with by the respondent before issuing impugned order dated 11.10.2022 (**Annexure P-2**), hence, we had stayed

the operation, implementation and execution of the impugned order dated 10.10.2022.

74. After reading the aforesaid interim order, especially paragraph 7 thereof, during the pendency of this Telecom Petition, DoT tried to overcome this fatal defect and after approximately three years' period from recommendations of TRAI dated 17.8.2020, made a back reference to TRAI's recommendations. Thus, it appears that the Central Government (through DoT) realizes after observations in paragraph 7 of the interim order passed by this Tribunal dated 09.01.2023 in the present Telecom Petition that back reference is a must, and therefore, Central Government finally referred back to TRAI for consideration. This back reference made by DoT is dated 27.01.2023 (**Annexure R-6** to the counter affidavit filed by the respondent).

75. Thus, the final decision was taken by the Central Government (**Annexure P-2**) without back reference. Later on, the back reference is made (**Annexure R-6** to the reply affidavit). Thus, admittedly there is a clear violation of Fifth Proviso to Section 11(1) of TRAI Act, 1997 in the

decision-making process by Central Government and hence also, we hereby quash and set aside the impugned decision dated 11.10.2022 (**Annexure P-2**).

76. TRAI reiterated its recommendation that the additional rate of 0.5% should be added only to the SUC rate of the particular band of spectrum being shared and not on the weighted average of SUC rates of all the bands in the area. TRAI stated "In the absence of any new facts and considering the above discussion, the Authority has nothing to add further".

77. Thus, the respondent through DoT tried to cure the fatal defect during the pendency of the present petition which is of no help to the respondent to legitimize illegal O.M. (**Annexure P-2**) and the demands on the basis of **Annexure P-2** which are at Annexure P-1 to the memo of this petition. Hence, both **Annexure P-1** and **Annexure P-2** are hereby quashed and set aside.

78. It appears that Union of India (through DoT) has filed an affidavit in reply on 19.04.2023. Nowhere it was mentioned in this counter affidavit that Union of India has made back reference to the recommendations of TRAI

dated 17.08.2020 (**Annexure P-19**) nor there is any reference in this affidavit in reply filed by Union of India that the recommendations of TRAI have been rejected by assigning reasons.

79. The Central Government (through DoT) has filed an affidavit on 24th April, 2024 making a reference for the first time of meeting DCC purportedly held on 21st July, 2023. The Respondent reiterated the recommendations of TRAI dated 2nd May, 2023 (**Annexure A-4** to the Rejoinder Affidavit) filed by the Petitioner, but, the Respondent has not disclosed the complete Minutes of the Meeting nor the Respondent has disclosed the reasons of rejection of reiterated recommendations of TRAI. Thus, the defect which is inherent in the Impugned Order remains as it is, meaning thereby to violation of the Fifth Proviso to Section 11(1) of TRAI Act, 1997 is evident in the Impugned Order. **Annexure P-2** cannot be cured by subsequent actions of the Union of India.

80. It has been held by this Hon'ble Tribunal in the case of ***Internet Service Providers Association of India Vs. UOI*** reported in **(2019)**

SCC Online TDSAT 1756 in **Para No. 6, 7, 29 to 35 & 42** which reads as under:

> ***"6.*** *Vide its letter dated* ***17.11.2006****, DoT sought recommendations of TRAI in terms of Section 11(1)(a) of the Act for* ***review of the Policy relating to Internet Services. TRAI issued a Consultation Paper*** *for various issues including license fee, on 27.12.2006. That Consultation Paper in Para 4.8.3.1. records that license fee was waived till 31.10.2003 and thereafter a nominal license fee of Re. 1/- became payable* ***but*** *the relevant clause pertaining to license fee provided that "the Telecom Authority reserves the* ***right to review*** *license fee including Universal Service Obligation (USO) levy any time during the validity of the license, which shall be binding on the licensee". TRAI mentioned that rationalization of ISP license fee is urgently required. The stakeholders were requested to give their suggestions.*
>
> ***7. On 10.05.2007****, TRAI made its recommendations on "Review of Internet Services".* ***It recommended a uniform annual license fee equivalent to 6% of AGR on all ISPs including revenues earned from pure internet services****. Soon thereafter, the respondent issued Guidelines and General Information for grant of license for operating internet services*

*on **24.08.2007**. Annual license fees at the **rate of 6% of AGR** subject to a minimum for Category A and B service areas were fixed. But importantly, the **revenues from pure internet services were excluded from the definition of AGR** for the purpose of computing license fee. TRAI's recommendation on this point was clearly **not accepted by the Government/respondent**.*

Whether the impugned decision of the respondent is in violation of Section 11 of TRAI Act.

***29. Section 11(1) of the Act lays down the functions of the Authority** under two heads; the first is covered **under (a)** requiring the Authority to make recommendations either suo moto or on a request from the licensor on 8 matters enumerated thereunder. **Under (b),** the Authority is given functions which require action and are different from recommendatory functions. It is made clear by the first proviso to Section 11(1) that the recommendations of the Authority specified in Clause (a) shall not be binding upon the Central Government. **However, this proviso is not absolute and is clearly conditioned by other provisos.** The second proviso mandates, without option, that the Central Government shall seek Authority's recommendation in matters covered by sub-clauses (i) and (ii) of Clause (a) of sub-section(1) in respect of*

a new licence to be issued to a service provider. The Authority is also mandated to forward its recommendations within a period of 60 days from the receipt of request from the Government.

30. *The third proviso is not relevant for the present purpose but it shows that if the Authority requires further information or documents than the Government has to supply the same in a time bound manner, within a period of 7 days. The fourth proviso entitled the Central Government to issue a licence to a service provider if no recommendations are received from the Authority within the period of 60 days or within such extended period as may be mutually agreed between the Government and the Authority.* ***The last and the fifth proviso lays down a clear procedure when the Central Government is of a prima facie conclusion that the recommendation of the Authority cannot be accepted or that it needs modification****. In such a situation it is required to refer* ***the recommendation back to the Authority for reconsideration. The Authority may make further recommendation to the Central Government within 15 days*** *and on receipt of such further recommendation, if any, the Central Government shall take final decision.*

31. *The provisos noticed above* ***clearly show that Central Government although free not to accept the recommendations of the Authority, has to mandatorily seek recommendations*** *when the matter involves terms and conditions of licence to a service provider,* ***particularly****, in respect of new licence, as is the case in the present matter. Though a time limit of 60 days is prescribed for the Authority to forward its recommendations but the fourth proviso enables the parties to mutually agree to extend such period. There is no good reason to read into this proviso that such mutual agreement must be through a written instrument. It may be inferred even by conduct because although Central Government can proceed to issue a licence without waiting beyond 60 days, the purpose of waiting for recommendations and having a effective consultation is to derive benefits from an expert and independent body such as the Authority and hence when the Central Government does not issue a further time limit and waits for the recommendation as in the present case, it has to be construed that the period of 60 days has been extended by mutual agreement.*

32. In the present case there is no exercise of power under fifth proviso *and the Authority was not asked to*

reconsider or make further recommendation under the said proviso.

33. *On facts the respondent has clearly accepted in its communications that it was waiting for recommendation in respect of issue of AGR/licence fee for ISPs even till January 2014 and thereafter the recommendations of TRAI were received on these issues on 01.05.2014.* ***Admittedly****, the recommendations are still pending for decision by the Government. These facts lead to a clear inference that the Central Government while on the one hand issued UL Guidelines on 19.08.2013, it did not communicate to the Authority that new licenses under UL be issued in January 2014 if the recommendations are not made by a particular time. The issuance of UL ISP Licence from January 2014 was an option open to the Central Government* ***but it had to act in a transparent manner and let all concerned including the Authority know of such a course of action****. That course of action was clearly not followed and hence we are of the considered view that the impugned decision or action is* ***not in conformity with the requirements of fairness and transparency inherent in Section 11(1) of the Act****.*

34. *The legal requirement that the Government, even when it has the necessary powers* ***must act fairly and in a***

transparent manner has been well recognized in several judicial pronouncements. This principle emanates from Articles 14, 19(1)(g) and 21 of the Constitution*. There is no good reason not to seek compliance of this principle when the Government is required to act as per provisions of Section 11(1) of the Act. The aforesaid principles have been highlighted by the Apex Court in Paras 80, 86, 89 and 92 of the judgment in the case of Cellular Operators Association of India v. Telecom Regulatory Authority of India, (2016) 7 SCC 703.*

35. *On behalf of petitioners reliance has rightly been placed upon observations of the Hon'ble Supreme Court in Para 68 of the judgment in the case of Bharti Airtel Ltd. v. Union of India, (2015) 12 SCC 1 in support of the proposition that upon receipt of a recommendation from TRAI if the Government comes to a prima facie conclusion that a recommendation cannot be accepted or needs certain modification, the Government is required to refer the matter back to TRAI for reconsideration. Government of India can take a final decision on receipt of a reconsidered opinion of TRAI. Such a provision is to ensure healthy respect for the views of the Regulator which is an expert body for the concerned sector. Such fair procedure is not affected by the provisions in the first proviso that Government*

is not bound by the opinion of TRAI falling under Section 11 (1)(a) of the Act.

42. *As a result the decision to include revenue from pure internet services in the AGR for levy of licence fee on the ISPs under Unified Licence regime is set aside on the grounds already considered and decided in favour of the petitioners. Accordingly, the impugned demands of licence fee are set aside with a direction to raise revised demands for licence fee on the basis of same concept of AGR as is being done in respect of ISPs holding licences under the old regime. In view of our interim protection granted to the petitioner on conditions, they are liable to pay such revised demands forthwith after deducting payments, if any, made in the meantime towards licence fee by way of ad hoc payments as per understanding. The respondent is expected to expedite the process of taking a decision keeping in view the relevant recommendations of TRAI as well as the constitutional requirement of providing and safeguarding a "level playing field" for all the ISPs. This should be done without any delay so as to end the uncertainty for the ISPs which has continued to grip them for the last about five years."*

[Emphasis Supplied]

81. By virtue of the aforesaid decisions, this Tribunal has set aside the demands issued by Department of Telecommunications on the ground of violation of DoT to consider the recommendations of TRAI and also on the ground that DoT has not followed the procedure set out in Section 11(1) of TRAI Act, 1997. In the facts of the present case also, there is violation of First Proviso to Section 11(1) of TRAI Act, 1997 while passing the Impugned Order (**Annexure P-2**) and hence, we hereby quash and set aside the O.M. dated 10th November, 2002 (**Annexure P-2**) as well as the demands made by the Respondent (**Annexure P-1**).

82. It has been held by this Tribunal in the case of ***Cellular Operators Association of India Vs. Union of India*** reported in **(2003) SCC Online TDSAT 37**:

> *"**Mr. Salve said that when a recommendation is made suo motu, by the Authority or on a request from the licensor**, the Central Government is not bound to accept the recommendations of the Authority. He said in respect of recommendations falling under sub-clauses (i) and (ii) of clause (a) of Section 11(1) procedure has been prescribed for the Central Government to examine the recommendations of the*

Authority but there is no procedure regarding other recommendations under sub-clauses (iii) to (viii) of clause (a). He said that the recommendation of the Authority not to use MSC and to use only V5.2 interface or any approved improved version with latest technology would be one under sub-clause (vi) of clause (a) and has no binding force and the Central Government has a right to allow use of MSC. ***On first blush there certainly appears to be some persuasive force in the arguments of Mr. Salve. His argument was that first proviso to Section 11 clearly stipulated that Central Government is not bound by any recommendation of the Authority*** *specified in clause (a) of sub-section (1).* ***But then if we accept the same, the Authority becomes an unproductive body*** *serving no purpose and not an independent expert body envisaged by the Act to regulate telecommunication services in the country* ***but*** *perhaps just any other department of the Government. That was never the object of the Act keeping in view the preamble which we have set out above and the functions and powers of the Authority.* ***By accepting such an argument we cannot make the Act worthless., a useless piece of legislation****. Take for example of power of the authority to ensure compliance of terms and conditions of licence.* ***This is one of the functions the Authority which it is mandatorily to discharge*** *under*

sub-clause (i) of clause (b) of Section 11. For that purpose the Authority can exercise powers under Section 12 of the Act. After finding that the licensee has not been complying with the terms and conditions of the licence the Authority recommends to the Central Government, the licensor, for revocation of licence for non-compliance of terms and conditions of the licence. This recommendation would be under sub-clause (iii) of clause (a). ***Could it be said that Government can treat that recommendation as a scrap of paper and consign it to the waste paper basket? Certainly not. Otherwise also, Government will have to give reasons for not accepting the recommendations of the Authority, even if we accept the argument of Mr. Salve. Otherwise the Authority will look absolutely ineffective and its functions can as well be performed by any of the Departments of the Central Government. It is mandatory for the Authority to make recommendations either suo motu or on the request of the licensor, the Central Government. Licensor must seek recommendations in respect of all the sub-clauses in clause (a). But as regards sub-clauses (i) and (ii) special procedure has been prescribed giving the time schedule. To us it appears that we have to adopt a constructive and purposeful approach in interpreting***

the provisions of Section 11 and we cannot accept an argument which strikes at the bottom of very existence of the Authority. It is undeniable that Authority is an expert body constituted under the Act and it has been held to be so by the judgement of the Supreme Court in the case of Cellular Operators Association of India & Ors. v. Union of India & Ors. — (2003) 3 SCC 186.

To us it is quite apparent that recommendations of the Authority in respect of sub- clauses (i) to (viii) are must whether these recommendations are made suo motu by the Authority or on the request of the licensor. ***When the Authority makes recommendation it does so only after following the set transparent procedure****. Even if nothing has been mentioned as to how the recommendations are to be considered by the Central Government* ***when the Government does not accept those recommendations, it has to be seen how the Central Government has considered those recommendations and the reasons therefor not to accept the same or even to accept the same with certain modifications. Central Government has to communicate to the Authority its reasons for non-acceptance of the recommendations and the Authority*** *will then consider those points and make further recommendations. Unless recommendations are there with respect of sub clauses (iii) to*

*(viii) of the Authority, Central Government **cannot treat the recommendations** or absence thereof as authorising it to act otherwise. It is therefore not correct for Mr. Salve to say that in the absence of any recommendations of the Authority or there being any non- acceptance consideration of the recommendations of the Authority by the Central Government it can prescribe any type of equipment to be used by the service providers after inspection of the equipment used in the network as provided in sub clause (vi) of clause (a). In any case letters of the TRAI written to DoT after its recommendations dated 8.1.2001, as we will hereinafter show, are not recommendations as envisaged in Section 11(1) (a) of the Act."*

[Emphasis Supplied]

83. In view of the aforesaid decisions, it has been held by this Tribunal that DoT cannot brush aside TRAI's recommendations to a waste paper basket. In the facts of the present case also, the recommendations of TRAI dated 17th August, 2020 (**Annexure P-19**) and recommendations dated 2nd May, 2023 (**Annexure A** to the rejoinder affidavit filed by the petitioner) having not been considered nor any reasons have been assigned for rejecting the recommendations of the Independent Statutory Body-TRAI. Hence also, the impugned order dated 11th October, 2022 (**Annexure P-2**)

is hereby quashed and set aside and consequent demand notices issued by the respondent which are at **Annexure P-1** are also hereby quashed and set aside.

84. It has been held by Hon'ble the Supreme Court of India in ***Cellular Operators Association of India Vs. TRAI*** reported in **(2016) 7 SCC 703** in **Para No. 92** as under:

> *"**92.** We find that, subject to certain well-defined exceptions, **it would be a healthy functioning of our democracy if all subordinate legislation were to be "transparent"** in the manner pointed out above. Since it is beyond the scope of this judgment to deal with subordinate legislation generally, and in particular with statutes which provide for rule making and regulation making without any added requirement of transparency, we would exhort Parliament to take up this issue and frame a legislation **along the lines of the US Administrative Procedure Act (with certain well-defined exceptions) by which all subordinate legislation is subject to a transparent process** by which due*

consultations with all stakeholders are held, and the rule or regulation-making power is exercised after due consideration of all stakeholders' submissions, together with an explanatory memorandum which broadly takes into account what they have said and the reasons for agreeing or disagreeing with them. ***Not only would such legislation reduce arbitrariness in subordinate legislation-making, but it would also conduce to openness in governance. It would also ensure the redressal, partial or otherwise, of grievances of the stakeholders concerned prior to the making of subordinate legislation****. This would obviate, in many cases, the need for persons to approach courts to strike down subordinate legislation on the ground of such legislation being manifestly arbitrary or unreasonable."*

[**Emphasis Supplied**]

85. In the aforesaid decision, Hon'ble the Supreme Court of India has elucidated the principles of transparency and held that subordinate

legislation can be struck down if transparent process has not been followed on the ground of being manifestly arbitrary and unreasonable.

86. In view of the aforesaid decisions, as the respondent has failed to maintain transparency while passing the impugned order especially by not making a back reference for the recommendations of TRAI dated 17th August 2020 (**Annexure P-19**) & for not assigning any reasons for rejection of recommendations of TRAI, we hereby quash and set aside the impugned order dated 11th October, 2022 (**Annexure P-2**) and the impugned demand notices which are at **Annexure P-1**.

87. It is vehemently contended by Learned Senior Advocate Mr. Vikramjit Banerjee, ASG on behalf of the Respondent that there is no violation of Section 11 of TRAI Act, 1997 and Respondent has given due weightage to TRAI from time to time before issuing impugned O.M. dated 11th October, 2022 (**Annexure P-2**). This contention of the Respondent is **not** accepted by this Tribunal for the following facts and reasons:

(i) Looking to the Fifth Proviso of Section 11(1) (a) of TRAI Act, 1997, procedure to be followed by TRAI as well as by the Government of India in decision making process has been stipulated. Thus, the decision-making process has to be followed by Union of India before taking final decision upon the recommendations of TRAI.

(ii) In the facts of the present case, DoT made a reference to TRAI on 15th January, 2020 (**Annexure P-16**) and DoT requested TRAI to provide recommendations under Section 11(1) of the TRAI Act 1997, as amended by TRAI Amendment Act, 2000, on whether the incremental 0.5% in SUC rate in cases of sharing of spectrum should be applied only on the specific band in which sharing is taking place or to the overall Weighted Average Rate of SUC which has been derived from all the bands.

(iii) TRAI published its recommendations on 17th August, 2020 (**Annexure P-19**) and paragraph 2.6 and 3.1 thereof read as under:

> "**2.6**… Spectrum-sharing arrangement results in an enhanced efficiency resulting into increased capacity.

Since the guidelines permit intra-band spectrum sharing only, capacity would be enhanced only in the spectrum bands being shared. Increment in SUC by 0.5% of the overall weighted average SUC would be justified only in a situation wherein a TSP is sharing spectrum in all the spectrum bands held by it. Therefore, the Authority is of the view that as per the existing spectrum sharing guidelines, which were based on the Recommendations of the Authority, the incremental SUC should apply to the spectrum band which is being shared and not on the overall weighted average SUC, which includes all the spectrum bands held by the TSP.

3.1 The Authority clarifies that as per the existing spectrum sharing guidelines, an increment of 0.5% on SUC rate should apply on the spectrum holding in specific band in which sharing is taking place, and not on the entire spectrum holding (all bands) of the Licensee."

(iv) Thus, there remains no controversy anymore and DoT clarified that there would be no additional SUC for spectrum sharing. This was clarified by DoT on 11th October, 2021 (**Annexure P-21**).

(v) After the recommendations made by TRAI on 17th August, 2020, (**Annexure P-19**) no back reference was made by DoT. As per Fifth Proviso of Section 11(1) of TRAI Act, 1997, whenever the Central Government is not agreeing with the recommendations of TRAI, back reference has to be made and if TRAI reiterates the recommendations or modified the earlier recommendations, thereafter, the Central Government is free to take its own decision. These final decisions shall be binding as per First Proviso to Section 11(1) of TRAI Act, 1997.

(vi) In the facts of the present case, without making back reference directly, the Central Government has issued O.M. dated 11th October, 2022 which is the impugned O.M. at **Annexure P-2** in these Telecom Petitions. Thus, there is a violation of procedure laid down in Fifth Proviso to Section 11(1) of TRAI Act, 1997 in the

decision-making process. Thus, there is a violation of Section 11 of TRAI Act, 1997 by the respondent.

(vii) The importance of decision-making process has not been appropriately appreciated by the Respondent while issuing the impugned O.M. dated 11th October, 2022 (**Annexure P-2**).

(viii) It has been held by Hon'ble the Supreme Court of India in ***Gujarat Urja Vikas Nigam Ltd. Vs. ESSAR Power Ltd***. reported in **(2008) 4 SCC 755** in **Para 35** as under:

> ***"35. It is well settled that where a statute provides for a thing to be done in a particular manner, then it has to be done in that manner, and in no other manner*** *[vide Chandra Kishore Jha v. Mahavir Prasad [(1999) 8 SCC 266 : AIR 1999 SC 3558] (SCC para 17 : AIR para 12), Dhanajaya Reddy v. State of Karnataka [(2001) 4 SCC 9 : 2001 SCC (Cri) 652 : AIR 2001 SC 1512] (SCC para 23 : AIR para 22), etc.]. Section 86(1)(f) provides a special manner of making references to an arbitrator in disputes between a licensee and a*

generating company. Hence by implication all other methods are barred."

[Emphasis Supplied]

(ix) In view of the aforesaid decision, it is well settled that where the statute provides for a thing to be done in a particular manner, then it has to be done in that manner and not in any other manner.

(x) It has been held by Privy Council in its final order & judgement dated 16.06.1936 in the case of ***Nazir Ahmad Vs. King Emperor*** reported in **1936 SCC OnLine PC 41**:

"*…The rule which applies is a different and not less well recognized rule, namely,* ***that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. This doctrine has often been applied to Courts Taylor vs. Taylor…"***

[Emphasis Supplied]

(xi) In view of the aforesaid decisions, procedure to be followed in decision making process has been unequivocally and unambiguously written in the statute i.e. in Fifth Proviso to Section 11(1) of TRAI Act, 1997. There is no option but to follow this decision-making process by the Central Government.

(xii) The final decision which is binding is to be taken by the Central Government but before taking the final decision, legal requirements as pointed out in the Fifth Proviso to Section 11(1) of TRAI Act must be complied with, otherwise final decision of Central Government - in the facts of the present case, the impugned O.M. dated 11th October, 2022 (**Annexure P-2**) deserves to be quashed and set aside for violation of the Section 11 of the TRAI Act. It ought to be kept in mind that before it is given to the Central Government for taking the final decision, it is mandatory to follow the decision-making process as pointed out in Fifth Proviso to Section 11(1) of TRAI Act, 1997.

(xiii) In the facts of the present case, without making back reference, the Central Government has taken a final decision on 11th October, 2022 which is impugned O.M. and hence, it deserves to be quashed and set aside.

(xiv) The aforesaid error is evident from the fact that after issuing O.M. and after filing T.P. No. 1 of 2023 and after Interim Relief being granted to the Petitioner vide Order dated 9th January, 2023 in T.P. No. 1 of 2023, now, subsequently, an attempt was made by DoT to cure the defect. The back reference was made by DoT on 27th January, 2023 (**Annexure R-6**). Even this back reference is made on 27th January, 2023, the original defect in the impugned O.M. dated 11th October, 2022 (**Annexure P-2**) remains as it is because impugned order cannot be supplied with reasons subsequently.

(xv) TRAI reiterated its recommendations that additional rate of 0.5% should be added only to SUC rate of a particular band of spectrum which is being shared and not on the **"Weighted Average of SUC Rate"** of all the bands. These reiterated recommendations are

dated 2nd May, 2023 (**Annexure A** to the rejoinder affidavit filed by the petitioner).

(xvi) Thus, the same recommendations have been made twice by TRAI, one is dated 15th January 2020 (**Annexure P-16**) and second is dated 2nd May, 2023 (**Annexure A** of the rejoinder affidavit).

(xvii) In fact, no final decision could have been taken by the Central Government before second recommendations by TRAI, as per Fifth Proviso to Section 11(1) of TRAI Act because 2nd Recommendation is based upon back reference. In the facts of the present case, after first recommendations by TRAI dated 15th January, 2020, the impugned O.M. has been issued (**Annexure P-2**) and thereafter back reference is made on 27th January 2023, (**Annexure R-6**) and thereafter TRAI reiterated its recommendations on 2nd May, 2023. Thus, there is a clear breach by Central Government in the decision-making process and hence, we hereby quash and set aside the impugned O.M. dated 11th October, 2022 (**Annexure P-2**).

(xviii) Learned ASG Mr. Vikramjit Banerjee has submitted that Union of India has given **"due weightage"** to the recommendations made by TRAI but as stated herein above, **"due weightage"** is said to have been given if they would have followed Fifth Proviso to Section 11(1) of the TRAI Act, 1997. As stated hereinabove, there is a clear violation of Fifth Proviso to Section 11(1) and hence, we are not agreeing with the contention of the learned senior counsel appearing for the Union of India that Central Government has given "due weightage" to the recommendations of TRAI. By violating the Fifth Proviso to Section 11(1) of TRAI Act, it cannot be said that "due weightage" has been given to these recommendations. The law enacted by the Parliament of India has to be followed in its true "spirit and letter". There is a definite purpose for enacting such type of decision-making process before final decision is to be taken by the Central Government. TRAI is an independent expert body which is empowered under Section 11(1) to make recommendations to the Central Government. These recommendations may be accepted by the Central Government or there may be a different view, than

what is recommended by TRAI, in that eventuality, the government must make back reference.

(xix) TRAI thereafter has to give its recommendations whether modified or by way of reiteration of the same recommendations. After receiving the second recommendation only, the Central Government can take its final decision. This final decision is binding and shall prevail upon recommendations of TRAI. This is an interpretation of law upon conjoint reading of First Proviso to Section 11(1) of TRAI Act, 1997 along-with the Fifth Proviso to Section 11(1) to be read with the decision rendered by Hon'ble the Supreme Court of India reported in **(2017) 4 SCC 269** particularly in **Para 33** and decision given by Hon'ble the Supreme Court of India reported in **(2015) 12 SCC 1** particularly in **Para 68** to be read with the decision given by this Tribunal reported in **(2019) SCC online TDSAT 1756** especially in **Paras 67, 25 to 35 and 42** to be read with the decision rendered by this Hon'ble Tribunal reported in **(2003) SCC online TDSAT 37** especially at **Pg. No. 165** of the judgement compilation filed by the petitioner to be read with the decision

rendered by Hon'ble the Supreme Court of India reported in **(2016) 7 SCC 703** especially **Para 92**. Thus, without following the procedure as laid down in Fifth Proviso to Section 11(1), O.M. has been issued and hence, **Annexure P-2** deserves to be quashed and set aside.

(xx) In view of the facts, reasons, and judicial pronouncements, it cannot be said that Union of India has given "due weightage" to the recommendations made by TRAI. In fact, the Central Government has carried out the **"read and rejected"** approach. The recommendations of TRAI dated 15th January, 2020 (**Annexure P-16**) had been rejected and the impugned O.M. was passed on 11th October, 2022 (**Annexure P-2**) without any back reference. This is known as **"read and rejected"** approach followed by the Central Government which is in **utter violation** of Fifth Proviso to Section 11(1) of TRAI Act, 1997.

(xxi) If this approach of Central Government is to be accepted by this Tribunal then perhaps there is no need for TRAI to make recommendations to the Central Government.

(xxii) The contention of the Ld. ASG that fixing of Additional SUC charges for sharing of spectrum is a policy decision entirely in the hands of Central Government does not hold water mainly for the reason that the same is not a policy decision at all. Moreover, petitioner has not challenged the policy to impose incremental SUC, but, the implementation of the said policy as well as its formula which is being applied incorrectly & in a manner which is inconsistent with the policy itself. There is absolutely no basis-either in law or on facts-for such a submission. It is a settled principle that even policy decisions taken by the Government, including matters concerning spectrum management & allocation, are subject to judicial review, on well-recognized grounds such as illegality, irrationality, procedural impropriety or violation of constitutional or statutory mandates. The mere fact that a matter involved a policy

element does not place it beyond the scrutiny of this Hon'ble Tribunal, particularly where such decisions directly affect the vested rights, violate statutory provisions or are otherwise arbitrary. The present matters are of implementation of SUC Rate & whether the same is in violation of the provisions of TRAI Act, 1997 & is in violation of Spectrum Sharing Guidelines.

88. In fact, Fifth Proviso to Section 11(1) is said to have been followed by the Central Government in its "true spirit and letter" and "due weightage" is said to have been given, by the Central Government, to the recommendations of TRAI only when:

(a) Procedure as laid down in Fifth Proviso to Section 11 (1) of TRAI Act, 1997 is followed by the Central Government i.e. Reference is to be made – Recommendations are to be given by the TRAI - if the Central Government is disagreeing with recommendations of TRAI, then make back reference to TRAI - again recommendation made by the TRAI - final decision to be taken thereafter by the Central Government.

(b) recommendations of TRAI should have been considered by the Central Government, meaning thereby to, even after receiving reiterated recommendations or revised recommendations or modified recommendations from TRAI, if the Central Government is not agreeing with the recommendations of TRAI, then in that eventuality Central Government can form its final opinion which is binding**, but,** this final decision must contain the reasons for not agreeing with the recommendations of TRAI. If the reasons are not given for disagreeing with the recommendations of TRAI, such final decision is said to have been taken by following **"read and rejected"** approach, meaning thereby to, recommendations of TRAI have been **"read and rejected"** and without any reasons the final decision is taken and this is not permissible. The law is not enacted to throw the recommendations of TRAI in the waste paper basket. "Due weightage" is said to have been given to the recommendations when final decision is taken with reasons whenever Central Government is not agreeing with the recommendations of TRAI, especially when TRAI has given detailed reasons for making recommendations. In the facts of the

present case, TRAI has given reasons in paragraphs 2.6 and 3.1 of the recommendations of TRAI dated 17th August, 2020 (**Annexure P-19**). Thus, reasons were given by TRAI and thereafter the recommendations were made and the Central Government is disagreeing and without making back reference and without assigning any reasons, O.M. dated 11th October, 2022 has been issued (**Annexure P-2**). This is in utter violation of Section 11(1) of TRAI Act, 1997.

(c) Subsequently, added reasons by way of an affidavit of DoT cannot improve the legality of the impugned order as held by Hon'ble the Supreme Court of India in ***Mohinder Singh Gill Vs. Chief Election Commissioner*** reported in **1978 1 SCC 405.**

89. In view of the aforesaid facts & reasons & judicial pronunciations, the Impugned Office Memorandum dated 11.10.2022 (**Annexure P-2**) & Impugned Demand Notices (**Annexure P-1**) have been issued in violation of Sec. 11(1) of TRAI Act, 1997.

The Impugned Demands (Annexure P-1) and Office Memorandum (Annexure P-2) are contrary to Spectrum Sharing Guidelines.

90. Learned Senior Counsels appearing for both the sides have placed reliance upon the Spectrum Sharing Guidelines issued by the Respondent dated 24th September, 2015 (**Annexure P-8** to the Memo of Telecom Petition No. 1 of 2023). Both the aforesaid petitioners are Telecom Service Providers (TSPs). They are either allocated or have purchased the spectrum during an auction conducted by DoT. In consideration of usage of spectrum, the petitioners (TSPs) are required to pay to the DoT Spectrum Usage Charges (SUC).

91. There are different bands of spectrum i.e. 700 MHz., 800 MHz., 900 MHz., 1800 MHz., 2100 MHz., 2300 MHz., 2500 MHz., 3300 MHz. and 26 GHz. etc. which are being used to deploy and offer Mobile Telecommunication Services.

92. It may happen that one of the TSPs may not be using a particular spectrum band to its optimum capacity and, therefore, it can share the same with another TSP that requires additional spectrum band.

93. Spectrum is an essential resource of Government of India and is required for Telecommunication Services and, therefore, instead of wastage of spectrum band by one of the TSPs, it was allowed by the Union of India that one TSP can share its unused spectrum band with another Telecom Service Provider. This permission was subject to certain conditions. This is known as Spectrum Sharing Guidelines. This Spectrum Sharing Guidelines was issued on 24th September, 2015 (**Annexure P-8**). Clause No. 2, 3, 12 and 13 of Spectrum Sharing Guidelines are as under:

> *"**(2)** Spectrum sharing is permitted between two Telecom Service Providers utilizing the spectrum in the same band.*
>
> ***(3)** Spectrum sharing is not permitted when both the licensees are having spectrum in different bands. Lease of spectrum is not permitted.*
>
> ***(12)** For the purpose of charging Spectrum Usage Charges (SUC), it shall be considered that the licensees are sharing their entire spectrum holding in the particular band in the entire LSA.*
>
> ***(13)** Spectrum Usage Charges (SUC) rate of each of the licensees post-sharing shall increase by 0.5% of Adjusted Gross Revenue (AGR). The sharing of spectrum for part of a month,*

full one month period shall be counted for the purpose of levying SUC.

[**Emphasis Supplied**]

94. Spectrum sharing is permitted only when Telecom Service Providers are sharing the same spectrum band. Spectrum sharing guidelines categorically prohibit a TSP from sharing spectrum in different bands. As per Clause 12 of Spectrum Sharing Guidelines, for the purpose of charging Spectrum Usage Charges, it shall be considered that the licensees are sharing their entire spectrum holding in the particular band. As per Clause 13, SUC rate for the TSP that is giving & TSP which is receiving shall increase by 0.5%. Thus, the TSP that is giving & the TSP which is receiving, both have to pay additional Spectrum Usage Charges (SUC) by 0.5% on AGR.

95. Upon conjoint reading of Clause 12 and 13 of Spectrum Sharing Guidelines, it appears that DoT, though was aware about TRAI's recommendations dated 21st May, 2015 (**Annexure P-7** to the memo of T.P. No. 1 of 2023), it decided not to charge the incremental rate of 0.5% on the weighted average of SUC rate and therefore, DoT did not even refer to the **"Weighted Average of SUC Rate"** in Clause 12 and 13 of Spectrum

Sharing Guidelines which are issued on 24th September 2015 (**Annexure P-8**).

96. Nowhere in the aforesaid Spectrum Sharing Guidelines Clauses there is a reference of charging incremental rate of 0.5% on **"Weighted Average of SUC Rate"**. On the contrary, the words used in Clause 13 are "**Spectrum Usage Charges (SUC) Rate"** read with Clause 12, this "**SUC Rate**" would only mean SUC Rate of the particular band which is being shared. The term "**SUC Rate**" can only mean SUC rate of a particular band. There is no SUC rate for a licensee. The DoT order dated 31.10.2014 laid down the methodology to arrive at **"Weighted Average of SUC Rate"** since SUC Rate of different bands was different and the revenue earned from each band cannot be separately determined. Thus, the 31.10.2014 order was issued to remove a difficulty in determination of SUC Charges. The DoT cannot now be heard to argue that the term "**SUC Rate"** means "**Weighted Average of SUC Rate"**. Even in 2015, DoT has raised the query to TRAI to consider the SUC to be applicable in case of sharing due to different SUC Rates for different bands. After doing so & after using the words "**SUC Rate**" in Clause 13, the DoT cannot contend that the term "**SUC Rate**" is

"**Weighted Average of SUC Rate".** DoT is aware of this intricacy from 2015 onwards. While framing the Spectrum Sharing Guidelines, DoT could have easily worded Clause 12 & Clause 13 as under:

> **"(12.) For the purpose of charging Spectrum Usage Charges (SUC) it shall be considered that the Licensees are sharing the entire spectrum in all bands held by them in the entire Licensed Service Areas (LSA)**
>
> **(13.) The Weighted Average SUC Rate determined in accordance with the direction contained in DoT order number P-14010/01/2014-NTG dated 31.10.2014 of each of the licensees sharing the Spectrum (even if spectrum is shared in one or some of the bands & not in all the bands) shall increase by 0.5%."**

DoT did not choose to do so. Accordingly, the contention of Respondent that Clause 13 means the Weighted Average of SUC Rate should go up by 0.5% is wrong & cannot be accepted. Further, this Tribunal does not accept the contention of Respondent that Clause 13 should be read alone for the purpose of charging. Interpretation of any clause comes from a combined

reading of all the clauses as per the principle of Harmonious Construction. Furthermore, in view of the fact that the Clause 12 also begins with the words 'For the purpose of charging Spectrum Usage Charges (SUC)…', this contention of DoT cannot be accepted & deserves to be dismissed.

97. Looking to Clauses 2 and 3 of Spectrum Sharing Guidelines (**Annexure P-8**), Spectrum Sharing is permitted between two telecom service providers utilizing the spectrum in the same band. Clause 3 of Spectrum Sharing Guidelines prohibits sharing of spectrum in different bands.

98. Looking to Clause 12 of Spectrum Sharing Guidelines dated 24th September 2015 (**Annexure P-8**), it has been categorically mentioned that for the purpose of charging, the holding of spectrum in a particular band shall be considered. This is a charging section for sharing the spectrum in a particular band.

99. Clause 13 of Spectrum Sharing Guidelines dated 24.09.2014 (**Annexure P-8**) prescribes that the SUC Rate of each of the licensees shall increase by 0.5%.

100. Thus, Clauses 2, 3, 12, and 13 of Spectrum Sharing Guidelines impose and levy additional SUC of 0.5% only for shared spectrum band, meaning thereby to, 0.5% incremental rate will be added in SUC rate in a particular band. Nowhere DoT has mentioned that incremental 0.5% will be added in weighted average of SUC rate.

101. Thus, there is no ambiguity in the Spectrum Sharing Guidelines. Unequivocally and unambiguously, the Central Government (through DoT) in Spectrum Sharing Guidelines prescribes that 0.5% incremental rate will be applicable for shared spectrum in the band to the SUC rate and not in **"Weighted Average of SUC Rate"**.

102. Despite clear and unambiguous spectrum-sharing guidelines, DoT issued impugned O.M. dated 11th October, 2022 (**Annexure P-2**) to the effect that incremental 0.5% will be added to **"Weighted Average of SUC Rates"**. This impugned Office Memorandum (**Annexure P-2**) is in utter violation of Spectrum-Sharing Guidelines, especially of Clauses 2, 3, 12, and 13 thereof. We therefore quash and set aside the O.M. issued by DoT dated

11th October, 2022 (**Annexure P-2**) as well as demand notices (**Annexure P-1**) which are based upon the Office Memorandum.

103. To understand the effect and impact of **Annexure P-2**, learned senior counsel appearing for the petitioner has pointed out at Table 1, 2, 3, 4, and 5 in the Written Submission during the course of arguments.

Table 1

Spectrum Band	**Quantity ('H')**	**SUC Rate ('R')**	**'R' x 'H'**
800 MHz	10 MHz	5.00%	50.00
1800 MHz	6.4 MHz	3.00%	19.20
2300 MHz	20 MHz	1.00%	20.00
Total Quantity	36.4 MHz	**Total**	89.20
Weighted Average **[89.20 ÷ 36.4 = 2.45%]**		**2.45%**	
Assuming AGR of the TSP		Rs. Crore	1,000
SUC Rate (Weighted Average)		%	2.45%
SUC Amount Payable		Rs. Crore	**24.50**

104. Thus, in case where the spectrum is not shared and assuming that AGR of TSP is Rs. 1000 crores, SUC amount payable will be Rs. 24.50 crores. This is by way of illustration and is not based upon the actual facts and figures of the TSP.

105. Learned Senior Counsel appearing for the petitioner has explained Table 2 where TSP is sharing a particular band.

106. It is submitted by Learned Senior Counsel for the petitioner that -

> *"RJIL, which had the above spectrum bands, shared 800 MHz spectrum with RComm (which did not possess the 2300 MHZ spectrum band) between June, 2016 to early, 2021 in terms of the Sharing Guidelines. Prior to sharing, since RJIL had multiple bands of spectrum, it was paying its regular SUC on the basis of the Weighted Average of SUC Rates say, based on table 1 above (i.e. 2.45%).*
>
> *Since RJIL only shared the 800 MHz of spectrum with RComm, RJIL determined the SUC payable as per* ***the PB Method*** *by including the Additional SUC of 0.5% in respect of the 800 MHz*

band which was shared, by increasing the SUC rate for such band from 5% to 5.5% as per the table below:

Table 2

Spectrum Band	**Quantity ('H')**	**SUC Rate ('R')**	**'R' x 'H'**
800 MHz	10 MHz	5.00% **+ 0.5%**= 5.50%	55.00
1800 MHz	6.4 MHz	3.00%	19.20
2300 MHz	20 MHz	1.00%	20.00
Total Quantity	36.4 MHz	**Total**	94.20
Weighted Average [94.20 ÷ 36.4= 2.59%]		**2.59%**	
Assuming AGR of the TSP		Rs. Crore	1,000
SUC Rate (Weighted Average)		%	2.59%
SUC Amount Payable		Rs. Crore	**25.90"**

107. The aforesaid Table No. 2 is an illustration based upon the fact that Shared Spectrum is 800 MHz spectrum and, therefore, the incremental SUC rate of 0.5% will be added only to the SUC rate of 800 MHz spectrum band.

108. The aforesaid methodology of calculation is as per Paragraphs 2, 3, 12, and 13 of Spectrum Sharing Guidelines dated 24th September, 2015 (**Annexure P-8**).

109. Whereas, Controller of Communication Accounts ("**CCAs**") of the DoT issued Demands between 2016 to 2020 charging Additional SUC of 0.5% on the Weighted Average of SUC Rates. Under this Method, the 0.5% Additional SUC is calculated and added to the Weighted Average rate of 2.45%, which includes all spectrum bands, instead of, levying the Additional SUC of 0.5% only on the 800 MHz particular band being shared. This is referred to as the **"DoT Method"**.

Table 3

Spectrum Band	**Quantity ('H')**	**SUC Rate ('R')**	**'R' x 'H'**
800 MHz	10 MHz	5.00%	50.00
1800 MHz	6.4 MHz	3.00%	19.20
2300 MHz	20 MHz	1.00%	20.00
Total Quantity	36.4 MHz	**Total**	89.20
Weighted Average **[89.20 ÷ 36.4 = 2.45%]**		**2.45%**	
Additional SUC has been added to the Weighted Rate of all Bands		**2.45% + 0.5% = 2.95%**	
Assuming AGR of the TSP		Rs. Crore	**1,000**
SUC Rate (Weighted Average)		%	2.95%
SUC Amount Payable		Rs. Crore	**29.50**

110. Thus, in view of Table No. 2 and Table No. 3, the economic effect of Impugned O.M. is evident (**Annexure P-2**). In the aforesaid illustration, the calculation as per DoT gives a liability of payable SUC amount at Rs. 29.50 Crores instead of Rs. 25.90 Crores. These figures are by way of illustration based upon assumption that AGR is Rs.1000 Crores.

111. As per the DoT Method, Additional SUC has been levied on the weighted average of all spectrum bands instead of only the 800 MHz band which is being shared. Sharing Guidelines permit sharing only in respect of spectrum being utilized in the same band and for the purpose of charging, it shall be considered that the licensees are sharing their spectrum holding in that particular band. This above illustration establishes the error committed by DoT thus rendering the levy on the weighted average method violative of its own spectrum guidelines. It is significant to note that if the two TSPs are not holding common spectrum bands, they cannot share those spectrum bands. Also, the levy of Additional SUC of 0.5% on the weighted average method has the effect of imposing the charge even on those bands which are not being shared. This has been explained by way of the following table No. 4:

Table 4

Spectrum Band	**Quantity ('H')**	**SUC Rate ('R')**	**'R' x 'H'**
800 MHz	10 MHz	5.00% + **0.5%** = 5.50%	55.00
1800 MHz	6.4 MHz	3.00% + **0.5%** = 3.50%	22.40
2300 MHz	20 MHz	1.00% + **0.5%** = 1.50%	30.00
Total Quantity	36.4 MHz	**Total**	107.40
Weighted Average **[107.4 ÷ 36.4 = 2.95%]**		**2.95%**	
Assumed AGR of the TSP		Rs. Crore	1,000
SUC Rate (Weighted Average)		%	2.95%
SUC Amount Payable		Rs. Crore	**29.50**

112. In view of the aforesaid illustration, as narrated in Table No. 1 to 4, patent error has been committed by DoT to the effect that:

> *"Even if a particular band of spectrum is not being shared (say 1800 MHz) and not capable of being shared (say 2300 MHz), yet the DoT Method proceeds to impose that levy on the basis that entire spectrum holding of each of the TSPs is being shared and becomes subject to the levy of the Additional SUC of 0.5%. While the DoT has simply sought to add 0.5% to the weighted average in an attempt to justify the imposition of the Additional SUC of 0.5%, in effect what it has done is to levy the 0.5% on each of the spectrum bands, irrespective of whether they are being shared or allocated or possessed by the TSPs."*

113. Annexure Annexed with the impugned O.M. dated 11th October, 2022 (**Annexure P-2** of the memo of T.P. No. 1 of 2023) is simplified for the purpose of explanation as under:

Table 5

Assuming TSP 1 and TSP 2 are only sharing the Spectrum in the 800 MHz Band

TSP 1			TSP 2		
Band	**Quantum of Spectrum**	**Rate**	**Band**	**Quantum of Spectrum**	**Rate**
800 MHz (shared)	4	3%	800 MHz (shared)	5	5%
900 MHz (not common and hence not shareable)	5	4%	1800 MHz (common but not shared)	3	5%
1800 MHz (common but not shared)	6	5%	2100 MHz (not common and hence not shareable)	3	3%
Weighted Average SUC Rate before Spectrum Sharing $= \frac{4x3\% + 5x4\% + 6x5\%}{(4+5+6)}$ = 4.14%			Weighted Average SUC Rate before Spectrum Sharing $= \frac{5x5\% + 3x5\% + 3x3\%}{(5+3+3)}$ = 4.46%		
SUC Rate after Spectrum Sharing = 4.14% + 0.5% = 4.64%			SUC Rate after Spectrum Sharing = 4.46% + 0.5% = 4.96%		

114. The aforesaid table is annexed with the impugned O.M. to give guidance about the calculation of spectrum usage charges.

115. Looking to the aforesaid table No. 5 which is a Simplified Format Annexed with the Annexure of Impugned O.M. (**Annexure P-2**), it appears that *prima facie* errors have been committed by DoT in view of Clauses 2, 3, 12, and 13 of Spectrum Sharing Guidelines issued by Union of India through DoT, dated 24th September, 2015 (**Annexure P-8**).

116. As we are dealing with two Telecom Petitions, it is worth to be noted here, all the law points raised in the T.P. No.22 of 2024 are similar except the fact in case of Bharti Airtel Ltd. (T.P. No.22 of 2024). The sharing of spectrum is as under:

Computation Of Weighted Average as Per Clause (ii)					
Rates	**Spectrum Band**	**Quantum of Spectrum (Mhz.)**	**Applicable SUC Rate**	**Applicable SUC Rate after adding 0.5%in the shared band**	**Product**
		(A)		**(B)**	**(A) X (B)**
Admin	900 MHz	8.2	5.00%	5.00%	0.41
2010 NIA	2300 MHz	10	1.00%	1.00%	0.1
2015 NIA	**2100 MHz**	**5**	**5.00%**	**5.50%**	**0.275**
2016 NIA	**1800 MHz**	**5**	**3.00%**	**3.50%**	**0.175**
2012 NIA	**1800 MHz**	**5**	**4.00%**	**4.50%**	**0.225**
	Total	**33.2**			**1.185**
Weighted Average of SUC Rate across all Spectrum Bands					**3.57%**

117. In view of the aforesaid table, it is explicitly clear that Bharti Airtel Limited - Petitioner in Telecom Petition No.22 of 2024 is holding more than one spectrum bands, out of which only two spectrum bands, 1800 MHz. and 2100 MHz. spectrum bands are being shared. Here also, incremental 0.5% SUC has to be added only in this shared spectrum and not to the Weighted Average Rate of SUC. Otherwise, it will tantamount to increment by 0.5% for all the spectrum bands held by Bharti Airtel Limited. Thus, even for unshared spectrum bands also there will be additional 0.5% SUC rate.

118. Thus, incremental 0.5% cannot be added to the Weighted Average Rate of SUC, but, incremental SUC rate is applied only for the shared spectrum band. In the case of Bharti Airtel Ltd. – TSP - Petitioner of T.P. No. 22 of 2024, the incremental rate of SUC shall be applicable to the shared spectrum of 1800 MHz. and 2100. MHz spectrum bands.

119. In view of the aforesaid two tables for Bharti Airtel Ltd. (Telecom Petition No. 22 of 2024), it appears that if incremental 0.5% is added only to the shared spectrums, then Weighted Average SUC Rate across all spectrum bands comes to 3.57%, **whereas**, if incorrect methodology (as

per DoT) is adopted, the Weighted Average of SUC Rate will come across for all the spectrum bands at the rate 3.84% (3.34% + 0.5%).

120. The incorrect methodology adopted by the respondent as illustrated hereinbelow in case of Bharti Airtel Ltd. (T.P. No. 22 of 2024).

The incorrect methodology adopted by the Respondent is illustrated hereinbelow:

Rates	Spectrum Bank d	Quantum of Spectrum (MHz) (A)	Applicable SUC Rate	Applicable SUC Rate (B)	Product
Admin	900 MHz	8.2	5.00%	5.00%	0.41
2010 NIA	2300 MHz	10	1.00%	1.00%	0.1
2010 NIA	2100 MHz	5	5.00%	5.00%	0.25
2010 NIA	1800 MHz	5	3.00%	3.00%	0.15
2010 NIA	1800 MHz	5	4.00%	4.00%	0.2
	Total	**33.2**			**1.11**
Weighted average of SUC rate across all spectrum bands =					3.34%
Adding 0.5% on the entire weighted average					**+0.5%**
					3.84%

[The aforesaid table is an example for Maharashtra LSA for the FY 2019-2020.]

121. The understanding of DoT in the annexure annexed with the impugned O.M. (**Annexure P-2**) is also in violation of Fifth Proviso to Section 11(1) of TRAI Act, 1997 and these *prima facie* errors committed by DoT are as under:

(a) Looking to the aforesaid Table No. 5 which is a simplified form of impugned O.M. (**Annexure P-2**), it appears that though Telecom Service Provider 1 and Telecom Service Provider 2 do not have any common 900 MHz band spectrum and, therefore, as per Clause 3 of Spectrum Sharing Guidelines, Annexure P-8, there is a prohibition from sharing 900 MHz spectrum because they are not common in both the TSP-1 and TSP-2, nonetheless, DoT method still charges TSP-1 0.5% for assuming that TSP-1 is sharing the very spectrum which is prohibited from sharing.

(b) Though there is no common 2100 MHz band spectrum between TSP 1 and TSP 2, then also, the DoT method charges TSP 2, 0.5% on assumption that TSP 2 is sharing 2100 MHz band spectrum. Though it is prohibited from sharing as per Clause No. 3, Spectrum Sharing Guidelines (**Annexure P-8**).

(c) The third error committed by DoT, looking to the Table No. 5, which is a simplified form of Annexure in the impugned O.M. (**Annexure P-2**) is to the effect that even if 1800 MHz spectrum band is not being shared by TSP-1 and TSP-2, the DoT method considers both TSP-1 and TSP-2 to be sharing 1800 MHz spectrum and adds 0.5% of the respective SUC rates.

(d) Meaning thereby to, even though there is no common spectrum band or even though there is no sharing of a particular spectrum band between TSP 1 and TSP 2, the DoT method still charges Telecom Service Providers by incremental 0.5% of SUC rate.

122. The aforesaid are the *prima facie* errors committed by DoT which is in violation of Spectrum Sharing Guidelines, especially Clause No. 2, 3, 12, and 13 thereof (**Annexure P-8**).

123. If incremental rate of 0.5% has to be added in **"Weighted Average of SUC Rate"**, then in that eventuality, even for unshared spectrum, there will be addition of 0.5% in the SUC rate of that particular spectrum band. And there is also a possibility of addition of incremental 0.5% SUC rate for

all the spectrum bands which are not even being shared. Hence, the interpretation that incremental 0.5% should be added to weighted average of SUC rates is not accepted by this Tribunal. On the contrary, looking to the Clauses 2, 3, 12, and 13 of spectrum sharing guidelines, incremental 0.5% should be applied only to the SUC rate of sharing spectrum and nothing beyond that and hence also, we hereby quash and set aside O.M. dated 11th October, 2022 (**Annexure P-2**) and demand notices (**Annexure P-1**) which are based upon (**Annexure P-2**) are also hereby quashed and set aside.

124. Much has been argued out by learned ASG Mr. Vikramjit Banerjee that as per Spectrum Sharing Guidelines, especially Clauses 12 and 13, no error has been committed by the Central Government while issuing the impugned O.M. dated 11th October 2022 (**Annexure P-2**). Additional 0.5% is to be added on **"Weighted Average SUC Rate"** because revenue segregation is not possible for different spectrum bands.

125. This contention is not accepted by this Tribunal mainly for the following facts and reasons:

(i) As stated herein above, Spectrum Sharing Guidelines have been issued by the Central Government on 24th September, 2015, (**Annexure P-8**). The relevant Clauses of this Spectrum Sharing Guidelines are 2, 3, 12, and 13. They read as under:

> *"**(2)** Spectrum sharing is permitted between two Telecom Service Providers utilizing the spectrum in the same band.*
>
> ***(3)** Spectrum sharing is not permitted when both the licensees are having spectrum in different bands. Lease of spectrum is not permitted.*
>
> ***(12)** For the purpose of charging Spectrum Usage Charges (SUC), it shall be considered that the licensees are sharing their entire spectrum holding in the particular band in the entire LSA.*
>
> ***(13)** Spectrum Usage Charges (SUC) rate of each of the licensees post-sharing shall increase by 0.5% of Adjusted Gross Revenue (AGR). The sharing of spectrum for part of a month, full one-month period shall be counted for the purpose of levying SUC."*

(ii) In none of the aforesaid Clauses of Spectrum Sharing Guidelines, the words "Weighted Average Rate" have been used. <u>On the</u>

contrary, the words used are Spectrum Usage Charges (SUC) rate, as per Clause 13 of the Spectrum Sharing Guidelines.

(iii) Spectrum sharing is permitted in the same band and it's not permitted in different bands.

(iv) TSP – Petitioner in both the aforesaid Telecom Petitions are given different bands of spectrum which may be 700 MHz., 800 MHz., 900 MHz., 1800 MHz., 2100 MHz., 2300 MHz., 2500 MHz., 3300 MHz. and 26 GHz. etc. Spectrums are given upon consideration to the telecom service providers. The sharing of spectrum is permissible only in the same band. In a different band, no sharing is permissible. As per Clause 12 of the Spectrum Sharing Guidelines for the Purpose of Charging SUC, it shall consider that licensee (TSPs) is sharing its entire spectrum holding in a particular band, meaning thereby to for the purpose of charging, SUC in a particular band shall be considered which is being shared.

(v) Nowhere in these Clauses, especially Clause 2, 3, 12, and 13 of the Spectrum Sharing Guidelines (**Annexure P-8**) dated 24th

September, 2015, the Central Government has used the words "Weighted Average Rate of SUC".

(vi) The "SUC rate" as per the guidelines has to be increased by 0.5% as per Clauses 12 and 13 to be read with Clauses 2 and 3 of Spectrum Sharing Guidelines. Incremental 0.5% has to be added in SUC rate of the shared Spectrum band only. The impugned O.M. is adding incremental 0.5% in "Weighted Average Rate of SUC", which has been explained in detail hereinabove in the form of Tables 1, 2, 3, 4, and 5. If these tables are read accurately with interpretation that incremental 0.5% has to be added in "Weighted Average Rate of SUC"., then it would tantamount to addition of 0.5% to the SUC rates of all the spectrum whether they are shared or not. Thus, an addition of 0.5% to the "Weighted Average Rate of SUC" will mean that even though there is no common spectrum band, then also it will be presumed that those different spectrum bands are being shared (though prohibited by Clause 3 of Spectrum Sharing Guidelines) and on the basis of this presumption, without sharing of different bands, incremental 0.5% is being added in SUC rates to

each and every band without there being any sharing of spectrum. Interpretation of Central Government is not accepted because there cannot be sharing of spectrum in different bands and therefore, only in the sharing spectrum, the telecom service providers (TSPs) shall be charged incremental rate of 0.5% over and above the regular SUC Rate for that "shared" band.

(vii) After the aforesaid Spectrum Sharing Guidelines was published on 24th September, 2015 (**Annexure P-8**), Central Government made a reference on 15th January, 2020 (**Annexure P-16**) in exercise of the powers under Section 11(1) of the TRAI Act and sought recommendations on the issue whether incremental rate of 0.5% in SUC rate in case of sharing of spectrum should be applied only on the specific band in which sharing is taking place or whether incremental rate of 0.5% in SUC rate should be applied to overall weighted average rate of SUC which is being derived from all the bands.

No other meaning can be derived from a conjoint reading of Clause 12 & 13 of the Spectrum Sharing Guidelines. We cannot accept the

contention of the Ld. ASG that Clause 13 has to be read alone for the purpose of determining the additional SUC for sharing. Clause 12 very clearly uses the words '*For the purpose of charging Spectrum Usage Charges (SUC)……'*

(viii) TRAI gave its recommendations after a comprehensive consultation process on 17.08.2020 (**Annexure P-19**). In paragraph 2.6, the recommendation states as under:

> "Therefore, the authority is of the view that as per the existing Spectrum Sharing Guidelines which are based on the Recommendations of the Authority, the incremental SUC should apply to the Spectrum Band which is being shared & not on the overall Weighted Average SUC, which includes all the Spectrum Bands held by the TSP."

(ix) Paragraph 3.1 of Recommendations of TRAI dated 17th August 2020 (**Annexure P-19**) is an interpretation by TRAI of the Spectrum Sharing Guidelines dated 24th September, 2015 (**Annexure P-8**).

Thus, even as per Spectrum Sharing Guidelines, incremental 0.5% is to be added to the SUC rate of the shared spectrum band only.

(x) Even in a back reference made by the Central Government on 27th January 2023 (**Annexure R/6**), again TRAI reiterated the same interpretation with their recommendations dated 2nd May 2023 (**Annexure A** to the rejoinder affidavit). TRAI reiterated that additional rate of 0.5% should be added to the SUC rate of a particular band of spectrum which is being shared and not to be added to the Weighted Average of SUC rate. Thus, second time also the Spectrum Sharing Guidelines dated 24th September, 2015 (**Annexure P-8**) have been incorporated by TRAI which is an independent expert body enacted under TRAI Act, 1997.

(xi) Thus, as per our interpretation as stated hereinabove looking to Clauses 2, 3, 12, and 13, 0.5% additional SUC is to be charged over and above SUC charge for the shared spectrum band & 0.5% additional SUC rate cannot be added to Weighted Average on SUC Rate otherwise, it will be presumed that all the spectrum bands,

though different, are shared & Clause 12 & 13 of Spectrum Sharing Guidelines also stipulate that the 0.5% addition will apply only to the SUC rate of the band which is being shared. This has been explained in detail in Tables 1 to 5.

(xii) The concept of the Weighted Average Rate has to be applied not for charging, but, it can be applied at the time of levy of total SUC rate for all the spectrums including for shared spectrum, but, with a rider that in case of sharing a spectrum, additional 0.5% will be charged over and above the SUC rates prescribed separately for each spectrum band. Thus, addition of 0.5% shall be only in the shared spectrum band, but, when the Telecom Service Providers are having more than one spectrum band, then for levying the SUC charges, weighted average method has to be applied because revenue for a particular band cannot be segregated. Therefore, on the basis of Weighted Average Rate, the Spectrum Usage Charges will be levied. This does not mean that whenever only one spectrum band is shared or two spectrum bands are shared, then 0.5% will be added to the regular SUC rates for all the spectrum bands of the

TSP, whether they are shared or not shared. This cannot be the interpretation of the Spectrum Sharing Guidelines as is clear from Clauses 2, 3, 12, and 13 which suggests that incremental 0.5% SUC rate is applicable only for shared spectrum.

(xiii) Thus, merely because the revenue for different spectrum bands cannot be separated does not mean that incremental 0.5% has to be added for the entire spectrum holding by the petitioners, even though they are not shared.

(xiv) The petitioners of both the Telecom Petitions are having five different spectrum bands and only one or two are being shared with other Telecom Service Providers, then incremental 0.5% cannot be to the Weighted Average of SUC Rate, otherwise it will tantamount to addition of 0.5% in all the five spectrum bands. Thus, even for unshared spectrum bands, there will be addition of 0.5% SUC. This interpretation is running counter to Spectrum Sharing Guidelines dated 24th September, 2015 (**Annexure P-8**).

(xv) As per Clause 12 of the Spectrum Sharing Guidelines, for the purpose of charging SUC, it shall consider the sharing of spectrum in the particular band, meaning thereby to, it is only for the shared spectrum. Even if it is shared 50%, it will be presumed that the sharing spectrum is fully shared and for this shared spectrum, 0.5% additional SUC rate will be applied. Even in Clause 13 of Spectrum Sharing Guidelines, the words used are "Spectrum Usage Charges" (SUC) Rate. Nowhere in the Spectrum Sharing Guidelines it has been pointed out that additional SUC rate shall be applicable to Weighted Average of SUC Rate. Nowhere in the Spectrum Sharing Guidelines there is a presumption that whenever one of the spectrum bands is shared, then it will be presumed that all the spectrum bands have been shared and in the SUC rates of all the spectrum bands there will be addition of 0.5%. Thus, if 0.5% is added to the Weighted Average of SUC Rate, it will tantamount to that even though one of the spectrum band is shared, additional SUC rate will be applied to all the spectrum bands, whether they are shared or not. In fact, this is not permissible looking to the plain

reading of Clauses 2, 3, 12, and 13 of the Spectrum Sharing Guidelines.

The impugned Office Memorandum (Annexure P-2) is unreasoned.

126. The recommendations of TRAI dated 17th August, 2020 (**Annexure P-8**) prescribes that incremental 0.5% of SUC rate should apply on the spectrum holding in a specific band in which sharing is taking place and not on the entire spectrum holding (all the bands of the licensee).

127. The reasons have been given in paragraphs 2.2 & 2.6 of these recommendations by TRAI dated 17th August, 2020:

> *"**2.2** TRAI in its recommendations dated 21st July 2014 had, inter alia, mentioned that all the access spectrum will be sharable provided that both the licensees are having spectrum in the same band. It was also mentioned that SUC rate of each of the licensee post sharing shall increase by 0.5% of AGR. Further, considering the fact that it is not possible to monitor quantum of spectrum being shared at each site and segregate*

*the AGR site-wise/area-wise, TRAI recommended that for the purpose of charging SUC, it shall be considered that the licensees are sharing entire spectrum holding in the particular band in the entire LSA**. It can be inferred that since spectrum sharing benefits the TSPs by pooling of their spectrum holding in a spectrum band in an LSA, benefit of spectrum sharing would also accrue only in that specific band and not in other spectrum bands; therefore, the incremental SUC of 0.5% also applies to that particular spectrum band, in which sharing is taking place, in the specified LSA**.*

***2.6** As already discussed, **Spectrum-sharing arrangement results in an enhanced efficiency resulting into increased capacity. Since the guidelines permit intra-band spectrum sharing only, capacity would be enhanced only in the spectrum bands being shared. Increment in SUC by 0.5% of the overall weighted average SUC would be justified only in a situation*

wherein a TSP is sharing spectrum in all the spectrum bands held by it. Therefore, the Authority is of the view that as per the existing spectrum sharing guidelines, which were based on the Recommendations of the Authority, the incremental SUC should apply to the spectrum band which is being shared and not on the overall weighted average SUC, which includes all the spectrum bands held by the TSP."

(Emphasis Supplied)

128. As per Fifth Proviso of Section 11(1) of TRAI Act, 1997, if the Central Government is not agreeing with the recommendations of TRAI, back reference should have been made by the Central Government. In the facts of the present case, before issuing impugned O.M. dated 11th October, 2002 (**Annexure P-2**), no such back reference was made by the Central Government. Looking to the observation made in **Para 33** of the judgement relied upon by the learned senior counsel for the Petitioner - ***Reliance Telecom Ltd. Vs. Union of India*** **(2017) 4 SCC 269**, it has been

observed that TRAI being an expert body, the recommendations of TRAI under Sec. 11(1)(a) of the TRAI Act, 1997 have to be given due weightage by the Central Government, but, the recommendations of TRAI are **not** binding to the Central Government.

129. In view of the aforesaid decisions, if the Central Government is not agreeing with the recommendations of TRAI, back reference has to be made again to TRAI and if TRAI reiterates the recommendations, then the Central Government can form its final opinion. In the facts of the present case:

(i) After the recommendations dated 17th August, 2020 (**Annexure P-19**), no back reference was made by the Central Government before issuing O.M. dated 11th October, 2022 (**Annexure P-2**).

(ii) No reasons have been assigned by the Central Government for not agreeing with the recommendations by the Independent Statutory Body – TRAI.

(iii) The "**Read and Rejected**" approach followed by the Central Government for the Recommendations of TRAI runs contrary to the very basic principle of Pith & Substance of Section 11(1) of TRAI

Act, 1997 to be read with the decisions rendered by Hon'ble the Supreme Court of India, including **(2017) 4SCC 269** particularly in **Para** 33 and is also in violation of judgment reported in **2019 SCC online TDSAT 1756** especially of **Para 29 to 34** as well as in violation of judgment reported in **(2003) 3SCC online TDSAT 37** as well as in violation of the decision reported in **(2016) 7 SCC 703** especially in **Para 92**.

(iv) Section 11(1) of TRAI Act, 1997 imposes duty upon both TRAI as well as Central Government whenever reference is made by the Central Government. It is the duty of TRAI to make recommendations within the stipulated time. If Central Government is not agreeing with the recommendations of TRAI, back reference is a must as per Fifth Proviso to Section 11(1) of TRAI Act, 1997. Thereafter, if TRAI reiterates its recommendations or reconsiders its recommendations, thereafter, the Central Government is free to form its own final decision which shall be binding, meaning thereby to, due weightage shall be given by the Central Government to the recommendations of an independent statutory body – TRAI.

(v) Though final powers are vested in Central Government to take the final decision, as per Fifth Proviso to Section 11(1) of TRAI Act, 1997, it does not mean that "**Read and Rejected**" approach should be adopted by the Central Government whenever Central Government is not considering the recommendations of TRAI. The Central Government ought to consider recommendations of TRAI. Consideration of the recommendations of TRAI is a must by the Central Government, meaning thereby to, whenever Central Government is not agreeing to the recommendations of TRAI, even after back reference, in that eventuality, final opinion can be formed by the Central Government by assigning reasons for not agreeing with the reiterated recommendations of TRAI. This is known as "**transparency"** in the decision-making process, by the Central Government & is prescribed to avoid label of arbitrariness for its final decision. Giving reasons for not agreeing with the recommendations of TRAI tantamount to the fact that the Central Government has **"considered"** the Recommendations. "**Read and Rejected**" approach for the Recommendations by the Independent

Statutory Body-TRAI cannot be followed by the Central Government in view of the Fifth Proviso to Section 11(1) of TRAI Act, 1997 to be read with the aforesaid decisions.

130. It has been held in the case of ***Mohinder Singh Gill Vs. Chief Election Commissioner*** reported in **(1978) 1 SCC 405** at **Para No.8**:

> *"**8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out**. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji [Commr. of Police, Bombay v. Gordhandas Bhanji, 1951 SCC 1088: AIR 1952 SC 16]:*

"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Orders are not like old wine becoming better as they grow older."

(Emphasis Supplied)

131. In view of the aforesaid decisions, the Central Government cannot assign reasons subsequently i.e. after issuing the O.M. dated 11th October, 2022 (**Annexure P-2**), otherwise, an order bad in the beginning may by efflux of time, when it comes to the Court on account of a challenge, gets validated by additional grounds/reasons later given in the counter affidavit. This is not permissible. The impugned order has to be judged on its own

merits. Subsequently, added wisdom (by way of an affidavit filed) to the impugned order cannot make the impugned order valid if the original impugned order is bad in law.

132. TRAI has again given its recommendations on 2nd May, 2023, which is during the pendency of these Telecom Petitions upon back reference made by the Central Government on 27th January, 2023. During the pendency of these Telecom Petitions (T.P. No. 1 of 2023 & T.P. No. 22 of 2024) and looking to the interim order passed by this Tribunal dated 6th January, 2023, it appears that wisdom has prevailed upon Central Government and the DoT finally referred back the second reference to TRAI for reconsideration on 27th January, 2023 (**Annexure R-6**). This back reference made by Central Government after the issuance of the impugned O.M. itself is evident of the fact that the impugned O.M. issued on 11th October, 2022 (**Annexure P-2**) was without back-reference. TRAI reiterated its recommendations on 2nd May, 2023 (**Annexure A**) to the rejoinder affidavit filed by the petitioner in T.P. No. 1 of 2023 to the effect that additional rate of SUC should be added only to the SUC rate of a particular band of spectrum being shared and **not** on the "**Weighted Average of SUC Rates" on all the bands**.

133. DoT has filed a short affidavit on 24th April, 2024 disclosing for the first time that the DCC at its meeting held on 21st July, 2023 purportedly rejected the recommendations of TRAI dated 2nd May, 2023. DoT has not disclosed the complete Minutes of the Meeting. DoT has not disclosed the reasons for rejection of recommendations of TRAI dated 2nd May 2023. Even otherwise also, the impugned OM was issued on 11th October, 2022 without back reference for the recommendations of TRAI dated 17th August, 2020 (**Annexure P-19**). This is in utter violation of Fifth Proviso to Section 11(1) of TRAI Act, 1997. Subsequent back-reference by DoT on 27th January, 2023 cannot cure the defect i.e. violation of Fifth Proviso to Section 11(1) of TRAI Act, 1997.

134. In view of the aforesaid facts, reasons, and judicial pronouncements, as reasons were given by the Central Government for not agreeing with the recommendations of TRAI at the time of taking final decision, and as the final decision is taken without back reference, it is also in violation of Fifth Proviso to Section 11(1) of TRAI Act 1997. Thus, we hereby quash and set

aside the O.M. dated 11th October, 2022 and the demand notices which are at **Annexure P-1**.

135. It is argued vehemently by Mr. Ramji Srinivasan, learned senior counsel appearing on behalf of the petitioners in both the aforesaid telecom petitions about the demand of interest and penalty as there is no basis for the same. The demand of interest as well as penalty deserves to be quashed and set aside. It is also submitted by Learned Senior Counsel for the petitioner that exorbitant amount of interest and penalty has been demanded with effect from the year 2016 onwards despite the fact that impugned O.M. has been issued on 11th October, 2022.

136. Learned Senior Counsel appearing for the petitioner has also submitted that various communications and representations were made by the petitioner to the respondent, including communications dated 18.10.2016 & 01.05.2017 & it was pointed out that the petitioner is following **"Particular Band method (PB Method)"** for payment of additional SUC.

137. Similarly, representations were also made which are also annexed as **Annexure P-15**. This shows the *bona-fide* on the part of the petitioner.

Learned Senior Counsel appearing for the petitioner has placed reliance upon the decision rendered by Hon'ble the Supreme Court of India reported in ***Akbar Badrudin Giwani v. Collector of Customs***, **(1990) 2 SCC 203** especially in **Para 60 to 62** as well as the judgment in the case of ***Hindustan Steel Ltd. v. State of Orissa***, **(1969) 2 SCC 627** especially in **Para 8,** and it is contended that penalty will not ordinarily be imposed unless the party obliged, either acted deliberately in defiance of law or dishonest or acted in conscious disregard of its obligations.

138. In the facts of the present case, the impugned Office Memorandum dated 11.10.2022, the impugned demands have been set aside for the reasons stated hereinabove. Accordingly, there is no question of imposition of interest & penalty.

139. Even otherwise, also for the following facts & reasons, the respondent cannot levy interest & penalty on the petitioners:

A. Spectrum Sharing Guidelines were issued on 24.09.2015;

B. The petitioners started sharing spectrum in May/June, 2016;

C. The petitioners have informed as early as 18.10.2016 & 15.05.2017, DoT that the additional SUC has to be determined only as per "**PB Method**";

D. There was no response from DoT for these two representations;

E. DoT, for the first time on 15.01.2020, referred to TRAI whether the increase of 0.5% should be applied on the SUC rate of the spectrum band which is being shared on the Weighted Average of the SUC rates;

F. TRAI, on 17.08.2020 while recommending, interpreted the Spectrum Sharing Guidelines, 2015 that in terms of the Guidelines, the increase of 0.5% should be applied on SUC rate of the spectrum band which is being shared;

G. The impugned Office Memorandum issued on 11.10.2022, seven years after the Spectrum Sharing Guidelines were issued;

H. After filing of these petitions, DoT made a back reference to TRAI on 27.01.2023 since DoT did not accept the recommendations of TRAI;

I. TRAI reiterated its recommendations on 02.05.2023;

J. DoT, for the first time on 24.04.2024 in its affidavit filed before this Tribunal mentioned that TRAI's recommendations were purportedly rejected on 21.07.2023.

The above sequence of events clearly shows that there is no justification for DoT to levy interest & penalty.

140. **MA No. 156 of 2024** has been filed by the petitioner praying that the amount of **Rs. 75.41 Crore** which has been adjusted by DoT towards additional SUC dues as per DoT method (**Rs. 46.76 Crore** towards SUC & balance towards interest) & which has been paid by the petitioner under protest, on 14.03.2024 should be refunded.

In view of the fact that both **Annexure P-1 & Annexure P-2** have been quashed & set aside, this amount should be refunded to the petitioner or adjusted against future liabilities of the petitioner.

141. Much has been argued out by Learned Senior Counsel appearing for the petitioner about the O.M. issued by the respondent dated 16th July, 2024, annexed as **Annexure-F** to the Memo of M.A. No. 301 of 2024 in T.P. No. 1 of 2023.

142. Having heard the counsels for both the sides and looking to the facts and circumstances of the same, it appears that the O.M. issued by the respondent dated 16th July, 2024 cannot be given effect to in view of the fact that we have already quashed and set aside **Annexure P-1** and **Annexure P-2** for the reasons stated herein above. Once both the aforesaid **Annexures P-1** and **Annexure P-2** are set aside, the O.M. dated 16th July, 2024 is also hereby quashed and set aside. The amount deposited by the petitioner shall be adjusted towards the future liability of the petitioner.

143. We have very clearly held that even as per Spectrum Sharing Guidelines, the increase of 0.5% has to be applied on the SUC rate of the spectrum band which is shared. They have also held that DoT has not followed & has violated the Fifth Proviso to Sec. 11 (1) of TRAI Act, 1997. Even otherwise, the demands made by DoT for additional SUC by applying the DoT method cannot be sustained even as per the doctrine of **"legitimate expectation"** laid down by Hon'ble the Supreme Court of India in ***State of Jharkhand Vs. Brahmaputra Metallics Ltd.*** reported in ***2020 SCC OnLine SC 968.*** The facts, namely:

i. That the Spectrum Sharing Guidelines were issued in 2015;

ii. The petitioner started sharing the spectrum in 2016;

iii. The petitioners even as early as 18.10.2016 had written letters that the additional SUC has to be calculated only as per PB Method;

iv. There were no replied by DoT;

v. In January, 2020, DoT referred to TRAI;

vi. TRAI confirmed in August, 2020 that even as per existing Spectrum Sharing Guidelines the additional SUC has to be calculated as per PB Method;

vii. Impugned office memorandum was issued in October, 2022, much after the petitioner discontinued sharing of spectrum band.

All these facts created a legitimate expectation for the petitioner that only PB Method will apply and this cannot be frustrated arbitrarily and that too without following the process laid down in the TRAI Act, 1997.

144. Thus, as a cumulative effect of the aforesaid facts, reasons & judicial pronouncements, we hereby allow both the telecom petitions & the Miscellaneous Application No. 156 of 2024 & Miscellaneous Application No. 301 of 2024 in these Telecom Petitions & we hereby quash & set aside OM dated 11.10.2022 (**Annexure P-2**) as well as impugned office

memorandum dated 16.07.2024 (**Annexure-F** to the memo of MA No. 301 of 2024) & the impugned demands at **Annexure P-1** to the memo of this petition.

145. We also hereby quash and set aside the consequential actions taken by the respondent in pursuance of the **Annexure P-1** and **Annexure P-2** and **Annexure F** of memo M.A. No. 301 of 2024.

146. In view of the aforesaid facts and reasons and looking to the clauses of Spectrum Sharing Guidelines, we are not agreeing to the contention raised by the learned senior counsel for the respondents that 0.5% shall be added to the Weighted Average of SUC Rates. On the Contrary, we hereby interpret that the Spectrum Sharing Guidelines dated 24th September, 2015 (**Annexure P-8**) to the effect that incremental SUC rate of 0.5% shall be added to the regular SUC rate prescribed by the Central Government only for the shared spectrum. For the unshared spectrum, a normal rate of SUC prescribed by the Central Government shall be applied.

147. Thus, in view of the aforesaid facts & reasons, we hereby hold that in terms of Spectrum Sharing Guidelines, the increase of 0.5% on SUC Rate

should apply, on the SUC Rate for the particular Spectrum band/bands which are being shared. The increase of 0.5% on SUC Rate **shall not apply** on the Weighted Average of SUC Rates.

148. T.P. No. 1 of 2023 and T.P. No. 22 of 2024 are hereby allowed and disposed of.

149. In view of the final disposal of T.P. No.1 of 2023 and T.P. No. 22 of 2024, Miscellaneous Applications preferred in these Telecom Petitions are also hereby disposed of.

(JUSTICE D.N. PATEL)

CHAIRPERSON

(SUBODH KUMAR GUPTA)

MEMBER

/NS/