TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED 31st MARCH 2009

Petition No.286 of 20

TELECOM DISPUTES SETTLEMENT AND APPELLATE TRIBUNAL, NEW DELHI

CORRIGENDUM

In the judgment in Petition No.286 of 2007 paras 112 – 118 may be read as para 111 – 117.

(Sanjeev Pandey)
Assistant Registrar

1. **Cellular Operators Association of India**
2. **Bharti Airtel Limited**
3. **Idea Cellular Limited** … Petitioners
4. **Spice Communications Limited**
5. **Vodafone Essar Limited**

Vs.

1. **Union of India**
2. **Telecom Regulatory Authority of India**
3. **Reliance Communications Limited**
4. **HFCL Infotel Limited** ... Respondents
5. **Tata Teleservices Limited,**
6. **Bharat Sanchar Nigam Limited,**
7. **Mahanagar Telephone Nigam Limited**
8. **Shyam Telelink Limited**

BEFORE:

HON'BLE MR. JUSTICE ARUN KUMAR **CHAIRPERSON**
HON'BLE DR. J. S. SARMA **MEMBER**
HON'BLE MR. G. D. GAIHA **MEMBER**

For Petitioners	Dr. A.M. Singhvi, Senior Advocate, Mr. C.S. Vaidyanathan, Senior Advocate, Mr. N.K. Kaul, Senior Advocate, Mr. S. Ganesh, Senior Advocate, with Mr. Manjul Bajpai, Mr. Navin Chawla, Mr. Gopal Jain, Ms. Inklee Roy Barooah, Ms. Shilpi Mehta, Mr. Kaushik Mishra, Mr. Amit Bhandari, Mr. Manoj B George, Advocates
For Respondent No. 1 (Union of India)	Mr. Vikas Singh, Senior Advocate, with Mr. Sanjay R Hegde, Mr. A. Rohen Singh, Advocates.
For Respondent no. 2 (TRAI)	Mr. Saket Singh, Advocate.
For Respondent No.3 (Reliance Communications Ltd.)	Mr. Mukul Rohtagi, Senior Advocate, with Ms. Manali Singhal, Mr. Mahesh Agarwal, Mr. Rishi Agrawala, Mr. Santosh Sachin, Advocates.
For Respondent No.4 (HFCL)	Mr. Biswajeet Bhattacharya, Senior Advocate, Mr. Ajay Singh, Mr. Debashis Mukherjee, Advocates.
For Respondent No.5 (Tata Teleservices Ltd.)	Mr. Ramji Srinivasan, Senior Advocate, with Ms. Vartika Sahay, Advocate.
For Respondent No. 6 (BSNL)	Mr. Maninder Singh, Mr. Yoginder Handoo, Mr. Kunal Sood, Advocates
For Respondent No.7 (MTNL)	Mr. Arun Kathpalia, Mr. Samir Sagar Vasisht, Mr. Virender Singh Thakur, Advocates
For Respondent No. 8 (Shyam Telelink Ltd.)	Ms. Vartika Sahay, Advocate.

-

-

-

-

-

-

ORDER

In this Petition, the Petitioners are challenging the decision dated 19.10.2007 of the Department of Telecommunications, Government of India (hereinafter referred to as **DOT**) on the ground that it is illegal, arbitrary, and violative of principles of natural justice as well as violative of the mutually agreed contract between the Petitioners and the Government.

2. The decision of the DOT was communicated vide a Press Release dated 19.10.2007 and the major decisions were, inter alia, as follows:

- That the Recommendations of Telecom Regulatory Authority of India (TRAI) that there should be no cap on the number of access providers in any service area were accepted;
- That Government have accepted TRAI's recommendation of enhanced subscriber linked criteria for frequency allocation;
- That it has been decided that the existing private UAS licensees may be permitted to expand their existing networks by using alternate wireless technology i.e. a UAS licensee who is presently using GSM technology for wireless access may be permitted to use CDMA technology and vice-versa;
- That the spectrum for the alternate technology, CDMA or GSM (as the case may be) shall be allocated in the applicable frequency band subject to availability after payment of prescribed fee;
- That BSNL and MTNL being incumbent operators shall be permitted usage of alternative technology and allocated spectrum for the alternate technology without paying the prescribed fee;
- That for the purpose of payment of licence fee and spectrum charges, the stream wise revenue of different technologies shall be considered; and
- That the Access Services providers shall endeavour to use more efficient methods and optimum technologies for spectrum utilisation.

3. In their Petition filed on 23.10.2007, the Petitioners assailed the above decisions on the ground that the Unified Access Service Licence (hereinafter referred to as **UAS Licence** or **UASL)** requires every licence holder to apply for and obtain a specific authorisation and licence, called the WPC licence from the Wireless Planning and Coordination (WPC) wing of the DOT and that while the UAS licence itself is technology neutral, it was incumbent on every licensee to choose, at the outset, either GSM or CDMA platform to offer its mobile services and that thereafter, it should operate within its designated band, and therefore within the chosen technology. Their contention is that the decision of the DOT, pursuant to the Recommendations of the Telecom Regulatory Authority of India (hereinafter referred to as **TRAI** or the **Authority**), was contrary to the provisions of the UAS licence. The Petitioners have also contended that while making its Recommendations, although the Authority held that the choice of GSM or CDMA, once exercised, becomes the basis for offering telecom services, it had, without any cogent reasons, recommended that dual technology (crossover technology) / allocation of dual spectrum may be permitted through an amendment of the UAS licence. They allege that based thereon, the DOT took a decision on or prior to 18.10.2007 to permit allotment of both GSM and CDMA spectrum under the same licence and vide its letter, dated the same day, addressed to some CDMA operators issued an in-principle approval to use GSM technology in addition to CDMA technology under the same licence. The contention of the Petitioners is that this was done in a completely non-transparent manner and without informing anyone and that the in-principle approval was issued to the CDMA operators even before the licences were amended in order to make the decision a fait accompli. Their plea is that the action of the DOT is a complete by pass of all due process and is, in fact, the equivalent of grant of a brand-new licence, which is otherwise not permitted as per the licence conditions.

4. Another contention raised by the Petitioners is that although the Authority had recommended that the spectrum usage charges should be applied on total spectrum held by the operator, the DOT decided that the spectrum charges would be charged for the two technology streams—GSM and CDMA-- separately.

5. The Petitioners have further contended that TRAI had also gone beyond its terms of reference and made some very arbitrary and ad hoc Recommendations raising the subscriber linked spectrum allotment criteria by as much as 700%. After some deliberation, the DOT had prescribed the criteria suggested by TRAI and in the process have deprived the Petitioners of additional spectrum to which they had a vested right and for which they had applied much earlier. Their contention is that this was deliberately done in order to make spectrum available to the CDMA operators who were given crossover technology and consequently the GSM spectrum.

6. The Petitioners further allege that contrary to the principle of a level playing field, BSNL and MTNL was given an allocation of spectrum of 10 MHz and 12.5 MHz respectively in excess of their eligibility under the subscriber linked criteria and that this tantamounts to discrimination by the DOT against the private GSM operators.

7. The Reply of Union of India, the 1st Respondent, was filed on 7.1.2008. The contention of this Respondent is that the Petitioners are indulging in unnecessary litigation. According to it, the issue of technology neutrality or crossover technology and therefore also the question of dual spectrum, was already decided. Alleging that the Petitioners have taken benefits of additional spectrum beyond the stipulated quantity in their respective licence agreements, the Respondent contends that they cannot question a valid policy decision taken by the Government of India and particularly a decision taken, in larger public interest, on the basis of Recommendations of expert bodies. The Respondent denies that the Petitioners have a vested right to receive spectrum and states that there was never an agreement whereby the Petitioners can claim additional spectrum beyond 6.2 MHz. It is also contended that the Petitioners are using outdated equipment, thereby leading to sub optimal utilisation of spectrum that was allocated to them. The argument is that there is a distinct scope for improving spectral efficiency and the subscriber base but that the Petitioners are not implementing these measures. It is also contended that the allocation of spectrum of 10 MHz to BSNL and 12.5 MHz to MTNL was made on a trial basis.

8. The contention of TRAI, the second Respondent, is that the Recommendations made by them are in pursuance of a request from the DOT seeking Recommendations on various issues and also in terms of the functions specified under the TRAI Act. It is stated that the Recommendations were made after due consultation process. While the DOT had not asked for any specific recommendation on the issue of spectrum allocation or pricing, TRAI was of the opinion that there was need for a predictable and transparent roadmap in the process of spectrum management including spectrum allocation principles, its pricing and means to promote its efficient utilisation. It is also contended that notwithstanding the Recommendations, the Central Government, as the licensor, had the power to either accept or reject the Recommendations of TRAI. It is also contended that no relief has been sought by the Petitioners against TRAI.

9. M/s Reliance Communications Ltd, the 3rd Respondent, in its counter affidavit alleged that the Petition has been filed with *mala fide* intentions of perpetuating the Petitioners' monopoly, preventing competition and is unfairly questioning the policy decision of the Government which has been arrived at through a multi-level decision-making process. According to the Respondent, the UAS licence agreements do not put any embargo on the use of any technology on which the licensee can operate its services and therefore the concept of dual technology is not prohibited and that the decision of the DOT does not infringe on any of the legal rights of the Petitioners. Besides, it is stated that the Petitioners having earlier welcomed the entry of the Respondent into GSM technology, are now estopped from raising objections. The Respondent contests the contention of the Petitioners that they have a vested right for spectrum.

10. The 4th Respondent, HFCL, underlined the role of TRAI in framing of policies by the Central Government and stated that it is in furtherance of the dual technology policy that HFCL Infotel Ltd had paid the requisite entry fee. It charged that the petitioners are interested only in retaining their monopoly and hence this Petition. According to the Respondent, which particular technology can and ought to be used by a service provider is in the realm of policy; and judicial review in the thicket of policy matters is not maintainable. Denying that there is any contract between the Petitioners and the DOT for spectrum up to 15 MHz, it was pointed out that the decision to implement dual technology was fair. The discrimination in favour of public sector operators was also contested.

11. In its counter affidavit, Tata Teleservices Ltd, the 5th Respondent herein, contends that the licence provisions clearly demonstrate the permissibility of dual technology within the same licence. Accusing the Petitioners of being interested only in hoarding vast amounts of spectrum, the Respondent denies that the Petitioners are entitled to additional spectrum as a matter of right.

12. The case of BSNL, the 6th Respondent, is that whenever BSNL desires to augment its infrastructure, it runs into unwarranted obstacles and that this petition is one such. It contends that while originally it was sanctioned 6.2 MHz of GSM Spectrum for all Circles, further spectrum allocation is varied in different Circles, the total spectrum available to it ranging from 6.2 MHz to 10 MHz, according to its needs. Its case is that the spectrum allocation made to BSNL, on trial basis, is valid and that no preferential treatment was shown to BSNL. A more or less similar case is made out by MTNL, the 7th Respondent. Its case is that all along, its allocation of spectrum was less than its entitlement and it is only now that the Government has allocated an additional 4.4 MHz, on trial basis. Both BSNL and MTNL contended that as Public Sector enterprises, they have social obligations and also certain constraints and that this puts them on a special footing.

13. In its Reply, M/s Shyam Telelink Ltd., the 8th Respondent, who is the licence holder in Rajasthan Telecom Circle, contends that as per the New Telecom Policy 1999 (hereinafter referred to as **NTP-99**), the UAS licence permitted it to deploy any technology without any restriction. Refuting the allegations made by

the Petitioners, it avers that the action of DOT is in accordance with the stated policy. Alleging that the contention regarding level playing field is but an attempt to maintain the Petitioner's monopoly, the Respondent submits that the Recommendations made by TRAI were after due deliberation and that the Government in DOT is empowered to take such policy decision. It is contended that there is no contract between the Cellular Operators and the Government and that, in fact, the Petitioners have been receiving spectrum in excess of their contractual entitlement.

14. In the light of the contentions of different parties, the following issues arise for determination in this case:

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

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

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

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

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

Each of these issues raises, in its turn, several questions. Before we proceed to analyse the issues however, it would be useful to refer briefly to the background of the case as well as to trace the developments during the course of hearing of this Petition.

15. The evolution of modern telephone services in India started with the inception of the National Telecom policy in the year 1994 with certain specific objectives. Two developments -- privatisation of the Telecom services and introduction of Cellular Mobile services -- have led the way for the rapid growth of telecommunications. Till 1994, telephone services were a monopoly of either DOT or Mahanagar Telephone Nigam Limited (hereinafter referred to as **MTNL**) which is a Public Sector Undertaking. To begin with, two private service providers each in Delhi, Mumbai, Kolkata and Chennai were awarded the Cellular Mobile services in November 1994. This was followed by award of two licences in each of the 18 Telecom circles, based on a competitive bidding process. The licences given to the private operators were on the basis of a fixed licence fee regime, the amount being determined on the basis of an auction. Originally only the **GSM** technology (Global Speciale Mobile) was preferred and the frequency provided was in the 900 MHz band i.e. 890-915 MHz paired with 935-960 MHz. Subsequently, in order to enable fixed service providers (basic service operators) to provide fixed wireless service, another technology known as Code Division Multiple Access (**CDMA**) was introduced in the year 1997, with the frequency allocation being in the 800 MHz band i.e. 824-844 MHz paired with 869-889 MHz.

16. In April 1999, the National Telecom policy, 1999 (NTP-99) was introduced with the objective of transforming, in a time bound manner the telecommunication sector in India. Far-reaching changes were brought about in this policy, which allowed the operators to migrate from fixed licence fee regime to revenue sharing regime for the payment of licence fee and spectrum charges. The policy of duopoly (only two operators in a service area) was changed to multipoly (multiple players). DOT/MTNL were brought in as third operators in each circle. The concept of level playing field was recognised and even DOT was to pay the licence fee. The policy envisaged achieving specific targets in a time bound manner. NTP-99 envisaged that spectrum should be utilised efficiently, economically, rationally and optimally. In September 1999, the concept of technology neutrality was introduced and the terms and conditions of licences were to be applicable to all licensees equally.

17. In January 2000, the TRAI Act was amended, specifying the powers and functions of TRAI. TDSAT also came into being pursuant to this amendment.

18. In January 2001, Guidelines were issued for the Fourth Cellular Operator and multi-stage bidding was followed for the fourth license. In November 2003, NTP-99 was amended, introducing two new categories of licence -- Unified Licence and Unified Access Services Licence. Both the licences were specifically declared to be technology neutral. Simultaneously, guidelines were also issued for Unified Access Services Licence (UASL). The UAS License conditions provided that allocation of spectrum would be subject to eligibility, justification and shall be considered a case-by-case basis. From time to time, the criteria for allocation of both initial as well as additional spectrum were notified, the last order being on 29.3.2006.

19. On 6.2.2006, Reliance Communications Ltd applied to the Department of Telecommunications seeking allocation of GSM spectrum. HFCL and Shyam Telelink also applied similarly a few months later.

20. On 13.4.2007, the DOT addressed a letter to TRAI seeking its Recommendations on various issues. For the purpose of convenience, this letter containing the Terms of Reference, is reproduced below.

No. 16-3/2004-BS-II
Government of India
Ministry of Communications
Department of Telecommunications
Sanchar Bhawan, 20, Ashoka Road, New Delhi – 110 001

Dated: 13th April 2007

To

The Secretary,
TRAI,
MTNL Exchange Building,
Jawaharlal Nehru Marg, Minto Road,
New Delhi.

Sir,

The policy on Unified Access Service Licensing was finalized in November 2003 based on the Recommendations of TRAI. As on date, 159 licences have been issued for providing Access Services (CMTS/UASL/Basic) in the country. Generally, there are 5-8 Access Service Providers in each service area. The Access Service Providers are mostly providing services using the wireless technology (CDMA/GSM). As per the present policy, any Indian company fulfilling the eligibility criteria can apply for UAS licence. These are increasing the demand on spectrum in a substantial manner. The Government is contemplating to review its policy. A suggested option can be to put a limit on the number of Access Service Providers in each service area, in view of the fact that spectrum is a scarce resource and to ensure that the adequate quantity of spectrum is available to the licenses to enable them to expand their services and maintain the Quality of Service.

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

- *i) Substantial equity holding by a company/legal person in more than one license company in the same service area (clause 1.4 of UASL agreement).*
- *ii) Transfer of licences (clause 6 of the UASL)*
- *iii) Guidelines dated 21.02.2004 on Mergers and Acquisitions. TRAI in its Recommendations dated 30.01.2004 had opined that the guidelines may be reviewed after one year.*
- *iv) Permit service providers to offer access services using combination of technologies (CDMA, GSM and / or any other) under the same licence.*
- *v) Roll-out obligations (Clause 34 of UASL).*
- *vi) Requirement to publish printed telephone directory.*

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

3. TRAI is requested to furnish their recommendations in terms of clause 11 (1) (a) of TRAI Act 1997 as amended by TRAI Amendment Act 2000, on the issue of limiting the number of Access providers in each service area and review of the terms and conditions in the Access provider licence mentioned in para 2 above.

-Sd-
(N. Parameswaran)
DDG (Access Services)
Tel:23716874
Fax: 23372201

21. In order to deal with the above issues, the Telecom Regulatory Authority of India issued a Consultation Paper on 12.6.2007 setting out various issues for consultation and seeking the views of various stakeholders thereon. After receiving comments and holding open house discussions, the Authority gave its Recommendations on 28.8.2007. Briefly stated, the Authority recommended that there should be no cap on the number of service providers in each service area. The Authority also recommended permitting the concept of dual technology and allocation of dual spectrum i.e. GSM spectrum to CDMA operators and vice versa. Simultaneously, TRAI recommended, *suo motu*, subscriber linked criteria for allocation of GSM spectrum, which criteria were significantly higher than those prescribed in the order of DOT dated 29.3.2006.

22. On 18.10.2007, DOT addressed a letter to Reliance Communications Ltd, giving an in-principle approval for use of GSM technology under the existing UAS licence in different Circles. It also stated that the date of receipt of payment of prescribed entry fee shall determine the date of priority for allocation of spectrum. It was also indicated the separate revenue streams shall be maintained for different technologies -- GSM and CDMA -- for calculation of licence fee and spectrum charges. Similar letters were also given to HFCL and Shyam.

23. On 19.10.2007, the Department of Telecommunications issued a Press Release setting out various decisions. This is the decision of the DOT that is impugned. For this reason, we feel it appropriate to set out this Press Release in full.

<u>Department of Telecommunications</u>

PRESS RELEASE

"Given the central aim of NTP 99 to ensure rapid expansion of tele-density" and the objective "to transform in a time bound manner, the telecommunications sector to a greater competitive environment in both urban and rural areas providing equal opportunities and level playing field for all players", the recommendations of TRAI that there should be no cap on the number of access providers in any service area has been considered by the Government and has been accepted.

The Unified (Telecom) Access Services (UAS) licences are technology neutral and the licensees are required to provide access services and meet the stipulated roll-out obligations using wireline and/or wireless technologies by utilising network equipment that meets the prescribed standards. The allocation of radio-spectrum and grant of wireless licence shall be subject to availability. In case UAS Licensee is not allocated spectrum due to non-availability, the Licensee shall endeavour to roll out services using wireline technologies. It has also been decided that the roll-out for wireless services shall be reckoned from the date of spectrum allocation. This will also apply to those licensees who are awaiting initial spectrum allotment.

TRAI had recommended to enhance the subscriber link criterion for allocation of frequency spectrum to UAS/CMTS licensees and to set up a Committee to study further allocation of spectrum. Government has accepted the TRAI's recommendation of enhanced subscriber linked criterion for frequency allocation and has set up a Committee in Telecom Engineering Centre (TEC) to further study and give a report to the Government.

In order to further enhance the penetration of access services for rapid expansion of tele-density, it has also been decided that the existing private UAS licensees may be permitted to expand their existing networks by using alternate wireless technology i.e. the present UAS licensee who is using GSM technology for wireless access may be permitted to use CDMA technology and vice-versa. The spectrum for the alternate technology, CDMA or GSM (as the case may be) shall be allocated in the applicable frequency band subject to availability after payment of prescribed fee. Allocation of spectrum for the alternate technology may be done to private UAS Licensees on payment of prescribed fee, which will be an amount equal to the amount prescribed as entry fee for getting a new UAS licence in the same service area. The existing UAS licensees, who have already applied for allocation of spectrum for the alternate technology shall also be considered for allocation of spectrum in alternate technology from the date of payment of prescribed fee. BSNL and MTNL being incumbent operators shall be permitted usage of alternative technology and allocated spectrum for the alternate technology without paying the prescribed fee. For the purpose of payment of licence fee and spectrum charges, the stream wise revenue of different technologies shall be considered.

At the time of further allotment of spectrum in any technology, allotment will be subject to the condition that in case the eligibility of the licensee for allocated spectrum in other technology falls below the criterion set for spectrum allotment in the specified technology for the last consecutive six months then corresponding chunk of spectrum in the technology will be surrendered by the licensee before any further allotment of spectrum is considered.

The Access Services providers shall endeavour to use more efficient methods and optimum technologies for spectrum utilisation. In order to encourage Licensees to use all available methods for efficient spectrum utilisation, the "Spectrum Enhancement Charge", in addition to annual spectrum charges based on revenue share, may be levied at the time of additional spectrum allotment to licences beyond 10 MHz for GSM and 5 MHz for CDMA. For each additional 1 MHz or part thereof "Spectrum Enhancement Charge"@Rs. 16 crore, 8 crore, 3 crore for Metro/category 'A', category 'B', category 'C' service areas respectively may be charged.

SACFA clearance should be given in a stipulated time frame of 60 days unless there are circumstances to the contrary.

For the substantial equity holding in the UAS/CMTS Licensee Company, there is no change in the existing criterion.

For failure to meet roll out obligation within prescribed time schedule, the existing stipulation of termination of licence under clause 35.2 of UAS licence agreement shall continue. In addition, Performance Bank Guarantee (PBG) may also be forfeited and the service provider may be asked to resubmit PBG of the same amount. No additional spectrum may be allocated to licensees without fulfilling the roll-out obligations. In case of spectrum auction, a Licensee, who has not met roll-out obligation against an existing licence, should not be eligible to participate in any spectrum auction till the roll out obligation is met. Any proposal for permission for merger shall not be entertained till the roll out obligation is met; however, request for permission for acquisition may be entertained. Roll out for each licensed service area is to be dealt separately. In case of violation of roll-out conditions, Government may consider termination of licence in certain cases.

Self certification scheme for completion of roll-out obligation is already in place and shall continue. The authorised testing party of the Licensor shall issue the required test certificate of compliance within 120 days from the date of submission of self certificate which is correct and complete in all respects.

Merger & Acquisition guidelines will be issued separately.

24. Even before TRAI submitted its recommendations, the DOT, on 6.8.2007 desired the Telecom Engineering Centre (TEC), a technical unit of the DOT, to study matters relating to spectrum utilisation by operators and spectral efficiency. The TEC gave its report on 26.10.2007 in which it recommended the subscriber base criteria for allocation of GSM spectrum, the level of which was much higher than those recommended by TRAI. Following receipt of representations from the Industry, a Spectrum Review Committee was constituted in the DOT under the chairmanship of the Additional Secretary on 7.11.2007. This committee, which studied various issues and also the recommendations of TRAI and TEC, gave a fractured report on 18.12.2007, leaving the matter of subscriber linked criteria to be decided by the Government. Thereafter, the DOT, on 17.1.2008, took a decision to apply, as an interim measure, the subscriber linked criteria recommended by TRAI.

25. Insofar as the present Petition no. 286 of 2007 is concerned, the COAI filed this Petition on 23.10.2007. Initially, the Petition was filed only with Union of India and Telecom Regulatory Authority of India as Respondents. When the matter first came up for hearing on 24.10.2007 before this Tribunal, it was adjourned to 12.11.2007 on which date, and on the request of the counsel for Petitioners, the following parties were impleaded as Respondents -- Reliance Communications Ltd (hereinafter referred to as **RCom**); HFCL Infotel Ltd (hereinafter referred to as **HFCL**); Tata Teleservices Ltd (hereinafter referred to as **TATAs**); Bharat Sanchar Nigam Ltd (hereinafter referred to as **BSNL**); Mahanagar Telephone Nigam Ltd (hereinafter referred to as **MTNL**); and Shyam Telelink Ltd (hereinafter referred to as **Shyam**). On the same date, the learned Solicitor General brought to the notice of this Tribunal that on 7.11.2007, the

competent authority in the Government had constituted a Committee to recommend revised subscriber base linked criteria for allocation of spectrum and that the Committee was required to submit its report within three weeks. It was also assured by the learned Solicitor General that till the criteria for allocation of spectrum is finally determined, the question of allocation of spectrum will not be taken up. On 12.12.2007, the learned Solicitor General informed this Tribunal that the COAI had formally dissociated itself from this Committee and that Government will not be bound by the statement made by him before this Tribunal on 12.11.2007. Accordingly, he was relieved of the earlier commitment made by him on behalf of the Government. The Prayer for stay made by the Petitioners was rejected at that stage. On 20.12.2007, COAI filed a Writ Petition no. 9654 of 2007 in the Delhi High Court. As the matter was seized of by the Delhi High Court, which was hearing the case on a day-to-day basis, the matter was not taken up for hearing in this Tribunal. Having heard the matter, the Delhi High Court reserved its orders once 28.2.2008 and delivered its judgement on 22.8.2008. In its judgement, which is a fairly lengthy one, the Delhi High Court dealt with various issues and dismissed the writ petition, also imposing costs on the six writ petitioners. It also stated that since the jurisdiction of the Delhi High Court related only to consideration of only a prayer for interim relief denied at that stage by the tribunal, the matter would need to be disposed of by the TDSAT.

26. In the meanwhile, the Petitioners filed certain additional affidavits. Pleadings having been completed by all parties concerned, the matter was taken up for hearing and was heard at length.

27. Before we proceed to examine the issues identified by us in para 14 above, we need to deal with a threshold challenge posed by the learned counsel for Union of India, Mr. Vikas Singh, who argued (a) that this Tribunal is bound by the judgement/observations of the Delhi High Court in writ petition no. 9654 of 2007 and (b) that while this Tribunal can go into questions of fact as well as questions of law, in so far as examination of issues of fact is concerned, it is bound by the principles of judicial review. This was duly countered by the learned counsel for petitioners. We would like to briefly deal with both these issues.

28. Insofar as the first issue is concerned, Mr. Vikas Singh pointed out that in its judgement dated 22.8.2008, the Delhi High Court had passed adverse comments on the Petitioners in several paragraphs, particularly on their not wanting to invest in new technology and equipment, hoard spectrum etc. He stated that these observations of the Delhi High Court are binding on this Tribunal. The learned counsel for Petitioners, Mr. Vaidyanathan, countered this and cited the judgement of the Supreme Court in the case of **NITCO Tiles Ltd v. Gujarat Ceramic Floor Tiles Manufacturing Association and Others [(2005) 12 SCC 454]** . We have considered the matter. Firstly, the TRAI Act fully empowers this Tribunal to settle any dispute between the licensor and licensee. There is no limitation in this regard. Section 15 of the TRAI Act bars the jurisdiction of civil courts. The writ petition no. 9654 of 2007 was filed in the Delhi High Court under writ jurisdiction, against an interim order of this Tribunal refusing to grant stay, <u>at that stage</u>. In its judgement dated 22.8.2008, the Delhi High Court had itself stated that "the challenge in the writ petition before this court is limited to the refusal of the TDSAT to grant an interim relief." It also stated that "the TDSAT is admittedly seized of and is competent to examine the entire matter relating to the decision to permit crossover of the technology." It was also mentioned by the Delhi High Court in its judgement that "this application is wholly beyond the scope of the proceedings before this court." In Para 268 of its judgement, the Delhi High Court observed as follows: "in the instant case, there is no application seeking relief on the basis of the subsequent facts and no prayer to this effect has been made in the proceedings before the TDSAT. The jurisdiction of this court in the present proceedings relates to consideration of only a prayer for interim relief denied at that stage by the Tribunal."

29. In the *NITCO tiles case*, cited supra, the Supreme Court had observed that "it is well established that orders passed on interlocutory proceedings do not conclude the merits of the matter." In the light of this, as well as the observations of the Delhi High Court, we do not think it is necessary for any party to entertain any doubts regarding the authority of this Tribunal to determine independently on its own the various issues arising in this matter for which it alone is competent. If we refer, during the course of our judgement to any of the observations of the Delhi High Court, it is only to draw attention to the convergence of judgement on the issues involved.

30. As regards the scope of this Tribunal's authority to review the decisions of the Government, we have carefully gone through the judgements cited by the learned counsel for Union of India. He has sought to take the support of the decisions of the Supreme Court in **Union of India and Others v. K.G. Soni [(2006) 6 SCC 794]; Directorate of Film Festivals and Others v. Gaurav Ashwin Jain and Others [(2007) 4 SCC 737]; Dhampur Sugar (Kashipur) Ltd v. State of Uttaranchal and Others [(2007) 8 SCC 418] and BALCO Employees' Union (Regd) v. Union of India and Others [(2002) 2 SCC 333].** We have carefully gone through all these cases. They relate to the scope of judicial review by courts. The position of this Tribunal is different. Insofar as this Tribunal is concerned, the Hon'ble Supreme Court has, in the case of **Cellular Operators Association of India and Others v. Union of India [(2003) 3 SCC 186],** explained the position in unambiguous terms and pointed out that the TRAI Act gives wide jurisdiction to this Tribunal. In this case, the Apex Court held that "having regard to the very purpose and object for which the Appellate Tribunal was constituted and having examined the different provisions contained in Chapter IV, more particularly, the provision dealing with ousting the jurisdiction of the civil court in relation to any matter in which the Appellate Tribunal is empowered by or under the Act, as contained in Section 15, we have no hesitation in coming to the conclusion that the power of the Appellate Tribunal is quite wide, as has been indicated in the statute itself and the decisions of this Court dealing with the power of a court, exercising appellate power or original power, will have no application for limiting the jurisdiction of the Appellate Tribunal under the Act. Since the Tribunal is the original authority to adjudicate any dispute between a licensor and a licensee or between two or more service providers or between a service provider and a group of consumers and since the Tribunal has

to hear and dispose of appeals against the directions, decisions or order of TRAI, it is difficult for us to import the self-contained restrictions and limitations of the court under the judge-made law to which reference has already been made and reliance was placed by the learned Attorney-General." The Apex Court went on to observe that "the jurisdiction of the Tribunal under Section 14 cannot be held to be a supervisory jurisdiction, in view of the language of the statute as well as the fact that it is the only forum for redressing the grievance of an aggrieved party inasmuch as the appellate jurisdiction to this Court is only on a substantial question of law and the jurisdiction of a civil court for filing a suit is also ousted. It has already been held by us that the Tribunal has the power to adjudicate any dispute ...." In the light of the above judgement, there need be no doubt whatsoever regarding the extent of this Tribunal's jurisdiction and the wide sweep it enjoys.

31. We now proceed to examine the various issues for determination.

32. In respect of **the first issue**, i.e. whether the petitioners have a vested right to be allocated spectrum, the learned counsel for Petitioners, Dr. Singhvi argued that the Petitioners have a vested right to receive 15 MHz of GSM spectrum which, according to him, is a right established through NTP-99, contractual settlement, as well as the various letters/orders of DOT. Dr. Singhvi pointed out that the need for adequate spectrum is recognised in the NTP-99 which states as follows:

"Availability of adequate frequency spectrum is essential not only for providing optimal bandwidth to every operator but also for entry of additional operators. Based on the immediately available frequency spectrum band, apart from the two private operators already licensed, DOT/MTNL would be licensed to be the third operator in the service area in case they want to enter, in a time bound manner. In order to ensure a level playing field between different service providers in similar situations, licence fee would be payable by DOT also. However, as DOT is the national service provider having immense rural and social obligations, the Government will reimburse full licence fee to the DOT. "

33. According to him, when the then existing operators migrated to NTP-99 regime, all provisions of NTP-99 were applicable to them including the right to optimal spectrum. Certain issues which were not resolved under the migration package were resolved through various letters of the DOT. In this connection, he referred to the letters written by DOT on 22.9.2001, 1.2.2002 and 18.4.2002. The counsel contends that all these letters put together constituted an 'offer' made by the DOT to the GSM operators and this included, inter alia, the promise of 10 MHz of GSM spectrum. The GSM operators 'accepted' this offer through their letter dated 23.8.2002 and accordingly a concluded 'contract' came into being on the basis of which the GSM operators withdrew their Petitions before the TDSAT on 19.9.2002. It is in accordance with this contract that the DOT allocated spectrum up to 10 MHz to the private GSM operators.

34. The learned counsel pointed out that while in our country, the allocation of spectrum is made in meagre quantities, the average spectrum allocated in other countries is 2*25.21 MHz per GSM operator. He pointed out that the average GSM frequency per operator is 52.60 MHz; 36.20 MHz in France; 26.60 MHz in UK; 22.50 MHz in China; 19 MHz in Thailand and 18 MHz in Malaysia. He also stated that the quantum of spectrum allocation impinges directly on not only the capital cost but also the operating costs for the service provider.

35. According to the learned counsel, clauses 23.5 and 43.5 of the UAS licence clearly confirm that the allocation of spectrum will be as per guidelines issued by the Government from time to time. In this context, the counsel also referred to a letter dated 12.4.2007 and stated that even as late as April 2007 Government had agreed to their commitment to provide spectrum. The learned counsel also stated that a high-level spectrum Committee set up by the DOT had, in a report dated 29.7.2003 extended the roadmap of allocation of GSM spectrum up to 15 MHz and that this was confirmed by DOT vide its letters dated 15.4.2004 indicating the AGR for spectrum including beyond 12.5 MHz. Then on 29.3.2006, Government revised the subscriber base criteria for allotment of GSM spectrum. He also referred to a letter of the DOT dated 17.1.2008 which stated that 15 MHz was the present upper limit for the GSM spectrum.

36. According to the learned counsel, a contract need not necessarily be a written contract and that it can be oral or even be implied and that no form is prescribed for a contract to come into being. In this connection, he cited the judgement of the Hon'ble Supreme Court in **Vishnu Agencies Pvt Ltd v. CTO [(1978) 1 SCC 520]** wherein the Apex Court held that "offer and acceptance need not always be in an elementary form, nor indeed does the Law of Contract or of Sale of Goods require that consent to a contract must be express. It is commonplace that 'offer' and 'acceptance' can be spelt out from the conduct of the parties which covers not only their acts but omissions as well. Indeed, on occasion, silence can be more eloquent than eloquence itself." The learned counsel also cited the case of **National Fertilisers v. Puran Chand Nangia [(2000) 8 SCC 343]**, wherein it was held by the Supreme Court that "once the contract is entered into, any clause giving absolute power to one party to override or modify the terms of the contract at his sweet will or to cancel the contract -- even if the opposite party is not in breach, will amount to interfering with the integrity of the contract."

37. Mr. Vaidyanathan, learned counsel for the Petitioners also contended that the Petitioners have a vested right not only because of the reasons adduced by Dr. Singhvi but also because the applications of the Petitioners for allotment of additional spectrum were pending. These applications were made in time and

each application has been duly considered and found eligible. In support of his argument, the counsel cited the judgements of the Hon'ble Supreme Court in the case of **Union of India and Others v. Asian Food Industries [(2006) 13 SCC 542]**.

38. Refuting the argument that the Petitioners have a vested right, the learned counsel for the Union of India stated that the Petitioners had always received more spectrum than they were entitled to under the licence conditions and so the question of violation of contract, even if it existed, did not arise. According to him, although the licence of the Petitioners initially only provided up to 4.4 MHz, the Petitioners were given upto 6.2 MHz without even the licence being amended. According to the counsel, the licences which were amended in the year 2001 provided for grant of maximum of 6.2 MHz of spectrum to each of the licensees which is the only contracted quantity. According to him, there is no other contractual obligation. On 1.2.2002, the Government clearly mentioned that no spectrum beyond 10 MHz would be allotted to any of the licensees, and that this additional spectrum of 1.8 MHz, if so essential, could be considered only after a suitable subscriber base, as may be prescribed, is reached. The learned counsel also pointed out that one of the stipulations made in this circular dated 1.2.2002 is that the additional spectrum beyond 6.2 MHz + 6.2 MHz would be assigned in the 1800 MHz band. However, subsequently, two GSM operators were allocated additional spectrum in the 900 MHz band. In July 2002, another 1.8 MHz of spectrum was given bringing the total allocation to 8 MHz. The counsel's contention is that spectrum allocation has always been made from time to time taking into consideration the achievement of a prescribed subscriber base. According to him, the letters that were cited by the counsel for Petitioners did not in any way confer a right in favour of the Petitioners because these letters were written in a different context and related to a different aspect of the spectrum.

39. The counsels for other Respondents also contested the issue of vested right. Mr. Mukul Rohtagi, learned counsel for 3rd Respondent states that the COAI has no right under any law or contract which entitles them to additional spectrum as a matter of right. The learned counsel for the 5th Respondent, Mr. Ramji Srinivasan also argued that no vested right can accrue on the basis of the three letters /orders of the DOT dated 22.9.2001, 1.2.2002 and 18.4.2002.

40. We have carefully considered the entire matter. The NTP-99 document, to which the counsel for Petitioners had referred, states that "it is proposed to review the spectrum utilisation from time to time keeping in view the emerging scenario of spectrum availability, optimal use of spectrum, requirements of market, competition and other interest of public." In section 5.0 relating to Spectrum Management, the document states that there is need to have a transparent process of allocation of frequency spectrum which is effective and efficient. Clauses 23.1 and 43.5 of the UAS licence read as follows:

"23.5 ..... Based on usage, justification and availability, spectrum may be considered for the assignment, on case-by-case basis. The frequencies assigned may not be contiguous and may not be same in all cases, while efforts would be made to make available larger chunks to the extent feasible. The detailed guidelines for allocation of frequency spectrum and charges thereof etc would be separately issued from time to time." (Emphasis supplied)

"43.5 Subject to availability and as per guidelines issued from time to time, the spectrum allocation and frequency bands will be as follows:

43.5 (i) For wireless operations in SUBSCRIBER access network, the frequencies shall be assigned by WPC wing of the Department of Telecom from the frequency bands earmarked in the applicable National Frequency Allocation Plan and in coordination with various users. Initially a cumulative maximum of of 24.4 MHz +4.4 MHz shall be allocated in the case of TDMA-based systems@200 KHz per carrier or 30 kHz per carrier on a maximum of 2.5 MHz +2.5 MHz shall be allocated in the case of CDMA-based systems @1.25 MHz per carrier, on case-by-case basis subject to availability. While efforts would be made to make available larger chunks to the extent feasible, the frequencies assigned may not be contiguous and may not be the same in all cases or within the whole service area. For making available appropriate frequency spectrum for roll-out of services under the licence, the types (s) of Systems to be deployed are to be indicated.

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

43.5 (iii) In the event, a dedicated carrier for micro cellular architecture-based system is assigned in 1880-1900 MHz band, the spectrum not more than 3.75 + 3.75 MHz in respect of CDMA system or 4.4+4.4 MHz in respect of TDMA system shall be assigned to any new Unified Access Services Licensee.

43.5 (iv) The licensor has right to modify and/or amend the procedure of allocation of spectrum including quantum of spectrum at any point of time without assigning any reason."

41. A perusal of both the NTP document as well as the licence conditions clearly indicates that there is no right conferred upon the Petitioners by virtue of these documents. We have also considered the various letters, cited by the learned counsel for Petitioners, which have been issued by the DOT. It is neither feasible nor necessary to reproduce these letters *in extenso*. Suffice it to say, the letter dated 22.9.2001 of the WPC wing of the DOT relates to royalty and licence fee charged towards WPC spectrum usage by Cellular Mobile Telephone Service (CMTS) providers. It only states that any additional bandwidth, if allotted subject to availability and justification, shall attract additional royalty and licence fee as revenue share (typically 1% additional revenue share if bandwidth allocated is up to 6.2 MHz + 6.2 MHz in place of 4.4 MHz +4.4 MHz). The letter dated 1.2.2002 states that in order to meet the requirements of growth of subscribers, it has been decided to assign additional spectrum up to 1.8 MHz +1.8 MHz to the CMTS operators and requires the operators to apply for allotment of additional spectrum after reaching a customer base of 4 lakh or more in a service area. Stating that the actual assignment will be made, subject to availability and coordination on case to case basis, after a customer base of 5 lakh or more has been reached in the service area, it states that the additional assignment will be beyond already allocated spectrum of 6.2 MHz +6.2 MHz and that the additional spectrum of 1.8 MHz +1.8 MHz would be assigned in 1800

MHz band. It also states that additional allocation be on 6.2 MHz + 6.2 MHz will carry a spectrum usage charge of 4% of AGR and would cover allocation of further spectrum which may become possible to allocate in future subject to availability, to add up to a total spectrum allocation not exceeding 10 MHz +10 MHz per operator in a service area and that such additional allocation could be considered only after a suitable subscriber base, as may be prescribed, is reached. The Order dated 18.4.2002 of the WPC wing of the DOT refers to the spectrum charges for microwave (MW) access and backbone networks of cellular networks. It relates to the microwave access spectrum in the frequency band of 10 GHz and beyond and as such has no relationship to the GSM or CDMA spectrum. In Para 6 of this order, it only states that in addition to the stipulations in the earlier paragraphs, the charges for GSM spectrum (900/1800 MHz band) will continue to be levied in accordance with the Government of India orders dated 22.9.2001 and 1.2.2002, which were referred to above. Para 7 of this order states that the above package of spectrum charging on percentage revenue share will be available to the cellular operators on the premise that it is accepted in its entirety and simultaneously all legal proceedings, with regard to spectrum charging, shall be withdrawn. The acceptance by COAI vide the letter of 23.8.2002 also states that the COAI "is taking necessary action at the earliest to withdraw all legal proceedings, with regard to spectrum charging, instituted by COAI and its members against the Government in courts and TDSAT".

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

43. As mentioned in para 36 above, the learned counsel for Petitioners, Dr. Singhvi, sought to take the support of the judgement of the Apex Court in the *Vishnu agencies case* cited supra, on the premise that the order dated 18.4.2002 of the DOT was an ‘offer’ and the reply dated 23.8.2002 of COAI an ‘acceptance’ of the same. But a close reading of these documents shows that they relate to spectrum charging and so has no relation to allocation of spectrum. We therefore hold that the instant case is not one of a contract and by virtue of this, do not regard the *Vishnu agencies case* as relevant to this case. For this very reason, we also do not hold that the observations of the Supreme Court in the *National Fertilisers case* are relevant to this case. The other learned counsel for petitioners, Mr. Vaidyanathan, sought to draw strength from the judgement of the Apex Court in the *Asian Food Industries case* (para 37 above), in which the Supreme Court held that "by reason of a policy, a vested or accrued right cannot be taken away. Such a right, therefore, cannot *a fortiori* be taken away by an amendment thereof". The facts of that case do not have a bearing on the facts in this case. Besides, as was brought out above, there is no vested right in favour of the Petitioners. The issue is whether the Petitioners have a vested right to receive GSM spectrum up to 15 MHz. And, for reasons indicated, we hold that they do not have any such vested right.

44. We now turn to the two critical aspects of this Petition. These are whether dual technology is permitted under the same licence and whether the subscriber linked criteria laid down by DOT are not arbitrarily fixed and arbitrarily high, rendering the Petitioners ineligible for receipt of additional spectrum to which they were entitled as per the previous criteria. The grievance of the Petitioners is that on the one hand the DOT, on the Recommendations of TRAI, permitted dual technology and thereby entry of CDMA operators in the GSM fold, and secondly they, again on the Recommendations of TRAI, revised the subscriber linked criteria for allotment of GSM spectrum to an unrealistic level. Their contention is that this ‘double whammy’ was deliberately dealt out so as to benefit the CDMA operators. They contend that allocation of GSM spectrum to the CDMA operators disturbs the level playing field and is violative of Articles 14, 19 and 21 of the Constitution.

45. We will first take up the **issues relating to dual technology and allocation of dual spectrum**. The arguments on behalf of the Petitioners were led by Dr. Singhvi and Mr. Vaidyanathan, both of whom argued at length. For purpose of convenience, and since several of their arguments overlapped, we shall list out the contentions of both the learned counsels, which are as follows:

1. CDMA operators wanting to offer GSM services could have offered the same in their allocated/contracted 800 MHz spectrum.
2. Technology neutrality enables the licensee to choose any technology -- either GSM or CDMA on the basis of which the allocation of appropriate spectrum is made. But, once the band is so allocated, the operator has to operate/provide service in its allocated band, whether it later chooses to use GSM technology or CDMA technology or both.
3. Government’s own understanding and actions evidence that dual spectrum was never permitted under NTP-99. In April 2001, when GSM operators applied for CDMA spectrum in 800 MHz band, their request was rejected by DOT on 9.4.2001. A request of BPL Mobile for CDMA spectrum in 1999 was rejected on the ground that the same was earmarked for fixed services. In the case of Bharti Airtel, DOT required the Company to surrender its CDMA spectrum in Madhya Pradesh and did not allow it to retain the CDMA spectrum under its UAS (GSM) licence. Thus, its request for dual spectrum was rejected.
4. Technology neutrality was understood by all in the field to mean only one system, to be chosen by the operator. The change of policy substantially impacts the existing operators. It is contended that rule of law involves legal certainty as decided in the case of **Reliance energy Ltd and Another v.**

Maharashtra State Road Development Corporation and Others [(2007) 8 SCC 1].

5. The licence conditions clearly stipulate that the service providers will continue to provide services in the already allocated/contracted spectrum. A Licence is a specific permission to do something and so unless it is specifically provided, an activity cannot be taken up. Specific provision to take up an activity and not lack of prohibition is what matters.
6. The Press Release of 19.10.2007 is a new decision resulting in an amendment of the licence condition. If dual spectrum was already allowed under the licence, there was no need for DOT to refer the matter to TRAI on 13.4.2007, and for the impugned Press Release of 19.10.2007 to state that it has been decided to 'permit' use of alternate technology and also for DOT to subsequently amend the licence of Reliance by replacing the word 'or' with 'and'.
7. The decision communicated through DOT's Press Release of 19.10.2007 is a new policy decision effectively amending NTP-99 and was taken without the approval of the Cabinet which had earlier approved the NTP-99.
8. The impugned decision is violative of clause 1.3.1 read with clause 1.4 (ii) of the UAS licence agreement which prohibits a promoter from having a stake of more than 10% in another licensee company in a circle. Also, clause 1.4 of the UAS licence states that Basic and Cellular licensees existing as on 11.11.2003 shall not be eligible for a new UASL in the same service area. The impugned decision effectively means that a second and new GSM licence has been given to the CDMA operators, which is not permissible.
9. The application of RCom of 6.2.2006 is void ab initio and *non est* since there was no dual spectrum policy till 19.10.2007
10. The implementation of the policy decision was in a non-transparent manner. There was also undue haste in the manner in which the decision was implemented. While the impugned policy decision was released to the world on 19.10.2007, the 'in-principle' approval was granted to RCom on 18.10.2007 itself and payment also accepted on the morning of 19.10.2007. Any Government order takes effect from the date it is published and not from the date it is made in the file.
11. In giving GSM spectrum to CDMA operators, injury has been caused to the existing GSM operators who are being denied additional spectrum for which they were entitled under the then existing criteria.
12. DOT was wrong in selectively implementing the Recommendations of TRAI and changing certain Recommendations. TRAI recommended levy of spectrum usage charges on combined spectrum (of both CDMA and GSM) whereas DOT unilaterally changed it to permit levy of charges separately for GSM and CDMA. This has resulted in the CDMA operators paying for spectrum usage@2% of AGR instead of 4% of AGR, as recommended by TRAI. DOT also disregarded TRAI's Recommendations for imposing contingent roll-out obligations, and also varied TRAI's Recommendations on one-time charges for spectrum.
13. Effectively, the impugned decision is leading to a situation where one operator holds 2 licences, 2 spectrums and runs 2 networks under the same licence while others have to do with only one. Secondly, one operator pays 4% AGR the spectrum usage charges while others pay only 2%, even though they both hold the same quantum of spectrum. Thirdly, one operator gets 4.4 MHz spectrum as start-up allocation while others are denied additional allocation of even 1 to 2 MHz and are asked to achieve arbitrarily hiked subscriber numbers. It is thus disturbing the level playing field, which is essential and is envisaged under NTP-99. Articles 14, 19 and 21 of the Constitution impose level playing field. Rule of law requires reasonableness and fairness.
14. The impugned decision is against public interest. The reason given for policy change in the Press Release of 19.10.2007 is that dual spectrum was being permitted in order to further enhance the penetration of access services for rapid expansion of tele-density. The said decision does not further this cause.

46. The learned counsel for the 1st Respondent, Mr. Vikas Singh argued that there was nothing irregular in the Government admitting to the concept of dual technology and consequential grant of GSM spectrum to CDMA operators. His case is that the licence conditions do not prohibit the use of dual technology. He pointed out that vide a letter dated 17.8.2006, the Cellular Operators' Association of India wrote to the then Minister of Communications & Information Technology welcoming the entry of Reliance and others into GSM; his argument is that having done so, COAI is estopped from now raising the issue of dual technology. On 17/18.10.2007, the Government while accepting the TRAI Recommendations, decided to permit dual use technology by the existing licensees, and asked Reliance, Shyam and HFCL to pay the requisite fee, as per the Recommendations of TRAI. This clearly shows that DOT is ensuring a level playing field. The learned counsel also referred to the judgement of the Delhi High Court which had clearly held in favour of the grant of dual technology to the Respondents.

47. Stating that he was making his submissions to assist the Tribunal in arriving at a proper perspective, the learned counsel for the 2nd Respondent, TRAI, Mr. Saket Singh explained that paragraphs 4.12 to 4.16 of the TRAI's Recommendations dated 28.8.2007 were more in the nature of setting out the common belief and that the comprehensive discussion on the issue started from Para 4.17 onwards and is specifically contained in paras 4.18 to 4.22. He stated that technology neutrality was not explicitly stated in the licensing policy due to which different interpretations were given by different persons to suit their needs. In paragraph 4.25, the Authority stated that there is need to bring clarity to the entire issue and recommended in Para 4.27 the manner in which the alternative technology may be permitted.

48. Mr. Mukul Rohtagi, learned counsel for 3rd Respondent, argued that the licence conditions do provide for dual technology. According to him, clause 43.5 of the licence clearly provides for use of any technology for provision of services under the licence. This clause only requires the licensee to indicate the type (s) of systems to be deployed. The very use of the word 'type(s)' means that GSM and CDMA can be used. According to him, the reference to maximum of spectrum in this clause is only with regard to concerned spectrum band. He also points to clause 5 of the licence which permits DOT to amend the licence and states that the amendment was duly carried out. According to the counsel, UAS licences are technology neutral as provided under clause 23.1. Clause 43 of the

licence does state that a specific authorisation for use of frequency is to be taken from the WPC wing but does not, at the same time, state that only one technology can be used.

49. Referring to the contention of the counsel for Petitioners that Bharti Airtel and BPL Mobile were not allowed to use dual spectrum, the counsel stated that BPL Mobile applied for CDMA spectrum under the GSM licence which was rejected by DOT on 21.1.2000. Also, he stated that during the period 1999-2000, there was no concept of UASL and that licences were separately issued for Basic services and Cellular services. It is only in the year 2003 the technology neutrality was recognised and therefore the Government could not have agreed to grant of dual spectrum to that time. As regards Bharti Airtel, it is contended that they had surrendered their licence but sought to keep the spectrum which was not permitted.

50. Arguing that the application of Reliance Communications made in February 2006 was valid, the learned counsel pointed out that the Petitioners also did not challenge the application at that time and there was no change in the licensing regulations between then and now. The Petitioners themselves having welcomed the entry of Reliance Communications along with other operators (Shyam and HFCL) into the GSM fold, are now estopped from raising any objections. Denying the charge of undue haste shown by the Government in issuing the in-principle approval, the counsel pointed out that the DOT had taken more than 15 months to consider the application made in February 2006. The Recommendations of TRAI were received in August 2007 whereas the decision was taken only in October 2007.

51. As regards the lack of equal opportunity and disturbance of level playing field, the learned counsel stated that neither the Petitioners had applied for dual spectrum under the UAS licence nor have they been denied the same while issuing the in-principle approval to Reliance Communications, Shyam and HFCL. Referring to the question of the in-principle approval having been issued before the licence is amended, the counsel stated that the licence can be amended only after the payment of entry fee as per clause 18.1 of the UAS licence, and as such there was no irregularity in the procedure that was followed.

52. Referring to the allegation of the Petitioners that Reliance did not have adequate coverage under CDMA in the areas licensed to it, the counsel stated that Reliance was not the only service provider to whom this dual technology approval was given. Secondly, although Reliance Communications (RCom) started its services only in the year 2003 unlike Airtel and Vodafone who started their services in 1994-95, Reliance has a subscriber base of 52 million as on 31.12.2008 as compared to 85 million of Bharti Airtel and 60 million of Vodafone. The counsel also pointed out that Reliance has paid entry fee twice for the same licence. The counsel argued that, if any, it is the Petitioners who have enjoyed the benefit of repeated changes in the licence conditions.

53. Referring to the alleged violation of clause 1.4 of the UAS licence, the learned counsel stated that this is not a case of issuing of 2 licences but of issuing of GSM spectrum through an amendment in the relevant clauses of the existing UAS licence. Besides, the proviso to clause 1.4 clearly states that clause 1.4 is not applicable to existing licensees and that in as many as 8 Telecom Circles, Reliance was not given GSM spectrum.

54. The learned counsel for the 5th Respondent, Tata Teleservices Ltd, Mr. Ramji Srinivasan referred to the Press Release issued on 13.9.1999, which clearly provided for technology neutrality. The counsel pointed out that a copy of this Press Release was marked to the Cellular Operators Association of India, who never challenged the same. The COAI cannot now say that there was a change in the policy of the Government of India. The counsel stated that the Consultation Paper issued by TRAI on 12.10.1999 referred to the Government's decision to allow technology neutrality and that TRAI's view was that application of new technology should not be held back as it offers better services to customers, and the protection of customer interest. The counsel stated that the case of COAI is based on the use of the word ‘or’ instead of ‘and’ and that it ignores the various facts. According to him, there are judgements indicating that the circumstances so warrant, the construction could be liberal. The learned counsel also pointed out that the Consultation Paper issued by TRAI on 12.10.1999 which records that on 15.9.1999, DOT gave MTNL an amended licence for providing Cellular Mobile service with technology neutrality i.e. MTNL received a licence to use the technology other than GSM to provide cellular mobile service. On 16.9.1999, MTNL requested for TRAI’s approval of its tariffs for the new service and received it the next day.

55. Learned counsel pointed out that taking advantage of technology neutrality policy announced on 13.9.1999, existing CMSP's allegedly applied for allocation of spectrum in 800 MHz band. According to him, the letter dated 9.4.2001 only seeks a justification for demand of additional spectrum. Nowhere is it stated that the requests are rejected because of non-admissibility of dual technology. He also states that COAI has not gone back to DOT giving justification for CDMA. Besides, he contends that this is only one letter and cannot be the basis for the argument of COAI. The counsel also states that Bharti’s surrender of the licence was a voluntary act and not because it was not permitted crossover technology. They elected to go by UAS Licence and surrendered their Basic licence by virtue of which they had the CDMA spectrum.

56. We have carefully considered the various aspects. At the outset, we would like to state that nothing was placed on record to show that the 800 MHz band was also allocated for the purpose of GSM. So we do not wish to enter into the question whether the CDMA operators could have offered GSM in their allocated/contracted 800 MHz spectrum. Indeed, by advancing this argument, the Petitioners appear to tacitly admit that CDMA and GSM services can be offered under the same licence.

57. From the above narration of the pleadings and arguments on the issue of validity of the decision regarding technology neutrality and allocation of dual spectrum as well as the manner of implementation of this decision, the following questions arise:

A. Is technology neutrality a new decision? Is a licensee required to abide for all time by its initial choice of either GSM or CDMA platform?
B. Was TRAI wrong in recommending that cross over technology/ allocation of dual spectrum be permitted under the same licence?
C. Was DOT wrong in deciding the issue at its level instead of taking the Cabinet's approval?
D. Was DOT wrong in allowing Reliance communications Ltd. to make necessary payments and complete formalities before announcing the decision on 19.10.2007? Was it done in a non-transparent manner?
E. Does giving dual technology effectively mean a new licence? Does it affect the Petitioners' right for a level playing field involving Articles 14, 19 (1) (g) and 21 of the Constitution?
F. Whether the allocation of start up spectrum of 4.4 MHz + 4.4 MHz to CDMA operators was appropriate?
G. Whether Government was right in treating the two streams of spectrum -- CDMA and GSM -- separately for the purpose of computing the spectrum usage charges?
H. Whether DOT had disregarded TRAI's Recommendations regarding contingent roll-out obligations?

58. In examining the question whether technology neutrality is a new concept, we have looked at various documents. The National Telecom policy 1999 (NTP-99) states that it is of vital importance to the country that there be a comprehensive and forward-looking telecommunications policy, which creates an enabling framework for development of the Telecom industry. It states that the policy framework must focus on creating an environment which enables continued attraction of investment in the sector and allows creation of communication infrastructure by leveraging on technological development. The Press Note (1999 series) dated 13.9.1999 issued by the DOT refers to the stipulation that Cellular Mobile Service Providers (CMSP) under the new licensing regime shall be free to provide all types of mobile services using any type of network equipment that meets the relevant International Telecommunication Union (ITU)/Telecom Engineering Centre (TEC) standards. It states that the technology neutral approach for provision of cellular mobile services will enable faster and cost-effective roll-out of the cellular networks by leveraging technological developments. Accordingly, the Telecom commission decided that all new cellular mobile service providers will be technology-wise neutral. The only stipulation is that the technology must be digital. The existing licensees of cellular services on their migration to the NTP-99 regime in terms of migration package already offered to them will also be permitted to expand their networks using any other technology or the GSM technology to which they have been bound so far as per the existing licences. (Emphasis supplied). As pointed out by the learned counsel for the 5th Respondent, a copy of this Press Note was also marked to the Cellular Operators Association of India. There is no evidence on record to indicate that this policy was contested. In its judgement dated 22.8.2008, the Delhi High Court held that "it is apparent that even as back as in 1999, the Respondent no.1 had notified technology neutral Cellular Mobile Service Providers and also envisaged expansion of networks by using any other technology. Admittedly, this communication was endorsed to and received by the Petitioner no.1 and is unchallenged in any legal proceedings". It is also seen that in an Approach Paper dated 15.11.2006, presented by the COAI for allotment of 2G spectrum, COAI itself acknowledged that technology neutrality was introduced into cellular services through NTP-99.

59. The learned counsel for Petitioners, Dr. Singhvi argued that the Press Note dated 13.9.1999 should be read along with the letter dated 9.4.2001 addressed by the DOT to COAI and other cellular operators wherein it dealt with requests for additional frequency spectrum in 900/1800 MHz band for cellular services and for allocation of frequency spectrum in 800 MHz band for CDMA services. Para 3 of that letter states that "the cellular services are to be operated by the existing licensees in the designated Cellular Mobile Telephone Service band i.e. 890-915 MHz paired with 935-960 MHz. The operators have been permitted to operate the Cellular Mobile Telephone Service in any technology. However, the technology shall be digital and has to operate in the designated frequency band. As such, no additional frequency spectrum needs to be allocated". The contention of the counsel is that this paragraph is a clear indication that dual spectrum is not permitted.

60. We have perused the letter dated 9.4.2001 and are unable to agree with this contention. All that the para 3 of this letter states is that the technology shall operate in the designated frequency band. Nowhere is it stated that the request is rejected because of non-permissibility of dual technology. It goes without saying that any technology has to operate within the designated frequency band. It cannot obviously operate in any band whatsoever. It is for the WPC wing, through the medium of the National Frequency Allocation Plan to designate the frequency band for each technology. This is all that the letter states and there is no scope for its misinterpretation and for reading non-permissibility of dual spectrum into it. We therefore do not agree with this contention of the learned counsel for the Petitioner.

61. An addendum to the New Telecom Policy was issued on 11.11.2003, on which day the guidelines for the Unified Access (Basic and Cellular) Services Licence were also issued. These guidelines stipulate that Government in the public interest in general and consumer interest in particular and for the proper conduct of telegraphs and telecommunication services, has decided to move towards the Unified Access Services Licensing regime. As a first step, Basic and Cellular services shall be unified within the service area. The guidelines provide that the Unified Access Service providers are free to use any technology without any restriction. It is also stipulated that the existing operators shall have an option to continue under the present licensing regime (with the present terms and conditions) or migrate to new Unified Access Services Licence (UASL) in the existing service areas, with the existing allocated/contracted spectrum. The licence fee, service area, roll-out obligations and performance bank guarantee under the Unified Access Services Licence will be the same as Fourth Cellular Mobile Service Providers (CMSPs). The service providers migrating to unified access services licence will continue to provide wireless services in already allocated/contracted spectrum and no additional spectrum will be allotted under the migration process for Unified Access Services Licence. The existing BSO's (Basic Service Operators) after migration to Unified Access Services Licensing regime were allowed to offer full mobility, with the stipulation that they will be required to offer limited mobility service also for such customers who so desire. From these provisions, one clearly gathers that as early as 1999 and definitely after November 2003, the concept of technology neutrality was very clearly enunciated.

62. We now turn to the question whether dual technology is permitted as per the existing licence conditions of the UAS licence, and for this we need to examine the relevant clauses of the licence. The UAS Licence, which is valid from 20 years from the effective date, contains the following important clauses in so far as the resolution of this issue is concerned:

1.3.1 The merger of Indian companies may be permitted as long as competition is not compromised as defined in conditions 1.4 (ii).

1.4 The LICENSEE shall also ensure that:

(i) Any change in shareholding shall be subject to all applicable statutory permissions.

(ii) No single company/legal person, either directly or through its associates, shall have substantial equity holding in more than one LICENSEE company in the same service area for the access services namely; Basic, Cellular and Unified Access Service. 'Substantial equity' herein will mean 'an equity of 10% or more'. A promoter company/Legal person cannot have stakes in more than one LICENSEE Company for the same service area.

Note: clause 1.4 (ii) shall not be applicable to Basic and Cellular Licensees existing as on 11.11.2003, and in case one of them migrates to UASL it shall not be necessary to surrender the other licence. Further, Basic and Cellular licensees existing as on 11.11.2003, shall not be eligible for a new UASL in the same service area either directly or through its associates. Further, any legal entity having substantial equity in existing Basic/Cellular licensees shall not be eligible for new UASL.

(iii) Management control of the LICENSEE Company shall remain in Indian Hands.

5. Modifications in the Terms and Conditions of Licence

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

18.3 Radio Spectrum Charges:

18.3.1 The LICENSEE shall pay spectrum charges in addition to the Licence fees on revenue share basis as notified separately from time to time by the WPC Wing. However, while calculating 'AGR' for the limited purpose of levying spectrum charges based on revenue share, revenue from wireline subscribers shall not be taken into account.

18.3.2 Further royalty for the use of spectrum for point-to-point links and other access links shall be separately payable as per the details and prescription of Wireless Planning & Coordination Wing. The fee/royalty for the use of spectrum/possession of wireless telegraphy equipment depends upon various factors such as frequency, hop and link length, area of operation and other related aspects etc. Authorisation of frequencies for setting up Microwave links by Licensed Operators and issue of Licences shall be separately dealt with WPC Wing as per existing rules.

23. TECHNICAL CONDITIONS:

23.1 The Licensee shall provide the details of the technology proposed to be deployed for operation of the service. The technology should be based on standards issued by ITU/TEC or any other International Standards Organisation/bodies/industry. Any digital technology having been used for a customer base of one lakh or more for a continuous period of one year anywhere in the world, shall be permissible for use regardless of its changed versions. A certificate from the manufacturers about satisfactory working for a customer base of one lakh or more over the period of one year, shall be treated as established technology.

23.5 The frequencies shall be assigned by WPC from the designated bands prescribed in the National Frequency Allocation Plan-2002. (NFAP-2002) as amended from time to time. Based on usage, justification and availability, spectrum may be considered for assignment, on case by case basis. The frequencies assigned may not be contiguous and may not be the same in all cases, while efforts would be made to make available larger chunks to the extent feasible. The detailed guidelines for allocation of frequency spectrum and charges thereof etc would be separately issued from time to time.

43.5 As extracted in para 40 above.

63. As can be seen from the licence clauses extracted above, clause 23.1 only states that the licensee shall provide the details of the technology proposed to be deployed for the operation of the service. The only stipulation is that the technology must be digital and must have been used for a customer base of one lakh or more for a continuous period of one year anywhere in the world, and that it should be based on ITU or TEC standards. Clause 23.5 also states that the frequencies shall be assigned by WPC from the designated bands under the NFAP. Nowhere is there any stipulation that the licensee shall be guided only by one technology or that the frequencies will be assigned only in one band. Clause 43.5 starts with the stipulation that spectrum allocation and frequency bands is

subject to availability and as per guidelines issued from time to time. This is the operational proviso. Even going into the details, none of the clauses specifically prohibit dual technology or the allocation of dual spectrum. Clause 43.5 (iv) clearly stipulates that the licensor has a right to modify or amend the procedure of allocation of spectrum. In the light of this, we do not find any provision to prohibit the allocation of dual spectrum. The argument of the learned counsels for Petitioner is that what is important is whether there is a specific provision providing for allocation of dual spectrum rather than the lack prohibition against doing so. We do not agree with this proposition. Even if we did, the very fact that clause 23.1 speaks of any digital technology being permitted so long as it is as per standards means that the licensee is entitled to provide its services in any technology including two or more technologies. It is a different matter that this issue was never closely examined till the matter was referred by the DOT to TRAI. The counsel for Petitioner stressed on the use of the word 'or' in clause 43.5 (i) to point out that only one of the technologies is permissible. The sentence reads as follows. " Initially a cumulative maximum of 4.4 MHz +4.4 MHz shall be allocated in the case of TDMA-based systems@200 KHz per carrier **or** 30 kHz per carrier on a maximum of 2.5 MHz +2.5 MHz shall be allocated in the case of CDMA-based systems @1.25 MHz per carrier, on case-by-case basis subject to availability." But a reading of the entire clause shows that it is meant for the initial allocation. In fact, the entire clause proceeds on the assumption that service providers would seek initial and additional spectrum in a given band. This does not mean that there is a prohibition on seeking spectrum in other bands. The licence is essentially a permission to provide Cellular services to the consumers. In what band it is provided is not really relevant. So long as technology is an approved technology, the service provider is free to provide such service. It is true that the assignment of spectrum is subject to its availability and also the guidelines that are prescribed from time to time. But this, per se, does not prohibit the use of dual technology. We are of the opinion that the two issues are different and must be kept distinct. We accordingly hold that a reading of the NTP-99 document and the licence conditions reveals that the concept of dual technology is not a new concept and that this is contained in the above documents. This was also the finding of the Delhi High Court which observed that "despite repeated queries to the Petitioners to point out prohibitions under the policy with regard to the entry of additional service providers or permissions to use of dual technology under the policy regime which was in vogue in 1999 or as added to in 2003, no such prohibition could be placed before this court". It also held that "nothing could be pointed out in the recommendations, policies or licences to suggest any prohibition in a cross-over of the technology".

64. The counsels for Petitioners contended that the past conduct of the Government clearly showed the dual technology is not permissible. But, as was brought out by the counsel for Respondents, the case of BPL Mobile and Bharti Airtel are entirely on a different footing. The case of the counsel for Petitioner is that on 28.10.1999, BPL Mobile, which had a licence and an operational network based on GSM, had asked for two pairs of CDMA frequency. Vide a letter dated 21.1.2000, the WPC wing of the DOT had rejected this request on the ground that the specific frequencies asked for have been earmarked for basic services application. The counsels for Respondents point out that the concept of technology neutrality was brought in only through an addendum to the NTP-99 in November 2003 and that during the period 1999-2003, DOT could not have agreed to the grant of dual spectrum under separate licences for Basic and Cellular services. The learned counsel for Petitioners, Mr. Vaidyanathan, invoked the principle of contemporaneous exposition to state that actual practice must be taken into consideration for construction of a statute and cited the cases of **State of Tamil Nadu v. Mahi Traders and Others [(1989) 1 SCC 724],** wherein the Supreme Court held that "the contemporaneous exposition by the administrative authorities is a very useful and relevant guide to the interpretation of the expressions used in a statute", as well as the case of **Ajay Gandhi and Another v. B. Singh and Others [(2004) 2 SCC 120]** wherein the Apex Court held that "for construction of a statute, it is trite, the actual practice may be taken into consideration".

65. We do not agree with the contention of the learned counsel for petitioners. As brought out by us above, the concept of technology neutrality was contained in the NTP document, at least after the Press Note of September 1999. However, while the concept of technology neutrality was available, as long as the licences for Basic and Cellular services were separate and each of them had their own designated frequency band, the question of operating Cellular services in a frequency band specifically earmarked, through a licence, to Basic services was not permissible. In our opinion, this was the reason why the WPC wing rejected the request of BPL Mobile . It would have been appropriate if the WPC wing had given detailed reasons for their decision. It is normal practice that administrative directions or correspondence do, at times, lack the necessary detail. At the same time, there is nothing on record to indicate that BPL Mobile had appealed against this decision or had asked for its review. It would therefore not be correct, in our opinion, to quote this particular case and to argue that the same logic should be applied to the UAS licensees who stand on a different footing. On the principle of *Contemporanea expositio,* the Apex Court dealing with this principle in the *Ajay Gandhi case*, cited supra, referred to the comment in Francis Bennion's 'Statutory Interpretation' 4th Edn. wherein the comment was that "the concept of legislative intention is a difficult one. Contemporary exposition helps to show what people thought the Act meant in the period immediately after it was passed. Official statements on its meaning are particularly important here, since every Act is supervised, and most were originally promoted, by a government department which may be assumed to know what the legislative intention was". The Apex Court also referred to the case of R. v. Wandsworth London Borough Council [(1996) 1 All ER 129: (1996) 1 WLR 60 (HL)] wherein the House of Lords held that "a departmental circular is entitled to respect. It can only be ignored when it is patently wrong". Therefore, going by the above interpretation, it is clear that the NTP document as well as the Press Note and the UAS licence conditions should be taken as an unambiguous exposition of the policy laid down, which is one of technology neutrality.

66. In so far as Bharti Airtel is concerned, it was brought to our notice by the learned counsel for the Union of India that the company has, vide a letter dated 12.10.2004 communicated to the Government of India that they would surrender, in the Madhya Pradesh circle, the UAS Licence to which they had migrated from their Basic licence. They had however requested DOT to allow them the continued use of the CDMA spectrum, while at the same time seeking the refund of entry fee paid by them at the time of acquisition of the said licence. In their letter, the company had indicated that *"it makes no practical or commercial sense to continue to maintain two identical licences for the same service area, competing for the same set of subscribers, deploying similar set of expensive infrastructure and duplicating resources that no investor would reasonably want to fund. ...... in summary, the licence has been rendered commercially*

unworkable and the performance of the contract frustrated. It is in these circumstances that we are constrained to exercise the option of surrendering the licence." The Petitioners' claim is that since they were not allowed to retain the CDMA spectrum, the concept of dual technology is understood to be not valid. But a perusal of the Company's letter dated 29.9.2006, which is part of the pleadings, shows that the Government allowed it to utilise CDMA spectrum for the first year under the other licence and it was only thereafter that the Department had started asking the Company to surrender the CDMA spectrum. The point to be noted in this case is that Bharti Airtel had surrendered the UAS licence to which it had migrated from the Basic licence. Obviously, if its licence is itself surrendered, the Company cannot expect to retain the spectrum which flowed from that licence. It is not as if it had asked for CDMA spectrum on the basis of the other UAS licence which it continued to be in possession of. As such, it would not be correct to argue that the obligation imposed on Bharti Airtel to surrender the CDMA spectrum is a reflection of the Government's policy not to allow dual technology. Two aspects of Airtel's letter of 29.9.2006 are significant in this respect. Firstly, it is admitted that the Company was allowed to use the CDMA spectrum under another licence, which was a GSM licence. Secondly, the letter itself states that BSNL is also providing GSM and CDMA services to its customer. Both these would not have been possible had DOT followed a policy of prohibition of dual technology.

67. Now, the question arises as to why, if the concept of dual technology was already provided for, the DOT had to seek the Recommendations of TRAI, why did TRAI give its Recommendations and why were they accepted by DOT. It appears to us that there was avoidable confusion in this regard. Para 2 of the letter dated 13.4.2007, extracted at Para 20 above, only states that the Government is contemplating to review certain terms and conditions in the Access Providers licence, namely, inter alia, "permit service providers to offer access services using combination of technologies under the same licence". This was interpreted as stating that the Government would *now like to permit* the combination of technologies. But a proper reading of Paras 2 and 3 shows that the Government only sought the Recommendations of TRAI in terms of clause 11 (1) (a) of the TRAI Act on the review of the terms and conditions in the Access Provider's licence mentioned in Para 2. In other words, the DOT did not seek any clarification from TRAI as to whether or not combination of technologies is permissible. If this was the intention, Para 2 (iv) would have been differently worded. What it really wanted was a review of the terms and conditions on which the Access Service provider is being allowed combination of technologies.

68. In our view, the confusion has been created by TRAI in its Consultation Paper dated 12.6.2007. Having noted in Para 4.4 thereof that the initial CMTS licence was amended on 1.10.1999 to make the licence technology neutral, the Consultation Paper analyses the licence agreements and then concludes that the option for various technologies by the licensee has been addressed within the four corners of the National Frequency Allocation Plan. Referring to clause 23.5 of UASL, which states that "based on usage, justification and availability, spectrum may be considered for assignment, on case-by-case basis", the Consultation Paper concludes that "evidently, the availability of spectrum in specified bands has been linked with usage and justification thus indicating a legacy baggage." It then refers to the guidelines for Unified Access (Basic and Cellular) Services Licence on 11.11.2003 and states that the guidelines reiterated that the service providers migrating to unified access services licence will continue to provide wireless services in the already allocated and contracted spectrum. Thus it envisages continuity of technology in providing telecom services. Further, the guideline mentions, "the unified access service providers are free to use any technology without any restriction". The paper concludes that based on the above analysis, it can be said that there is a legacy baggage on the licensees along with predetermined spectrum bands for the deployment of technologies. In our view, it is in drawing this conclusion that the Consultation Paper went wrong. The clauses referred to in the Consultation Paper deal with spectrum. As indicated by us above, there is no specific prohibition on provision of more than one technology by licensee.

69. It is true that the spectrum allocation is based on availability and justification. It is also true that the licence agreements, for provision of unified access services after migration from CMTS, state that the licensee operating wireless services will continue to provide services in already allocated/contacted spectrum. This only means that on migration, the licensee will continue to operate in the same spectrum band and with the same allocated/contracted spectrum. In other words, there is no change in so far as spectrum is concerned between the date prior to migration and the date immediately after migration. Nowhere is there any stipulation that the once spectrum is allocated in a band, the licensee is barred from introducing any other technology. It would have been useful if this had been carefully analysed by TRAI and brought out clearly so as to avoid any confusion. In fact, this is the position that was taken by TRAI itself in its Recommendations on Unified Access Licensing given on 27.10.2003. Para 7.31 of these Recommendations, dealing with spectrum related issues, reads as follows: "Service providers migrating to the Unified Access Licensing Regime will continue to provide wireless services in the already allocated/contracted spectrum and no additional spectrum would be allotted only because of migration. There shall be no change in the spectrum allocation procedure as part of migration process." (emphasis supplied). On the other hand, the Consultation Paper of TRAI dated 12.6.2007 only added to the confusion instead of clarifying matters. It then goes on to speak of the necessity for having more than one technology and then identifies the issues that may require resolution. But in Para 4.15 again, the Consultation Paper states that "a simpler version may be to treat the existing licensee seeking plurality of technology as a new licensee without necessary requirement of forming a new company." In our view, the first issue for consideration posed in Para 4.17 (Q1) of the Consultation Paper dated 12.6.2007 was unnecessary.

70. The Recommendations in chapter 4 of the TRAI's Recommendations dated 28.8.2007 are equally significant. Para 4.6 states that "technological neutrality is being effectively pursued in terms of freedom to choose any technology by the licensee". Having said this, it goes on to state that "however, the specific mention of certain spectrum bands reveals the framework of licence as structured by the Department." Having analysed the various aspects, Para 4.16 of the

Recommendations states that "the licensee is given the option of choosing technology of its own. However, he has to indicate the technology mainly because of specific spectrum bandwidth requirement for each technology. In the entire licence agreement it is only stated that the licensee shall provide the details of technology proposed to be deployed for operation of the service. Accordingly, the growth path of the licensee is confined to the technology chosen at the early stage." This clearly gives the impression that the TRAI itself is stating that there can only be one technology and which remains the one chosen in the initial stages. During the course of hearing, however, the learned counsel for TRAI, Mr. Saket Singh mentioned that what is stated in the Recommendations upto Para 4. 16 is only the common belief or perception which the Authority has outlined. Unfortunately this was not brought out explicitly in the Recommendations. If the intention of TRAI is to bring out in these paragraphs the common belief and state that this is not the correct interpretation, it should have stated so very clearly. For, what follows from Para 4.17 onwards is different from what was narrated upto Para 4.16.We are therefore of the view that in analysing this issue, TRAI did not exhibit the required degree of care and has itself given the impression that what was being done is something that was new. This was avoidable.

71. The next question for consideration is whether the DOT erred in taking a decision on its own without referring the matter to the Cabinet. The contention of the learned counsel for Petitioners, Dr. Singhvi is that the UASL regime having been brought in through an amendment of NTP-99 by way of a Cabinet decision in the year 2003, it was incumbent upon the DOT to secure cabinet approval for a decision providing for dual technology. Mr. Vaidyanathan, counsel for Petitioners argued that as per section 14 of the General Clauses Act, if a decision has been taken by the Government in a particular manner, the review of such a decision has also to follow the same procedure. We do not agree that in the facts of the case, the learned counsels for Petitioners are correct. This is for two reasons. Firstly, as was fairly conceded by Dr. Singhvi himself during the course of hearing, seeking a Cabinet approval is a matter of procedure for decision-making in the Government. So long as the decision is communicated by the competent authority in the Government, it is not a matter for adjudication whether such a decision has been taken with or without the approval of the Cabinet. Secondly, and more importantly, as brought out above, technology neutrality is not a concept that has been newly introduced. It is a concept that already exists. So the General Clauses Act is not attracted in this case. Besides, neither the letter dated 18.10.2007 addressed to the 3rd Respondent by DOT nor the Press Release dated 19.10.2007 speak of technology neutrality as a new decision. In fact, Para 2 clearly states that the unified (Telecom) Access Services (UAS) licences are technology neutral. It only speaks of spectrum allocation including for the alternate technology. The learned counsel for Petitioner laid emphasis on Para 4 of the Press Release which states that "it has also been decided that the existing private UAS Licensees may be permitted to expand their existing networks by using alternate wireless technology i.e. the present UAS Licensee who is using GSM technology for wireless access may be **permitted** to use CDMA technology and vice versa." He sought to lay emphasis on the word ‘permitted’ to state that it is a case of fresh licence or an amendment to the existing licence. This is taking a too technical view of the matter. Firstly, a Press Release is only meant to give information to the public and is not a legal document. Secondly, it is common knowledge that administrative use of language is different from legal use of the language. For these reasons, we reject the contentions of the learned counsel for Petitioner and hold that in taking the decision reflected in the letter dated 18.10.2007 or the Press Release dated 19.10.2007, no impropriety was committed by the DOT regarding impropriety of decision-making.

72. The next question is whether the DOT was wrong in allowing CDMA operators to make payments and complete formalities before announcing the decision on 19.10.2007 through a Press Release and whether it was done a non-transparent manner. The contention of the learned counsels for Petitioners is that on 18.10.2007, an in-principle approval is granted to RCom for allotment of dual spectrum, without there being any such policy in existence. This decision was acted upon on 18.10.2007 but was announced on 19.10.2007. On 18.10.2007 itself, RCom was told that the date of payment of fee would determine the priority date for allocation of spectrum, following which the requisite fee was paid by the Company on the morning of 19.10.2007, even before the Press Release was issued. The contention of the counsels is that this is not a matter just between the DOT and the CDMA operators but that the GSM operators were also to be informed since they would also be concerned parties as the policy provided for alternate technology i.e. CDMA to GSM or vice-versa. It is contended that the policy has to be pronounced and made known to all before it is implemented.

73. We have examined the matter. We had already indicated our view that the concept of dual technology or allocation of dual spectrum is not a new decision. As such, it would not be appropriate to state that unless the Press Release was issued, a letter to the CDMA operators could not have been issued. The Petitioners contended that the application dated 6.2.2006 of RCom is void ab initio and non est. The learned counsel for the 3rd Respondent has countered this stating that this application was never rejected and just because it is pending for more than one and a half years is no reason why it should be considered as invalid. We must straightaway reject the contention that this is an invalid application. COAI was aware of the application dated 6.2. 2006 of RCom and had also issued a response welcoming the entry of this company and other CDMA operators into the GSM fold. If they felt that this was an invalid application, on any ground whatsoever, they should have represented to the DOT accordingly. There is no evidence on record to indicate that this has been done. As regards the contention that unless the GSM operators have been informed, the decision could not have been operationalised, we find no basis to hold such a view. It is not their contention that they had similarly applied for alternate technology or for dual spectrum.

74. A reading of the Press Release shows that it is to inform the public of the following major decisions: (A) that there will be no cap on the number of access providers in any service area; (B) that the roll-out for wireless services shall be taken from the date of spectrum allocation, including to those licensees who are awaiting the initial spectrum allotment; (C) that Government has accepted TRAI’s recommendation of enhanced subscriber linked criteria for frequency allocation and has set up a Committee in Telecom Engineering Centre (TEC) to further study and give a report to the Government; (D) that the existing private UAs licensees may be permitted to expand their existing networks by using alternate wireless technology and that the spectrum for the alternate technology,

CDMA or GSM (as the case may be) shall be allocated in the applicable frequency band subject to availability after payment of prescribed fee; (E) the existing UAS licensees, who have already applied for allocation of spectrum for the alternate technology shall also be considered for allocation of spectrum in alternate technology from the date of payment of prescribed fee; (F) BSNL and MTNL being incumbent operators shall be permitted usage of alternative technology and allocated spectrum for the alternate technology without paying the prescribed fee; (G) for the purpose of payment of licence fee and spectrum charges, the stream-wise revenue of different technologies shall be considered.

75. It has been brought to our attention by the learned counsel for the Union of India that the Press Release was also prepared on 17/ 18.10.2007 but for administrative reasons, the same could not be issued before 19.10.2007. Now the question is as to how the Petitioners are adversely affected by the action of the DOT in issuing the letter to the CDMA operators ahead of the Press Release. Considering that the date of payment of prescribed fee is the reference date for allocation of spectrum, it is possible to argue that the interests of GSM operators were involved. But in an affidavit filed on 13.11.2007, the Union of India indicated that contrary to the impression of sought to be created, that the persons who had made payment pursuant to the in-principle approval issued on 18.10.2007 would get priority over the existing operators' request for additional spectrum, all the applications will be decided on the basis of the norms that would be finalised after receipt of the report of the Committee constituted under the chairmanship of the Additional Secretary, DOT. It was also indicated that there are three categories of applicants. The first category was in respect of pending applications for allocation of spectrum to existing operators, which were to be decided on the basis of the norms that will be finalised after receipt of the Committee's report. The second category of UAS licensees who were issued licences in December 2006 and who had not been allotted initial start up spectrum were to be allotted start up spectrum after the first category was dealt with. It was only thereafter that the third category, viz., those to whom in-principle approval was issued on 18.10.2007 will be considered for grant of start of spectrum. Subsequently Union of India had filed an affidavit on 18.8.2008 wherein they have confirmed that this pattern was adhered to in subsequent allocations of spectrum, which have been made in various service areas. In the light of this, it does not appear to us that any injury was caused to the Petitioners, whose applications may have been pending, vis-à-vis the CDMA operators.

76. As regards the allegation that there was undue haste on the part of DOT in issuing the in-principle approval to the CDMA operators, what is undue haste is difficult to be defined. The fact in this case is that an application of February 2006 was spending, the matter was referred to TRAI, its Recommendations were received in August 2007 and a decision was taken in October 2007. And the same was communicated to the concerned Parties on 18.10.2007.At best, it can only be said that there was minimal time lag between the time the decision, its communication to the CDMA operators and the date of payment by RCom. The insinuation there is that the prompt payment by RCom is indicative of some prior information. But this is at best an insinuation, not backed up by any evidence regarding mala fide action on the part of DOT. In the case of **Chairman & MD, BPL Ltd. v. S.P. Gururaja and Others [(2003) 8 SCC 567]**, the Supreme Court held that "undue haste also is a matter which by itself would not have been a ground for exercise of the power of judicial review unless it is held to be mala fide. .... the question as to whether any undue haste has been shown in taking an administrative decision is essentially a question of fact. ... A decision which has been taken after due deliberation and upon due application of mind cannot be held to be suffering from malice in law on the ground that there had been undue haste on the part of the State and the Board". We do not find any ground to level mala fide intention on the part of DOT and accordingly hold that the issue of early completion of formalities is not a matter that would require intervention at our level.

77. We now come to the question whether the impugned decision of 19.10.2007 resulted in any disturbance of the level playing field insofar as the Petitioners are concerned. The arguments in this behalf were led by the learned counsel for Petitioners, Mr. Vaidyanathan. His contention is that the decision of 19.10.2007 has led to a situation where a class of super operators was created whereby the CDMA operators are now allowed also the GSM spectrum, thereby negating the investment of existing GSM operators. His contention is that the GSM operators made and continue to make investments in the expectation that, according to the license conditions, the CDMA operators would not be allowed the GSM spectrum. According to him, the impugned decision has disturbed the level playing field and attracts the provisions of Articles 14, 19 (1) (g) and 21 of the Constitution. He referred in this context to the decision of the Supreme Court in the case of **Reliance Energy Ltd. and Another v. Maharashtra State Road Development Corporation Ltd. and Others [[(2007) 8 SCC 1]** wherein the Apex Court held that "level playing field is an important concept while construing Article 19 (1) (g) of the Constitution... When Article 19 (1) (g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of level playing field".

78. We have considered the matter. As indicated by the Delhi High Court in its judgement dated 22.8.2008, "the phrase 'level playing field' alludes to the requirement of fairness i.e. fairness in competition so that no advantage is shown to either side". We are unable to see how the Petitioners' right to a level playing field is adversely affected on account of the impugned decision of DOT. As we have held in para 63 above, the concept of technology neutrality is already enshrined in the NTP-99 and also the licensing conditions. The Petitioners have not been able to place before us convincingly that a new decision has been taken which has completely altered the position to their disadvantage. Even assuming that technology neutrality is not a new concept, a reading of clause 5 of the UAS license conditions extracted in para 62 above, clearly shows that DOT as licensor has the right to alter, at any time, the licence conditions, if in the opinion of the licensor, it is necessary or expedient to do so in public interest. As such, insofar as the Petitioners are concerned, they knew even at the time of obtaining the UAS licence that the licence conditions are liable to be changed at any time in public interest. Secondly, the COAI itself had issued a letter to the Minister of Communications & Information Technology welcoming the entry of the CDMA operators into the GSM fold. As such, to now level a charge of disturbance of level playing field when the CDMA operators were given the GSM spectrum would not be appropriate. Thirdly, the main objection of the Petitioners is about the

CDMA operators being given GSM spectrum. They have no objection for the entry of new GSM players. It is an admitted position of the DOT that, even with 25.9. 2007 as the cut-off date, there were as many as 232 new applicants to whom letters of intent were issued and start-up spectrum was also given in as many as 84 cases. The Supreme Court in the *Reliance Energy case*, cited supra, had also indicated that "the doctrine of level playing field is subject to public interest and in the world of globalisation, competition is an important factor to be kept in mind". Given these facts, we are unable to agree with the petitioners that the impugned decision of DOT dated 19.10. 2007 has disturbed the level playing field. We notice that the Delhi High Court also in its judgement dated 22.8.2007 held that "prima facie, it cannot be held that the decision of the Government confers any unfair advantage to any particular person and consequently the submission that the Government has disturbed the level playing field is to be rejected".

79. The next question that is to be addressed is the Petitioners' contention that even assuming that technology neutrality and allocation of dual spectrum are to be permitted, the CDMA operators ought not to be given GSM spectrum of 4.4 MHz + 4.4 MHz but smaller quantities as are being given in the form of additional allocation to existing operators i.e. 1.8 MHz/1 MHz. We have considered the matter and find that the start up spectrum for GSM has always been 4.4 MHz +4.4 MHz. This is evidently an account of technical considerations and has its basis in the cell configuration. A minimum of 22 carriers are required and the bandwidth of each carrier is 200 KHz, taking the minimum requirement to 4.4 MHz. It is also noticed that the subscriber criteria for GSM spectrum, fixed from time to time, have been speaking of a minimum of 4.4 MHz. Since the GSM technology has to be implemented with new infrastructure by the CDMA operators, they should be entitled to a minimum start-up allocation of 4.4 MHz as in the case of other GSM operators. We accordingly hold that there is nothing irregular in grant of 4.4 MHz as start up spectrum to the Respondents.

80. We now turn to the contention of the Petitioners that while TRAI had recommended levy of spectrum usage charges on combined spectrum, DOT unilaterally changed it to permit levy of spectrum usage charges separately for GSM and CDMA spectrum with the result that CDMA operators would be paying much lower spectrum usage charges. We have analysed the matter. GSM and CDMA are admittedly separate streams. They have their own architecture and consequently, DOT has prescribed separate subscriber linked criteria. It is therefore difficult to club both these streams for the purpose of charging the spectrum usage charges. Besides, as per the Recommendations of TRAI, DOT has charged entry fee of Rs. 1651 crore. This is besides the entry fee that was charged for the CDMA spectrum. Having done so, it would not be equitable to charge the company for the combined spectrum of GSM and CDMA. We do not therefore agree with the contention of the Petitioners that those with dual technology and dual spectrum should be charged the spectrum usage charges on the basis of the combined spectrum.

81. Another contention of the Petitioners is that the DOT had disregarded the TRAI's Recommendations for imposing contingent roll-out obligation in case of dual allocation of spectrum. We have perused Para 4.35 of the Recommendations made by TRAI on 28.8.2007, where it is recommended that "if an existing licensee wishes to provide services using another technology, then he must be treated as per the norms of spectrum allocation in bands for alternate technologies. On payment of the specified fee for the service area for which the LICENSEE wishes to provide plurality of technologies, the licensee may be given additional spectrum equal to the initial spectrum allowed in the licence for that technology. The Authority further recommends that in order to ensure that this additional spectrum is efficiently and properly utilised in a timely manner, the licensee should also be required to fulfil the contingent roll out obligation." The letter dated 18.10.2007 addressed to M/s Reliance Communications Ltd. states that "the company shall meet the roll-out obligations and other stipulations of the UAS licence (s)." In the light of this, we do not agree with the Petitioners' contention that the DOT has disregarded the Recommendations of TRAI in respect of contingent roll-out obligation**.**

82. The learned counsel for Petitioners argued that DOT had disregarded the recommendations of TRAI regarding the one-time charges to be levied for allocation of spectrum. We notice that the CDMA operators who have been given GSM spectrum were charged fee equivalent to that paid by the fourth cellular operator. We would not like to further examine this issue as we were informed by the all the counsels that this is the subject matter of another writ petition being considered by the Delhi High Court.

83. One of the contentions of the learned counsel for Petitioners is that the impugned decision, which is ostensibly in public interest, is truly not in public interest. He states that firstly, Reliance which is already offering both GSM as well as CDMA services (under separate licences) in 5 service areas is lagging far behind its competitive rivals in almost all states. Secondly, if faster roll-out for larger number of subscribers was the justification, then allotting additional spectrum to existing GSM operators would have been the best solution as they can serve larger number of subscribers with smaller/same amount of spectrum utilising existing infrastructure. Insofar as the first issue is concerned, the counsel for 3rd Respondent, RCom, had already indicated that RCom's subscriber base is comparable to that of Bharti Airtel and Vodafone. As regards the second contention, we are unable to agree with the contention of the learned counsel for the simple reason that if this were to be accepted, there would be no possibility of any other operator coming in. Since the start-up spectrum is always 4.4+4.4 MHz, and since the coverage for the start of spectrum proportionately is less than that for spectrum beyond 6.2 MHz, it will always be argued that giving additional spectrum, even in small quantities, would be more advantageous clearly from the point of coverage of more subscribers. But this argument obscures the fact that competition is essential from consumers' point of view. It has been the experience in the Telecom sector that prices have fallen because of competition. We are

however conscious of the fact that this should not necessarily mean unlimited number of players in each service area, a point which we will not take up here since it is not a matter before us for adjudication.

84. In conclusion, we hold that the policy as well as licence conditions clearly stipulate that the UAS licence is technology neutral and that the technology choice is not confined to one technology for all times. It is necessary for the licensee to indicate the technology, as laid down in clause 23.1, following which the allocation of spectrum will be made, subject to availability and justification on a case to case basis, in the relevant frequency band, including further spectrum allocation in that frequency band. If a licensee, at a later date, chooses an alternate or an additional technology, in order to provide access services to the consumers, all it has to do is to indicate the other technology and await allocation of spectrum in the relevant frequency band, again subject to its availability and justification. The rationale for this approach can also be seen from the fact that technology is continuously evolving and it is difficult to have a situation where a licensee is forever barred from providing to its consumers the advantages of such new technology just because it is constrained by the original choice. We hold that there was nothing irregular in the action of the DOT in having issued the letter dated 18.10.2007 to the CDMA operators or in issuing the Press Release dated 19.10.2007.

85. The **third issue** for consideration is whether the subscriber linked criteria fixed by the DOT, as an interim measure, vide the order dated 17.1.2008 are arbitrary and whether the criteria fixed therein are unduly high. The learned counsels for Petitioners have argued that the criteria were deliberately fixed at an unduly high level so as to deny additional GSM spectrum to the GSM operators; that TRAI fixed the criteria for GSM spectrum allocation without having been asked to do so by the DOT; that TRAI fixed the criteria without following the due procedure; that several applications of GSM operators were made much before even the reference to TRAI by the DOT and that they were found valid. The contention of the learned Petitioners is also that the GSM operators were denied additional spectrum by arbitrary and ad hoc enhancement of subscriber linked criteria even as the start up GSM spectrum is given to CDMA operators. We proceed to examine each of these contentions, which can broadly be grouped as follows:

A. Whether the subscriber linked criteria were designed to adversely affect the interests of the existing GSM operators?
B. Whether the Recommendations of TRAI regarding subscriber linked criteria were rightly made?
C. Whether adoption by DOT of the criteria recommended by TRAI was appropriate?

86. The first contention raised by the petitioners is that the subscriber linked criteria were so fashioned as to deny spectrum to GSM operators and give the same to CDMA operators. Mr. Vaidyanathan, counsel for Petitioners states that Government wanted to find spectrum for new licences as well as persons who wanted the crossover (dual) spectrum. His case is that till the issue of the Press Release, even the Government was following the criteria laid down on 29.3.2006 and was disposing of the pending applications and also gave additional spectrum to BSNL and MTNL. Suddenly, TRAI gave its Recommendations and Government with alacrity appointed a Committee, which with equal alacrity submitted its report. But amidst all this, DOT had accepted TRAI's Recommendations, and went ahead with the disposal of applications on the basis of the Order dated 17.1.2008. But while those permitted for crossover spectrum as well as new licensees were being given spectrum, the existing licensees were being deprived of the same. The Union of India, in an affidavit dated 8.1.2008, submitted that even prior to the submission of the Recommendations by TRAI on 28.8.2007, the TEC was asked to study the matter and make suitable Recommendations. On receipt of the report of the TEC in October 2007, representations were received from the industry. Keeping these as well as TRAI's Recommendations in view, Government constituted a Committee to recommend revised subscriber base spectrum allocation criteria for allocation of spectrum in a scientific and practicable manner. This Committee which was headed by the Additional Secretary, DOT gave its report on 18.12.2007. In a further affidavit filed on 18.8.2008, the Union of India stated that Government had formed another Committee for allocation of Access (GSM/CDMA) spectrum and pricing. During the course of hearing, we were informed that this Committee had not yet completed its work. In this affidavit, and as brought out in para 75 above, it was also stated that the existing operators were given spectrum ahead of the grant of initial GSM spectrum for dual technology and that some of the new UAS licences of 2008 were given spectrum only thereafter, while other new UAS licences of 2008 are still awaiting grant of initial spectrum. In the light of this, the contention that the allocation of spectrum was made to favour CDMA operators seeking GSM spectrum, by virtue of dual technology, adversely affecting the interests of the existing operators does not seem to hold much ground. The Petitioners may be under the impression, which they believe is reasonable, that the entire exercise was deliberately aimed to affect their interests and to promote the interests of their competitors. But the fact that they were given spectrum ahead of the CDMA operators opting for dual technology shows that this is not true. We accordingly hold that this contention does not merit further consideration. However, the question remains whether the Petitioners ought to have been given additional spectrum that they were entitled to. This is an issue to which we will revert below.

87. We now turn to the question whether the Recommendations regarding subscriber linked criteria were rightly made by TRAI. The contentions raised by the Petitioners in this respect are that TRAI made these Recommendations without having been asked to do so and that the procedure followed by TRAI in making its Recommendations was in violation of the principles of natural justice and particularly transparency, which is obligatory as per section 11 (4) of TRAI Act. The learned counsel for Petitioners, Mr. Vaidyanathan, referred to the letter dated 13.4.2007 issued by DOT to TRAI and points out that there is no mention therein of any issue relating to spectrum allocation. He points out that at para 2.39 of the Recommendations dated 28.8.2007, TRAI itself states that "the Authority is conscious of the fact that DOT has not asked for any specific recommendation on the issue of spectrum allocation or of pricing." Admitting that this is so but explaining the reasons why TRAI made its Recommendations in this regard, Mr. Saket Singh, learned counsel for TRAI, stated that with reference to a

specific term of reference, TRAI had, in para 2.37 of the Recommendations, recommended that there should be no cap on the number of licences in a circle, The moment there is no cap, the next issue to be considered was how to deal with distribution of available scarce spectrum among different service providers. He explained that TRAI was looking into spectrum management as a whole and had also recommended that for a long term policy, a suitable Committee should be appointed. However, having felt, at the same time, that the present subscriber linked criteria needed to be tightened, TRAI did a theoretical simulation and gave an interim Recommendation, which was found to be workable by DOT. During the course of hearing, it was submitted before us that this issue was something that came up during the course of examination of the responses of the stakeholders on the issue of capping of the licensees in each service area. However, on examination, we find that the Consultation Paper (issued on 12.6.2007) itself identifies that availability of spectrum is a key issue that will determine the maximum limit of the number of operators in a service area. This aspect is dealt with in paras 6.37 to 6.50 of the Consultation Paper. But for some reason, it does not find place in the issues for consideration, listed at para 6.51 of the Consultation Paper.

88. The further contention of the learned counsel for Petitioners is that TRAI's Recommendations on subscriber linked criteria for spectrum allocation were made in total violation of the principles of transparency. There is an established practice of giving out Consultation Paper, calling for views, and discussing them in a public hearing. In this case, none of these procedures were followed. Then, turning to the Recommendations themselves, the learned counsel states that transparency is lacking in arriving at the Recommendations. None of the material therein is disclosed to anyone. He argues that if TRAI wants to determine any issue, they must follow the set procedure. Besides, TRAI does not come to a final conclusion but has suggested the constitution of a multi-disciplinary Committee. Given this position, the counsel questions the need for TRAI to determine various issues relating to spectrum management including the subscriber linked criteria on its own, particularly when it was not asked to do so. He also contends that none of the issues listed in the Recommendations were disclosed to the stakeholders. It is also contended that the theoretical simulation referred to in Para 2.60 of the Recommendations, which was the basis for arriving at the recommended subscriber linked criteria was also not disclosed to anyone. But, TRAI made Recommendations which have a wide-ranging effect. Although TRAI issued a corrigendum after certain discrepancies were pointed out, it did not change the numbers.

89. The contention of the learned counsel for TRAI is that during the consultation process, papers were invited and both COAI and Reliance made presentations. So, he contends, the presentation of COAI was part of the consultation. Notwithstanding this, the counsel stated that there is no statutory requirement that TRAI has to hold a consultation. The Authority has the power to rely on data and make its decision. According to him, if there is a process it is sufficient to ensure transparency. Besides, he argued, the criteria recommended are only as an interim measure.

90. We are unable to agree with the contention of the counsel for TRAI. As was pointed out earlier by us, the issues relating to spectrum availability and management were identified in detail in the Consultation Paper but no issue was posed for consultation. There is also no averment to the effect that detailed comments were received from stakeholders on the subject. The only submission is that both COAI and Reliance had made presentations. During the course of hearing, the learned counsel for Petitioners stated that the paper presented by Reliance was not made available to them but they were only asked to make some suggestions. Without going into the correctness or otherwise of this submission, suffice it to say that receipt of comments even from two institutions does not tantamount to an open consultation. To this extent, we hold that TRAI had failed to observe the prescription in the TRAI Act that it should observe the principle of transparency. It is expected of institutions like TRAI to follow a uniform procedure while making its Recommendations. It cannot choose the procedure to suit its convenience.

91. The next question for consideration is whether the subscriber linked criteria accepted by the Government are right. There were in all three Recommendations before the Government. The first was the Recommendations of TRAI dated 28.8.2007, wherein the Authority had indicated certain criteria which were higher than the criteria adopted vide the order dated 29.3.2006. Even before the Recommendations of TRAI were received, the DOT had asked TEC to look into the criteria to be adopted. The TEC gave its report in October 2007, when the industry represented against the criteria adopted by the TEC. In order to address the various concerns, DOT constituted a Committee called the Spectrum Review Committee on 6.11.2007. This Committee submitted its report on 18.12.2007. It was a fractured report and after setting out divergent views of its Members, the Committee left it to the Government to decide on the criteria. Government accordingly issued orders on 17.1.2008, adopting, as an interim measure, the criteria recommended by TRAI. The DOT had also separately constituted another Committee for allocation of access (GSM/CDMA) spectrum and pricing. It is understood that the report of this Committee is awaited. This clearly indicates that the DOT had not finally decided on the subject and that the criteria adopted for allocation of spectrum are only of an interim nature. Nevertheless, we proceed to examine the appropriateness or otherwise of the criteria recommended by TRAI.

92. But before doing so, we would like to briefly refer to the contentions of the Petitioners regarding the criteria recommended by the TEC. In an affidavit filed on 6.11.2007 the Petitioners assailed the report of the TEC on the ground that the report was a hastily prepared and rushed exercise, that the Committee was not a multi-disciplinary Committee as suggested by TRAI in its Recommendations dated 28.8.2007, that there was non-transparency in the calculations; that the increase was arbitrary and illegal and that the principles of natural justice as well as of level playing field have been violated. Subsequently, in an additional affidavit filed on 30.9.2008, the Petitioners have also questioned the technical parameters which formed the basis of TEC report and also presented a report prepared by one Dr. Chris Davis, Director, Quotient Associates Ltd, which is said to be an internationally repeated Agency. Arguing on their behalf, the learned

counsel for Petitioners pointed out that the report of Dr. Davis clearly identifies the arbitrary nature of the TEC calculations in respect of various parameters. Countering this argument, the learned counsel for Union of India charged that the Petitioners had filed the additional affidavit only with the ulterior motive of stalling wider competition. He submitted that the criteria adopted by TEC were arrived at in a fair and transparent manner after making a full presentation to all the stakeholders including the Petitioners and that the concept paper as well as other papers were posted on the TEC website. He detailed the various steps taken by the TEC along with their dates. He also pointed out that the reply to the additional affidavit clearly brings out the lacunae in the case of the Petitioner. The learned counsel for 3rd Respondent contended that the intention of the Petitioners is to create confusion and to mislead the Tribunal, and requested that the objections of the Petitioners need to be rejected on this ground alone. He also pointed out that the Petitioners had raised the same issue of calculations of TRAI and TEC before the DOT Spectrum Review Committee on 26.11.2007 and that these were considered by the Committee. He also referred to his client's letter dated 30.11.2007 explaining to the DOT Committee the flaws in the case of the COAI. He further submitted that DOT had constituted as a Committee of technical experts on 16.6.2008 including the representatives of COAI and AUSPI.

93. Insofar as the Recommendations of TEC are concerned, we do not feel it necessary to consider the question whether or not the Recommendations made by TEC are valid. At this stage, and as only preliminary comments, we find that TEC's calculations of the number of subscribers that can be supported by a given amount of spectrum is based on scientific method of traffic modelling and with technical understanding of practical network operations. The criteria adopted by the TEC regarding the carrying capacity of the BTS (Base Trans-receiver Station) also appear to be realistic. TEC's exercises for estimating special utilization efficiency also appear to have been carried out in a fair and transparent manner as deliberations were held with stakeholders, inputs from stakeholders considered and analysed. We also notice that after these Recommendations were issued and made public, representations were made by the Industry to the Government and that the DOT had constituted a Spectrum Review Committee to go into the entire matter. On this Committee's recommendations, DOT decided to adopt the subscriber linked criteria recommended by TRAI, as an interim measure. Simultaneously, the DOT also constituted another Committee on 16.6.2008 under the chairmanship of the Additional Secretary, DOT and with various Members including technical experts from different institutions, the Ministry of Defence as well as COAI and AUSPI. We are given to understand that this Committee has not yet completed its task and that its report is awaited. In the light of this, it is obvious that the TEC report did not form the basis of any Government decision. We do not find it necessary to pass a judgement on this issue as firstly, this report has not been acted upon by the DOT; and secondly, the entire issue is under review by a Committee constituted by the DOT in June 2008. There can however be no denying the fact that deployment of technologies, solutions and network elements is not a one-time exercise and that all available technologies and innovative solutions need to be exploited to the full extent on regular basis for the most efficient use of available spectrum.

94. Having dealt with the criteria set by the TEC, we now turn to the criteria recommended by TRAI. Since DOT adopted, albeit as an interim measure, the subscriber linked criteria recommended by TRAI, what is to be examined is whether these criteria are arbitrary and are unduly high. In their original petition, the COAI contested these Recommendations on the ground that it had not taken into account the fact that actual spectrum requirements are governed by the hotspot (dense urban) areas in big cities and not by the service area as a whole; that the BTS configurations adopted were incorrect; that TRAI had not taken into account the requirements of data capacity and that it had also not taken into account the spectrum required for in building solutions and micro-sites etc. It is also pointed out that when they had taken up these issues with TRAI, the latter issued a corrigendum on 13.9.2007 but did not make any changes in the numbers. The learned counsel for Petitioners pointed out that while technically only a BTS configuration of 4+3+4 and maximum traffic capacity of 56 erlangs is feasible for 6.2 MHz of GSM spectrum, TRAI has assumed traffic as high as 104/146 erlangs and a BTS configuration of 6+6+6 and 8+8+ 8. Although subsequently TRAI corrected this configuration, it stuck to the traffic capacity and the subscriber base. The learned counsel stated that the very fact that TRAI issued a corrigendum shows that its original calculations were not based on proper technical analysis. Besides, TRAI did not take into account data capacity requirement in a network as well as spectrum required for in building solutions. Another factor that led to TRAI's overestimate in the subscriber base is the assumption regarding capacity utilisation for practical at 102%. He stated that while the realistic figure should be 71% capacity utilisation, even TEC takes into account only 85%. According to learned counsel for Petitioners, if capacity utilisation figure of 71% is adopted, the subscriber base will only be 10 lakh instead of 15 lakh.

95. In its Reply, the Union of India had only stated that the subscriber linked criteria adopted in the order dated 29.3.2006, are outdated and are no longer relevant. In its reply, TRAI relied once again on the Recommendations dated 28.8.2007.

96. A perusal of TRAI's Recommendations dated 28.8.2007shows that the Authority wanted that the issue of spectrum allocation criteria, pricing methodology and management system should be taken up as a holistic and the long-term policy issue and should address the four dimensions of the problem viz., measures to increase spectrum efficiency, spectrum allocation criteria, efficient pricing of spectrum and the need for improving spectrum management. In the section dealing with the measures to increase spectrum efficiency, the Authority spoke of twenty different measures available to achieve this objective. Dealing with the issue of subscriber base criteria, the Authority itself states that the subscriber based criteria for spectrum allocation has several limitations and problems, especially in the current market environment. Para 2.50 of the Recommendations outlines the deficiencies of the subscriber base criterion inasmuch as it does not consider subscriber base density across service areas, does not account for subscriber distributions between service areas and has led to over reporting of the subscriber base. In Paras 2.51 and 2.52, it is also stated that this criterion also causes problems from a network planning perspective and that "given these problems with the subscriber base criteria, it is necessary that in a truly competitive, growing market, where technology neutrality is the norm, spectrum assignments should not be based only on subscriber base growth." In Para 2.60 it is stated that "the Authority is conscious of the fact that due to paucity of time

it is not possible to frame and recommend revised allocation criteria for a longer term framework taking into account the latest spectrum efficient techniques and the foregoing discussion." However the Authority, on the basis of some theoretical simulation, suggested revision in the criteria as per the table given therein. However the Authority recommended that in order to frame new spectrum allocation criteria, a multi-disciplinary Committee may be constituted. It is thus clear that although it is a laudable objective, the Authority, admittedly because it did not have adequate time and based only on theoretical simulation, arrived at some subscriber norms, "as an interim measure so that the task of spectrum allocation is not stalled." It is significant that there was no reference to TRAI to review or examine the spectrum allocation criteria. Nor is there any indication anywhere that the spectrum allocation has been 'stalled' because of lack of revised norms. Under the circumstances, it is not clear as to why TRAI chose to recommend revised subscriber norms based on a theoretical simulation and that too, without an opportunity being given to all stakeholders to debate the issue. This is all the more incomprehensible when the Consultation Paper itself has identified the need to assess the adequacy of spectrum requirements including to the existing operators. We cannot help but observe that TRAI ought to have been more careful, painstaking and transparent in attempting this exercise.

97. But, the question arises whether DOT itself was wrong in adopting the revised criteria. There can be no doubt that spectrum is a scarce national resource and must be utilised in the most efficient manner. And this was apparently engaging the attention of the DOT, precisely why it referred the matter to TEC even prior to receiving the Recommendations of the TRAI. Obviously, spectrum allocation not being a term of reference to TRAI, DOT could not have foreseen that TRAI was making Recommendations in this regard. The TEC submitted its report on 26.10. 2007 and the report was made public on 31.10.2007. The criteria recommended by TEC were more stringent than those recommended by TRAI and therefore immediately after the report's Recommendations were known, there were representations from the Industry and DOT decided to constitute a Committee headed by the Additional Secretary, DOT. This Committee, which is known as the Spectrum Review Committee, gave its Recommendations on 18.12.2007. From a perusal of this Committee's report, accompanying an affidavit filed by Union of India on 8.1.2008, it is seen that this Committee went into several details and consulted experts on the subject besides TEC, COAI and AUSPI. Having studied the subject, within the limited time available to it, the Committee noted that "India is the only country in the world that is using a subscriber linked criterion for incremental spectrum allocation to operators." The Committee recommended that "it is time to look at other criteria for deciding incremental spectrum allocation, possibly in combination with a subscriber linked criterion." It also recommended that "keeping in view the immediate task at hand, as an interim measure, until such time as a Committee as recommended above is constituted and it completes its work, (two experts) felt that criteria recommended by TRAI, which is the regulatory body, may be considered by Government. However, (one expert) was of the view that for GSM systems TEC criteria may be considered while for CDMA, the TRAI criteria may be considered. In view of the sharp divisions among the members of the Committee regarding this important issue, the Committee felt that this decision is best left to the Government." It can thus be seen that the Government was left with the task of having to choose between the various Recommendations. It finally adopted, on 17.1.2008, and as an interim measure, the Recommendations of TRAI. We note that the Delhi High court had concluded that "it was observed (by the three Committees-TRAI, TEC and the DOT Spectrum Review Committee) that the 2006 norms had lost all relevance in the matter. None of the expert bodies have even remotely suggested adherence to the 2006 norms".

98. The petitioners have questioned the right of DOT to apply the revised subscriber linked criteria with, what they term, retrospective effect. The learned counsel for petitioners Dr. Singhvi argued that subscriber linked criteria cannot be applied with retrospective effect and that the legal principle of retrospectivity is that it cannot be read even into an Act unless it is specifically expressed or very clearly implied. The counsel pointed out that it is just not available for subordinate legislation, let alone executive orders. In this context he relied on the judgement of the Supreme Court in **Kusumam Hotels (P) Ltd. V. Kerala State Electricity Board & Ors. [2008 (9) SCALE]** and also the case of **Chairman, Railway Board and Others v. C.R. Rangadhamayya and Others [(1997) 6 SCC 623]**. In the *Kusumam Hotels case*, the Apex Court observed that "it is also not in dispute that all administrative orders are to be to be considered prospective in nature. When a policy decision is required to be given a retrospective operation, it must be stated so expressly or by necessary implication. The authority issuing such direction must have power to do so." In the *Rangadhamayya case*, the Apex Court observed that "it has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution." We have considered the argument of the learned counsel for petitioner as well as the judgements of the Apex Court in both these cases. The central point to the argument of the learned counsel is that to receive additional spectrum is a right vested in the petitioners. The judgement of the Supreme Court in the *Rangadhamayya case*, cited supra, was in the background of vested right having been available. The Supreme Court held that in many of the decisions of the Supreme Court cited in that particular case, the expressions "vested rights" or "accrued rights" have been used by striking down the impugned provisions, and that the said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at the time. We have already held in paras 42 and 43 above that the petitioners do not have any vested right to receive additional spectrum. We have also held that it is an undisputed fact that the allocation of spectrum beyond the contracted 6.2 MHz is subject to justification, availability and on consideration on a case-by-case basis. Insofar as the *Kusumam Hotels case*, cited supra, is concerned, it was again a case where the appellant therein had a right which was sought to be removed with retrospective effect, without any authority, and it was therefore held that the respondent therein i.e. the Kerala State Electricity Board had no right to issue the appellant with the demand-cum-disconnection notices with retrospective effect. Here again, the facts of that case are entirely different from the present case, where the petitioners did not have any right to receive additional spectrum on any given date.

99. The real issue for consideration is whether the decision of the DOT in adopting the Recommendations of TRAI as an interim measure is itself flawed. Two aspects have been brought to our notice in this regard. The learned counsel for the 1st Respondent, Union of India, pointed out that the actual subscriber base achieved by the Petitioners as on 31.12.2008, with the available spectrum that was allotted to them prior to January 2008, was more than the subscriber linked criteria recommended by TRAI. He gave figures of the available subscriber base in the four Metro cities. The position of the spectrum allocated, the criteria prescribed by the order of DOT dated 29.3.2006, the Recommendations of TRAI and the Recommendations of TEC Committee as well as the subscriber base as on 31.12.2008 in the four Metro cities emerges as shown in the Table below (**Page 62**).

100. It is interesting to note that some of the operators such as MTNL in Mumbai (MTNL figures for Delhi are not given), BPL Mobile in Mumbai , BSNL in Kolkata and Chennai and Reliable Internet Ltd and Dishnet Wireless Ltd in Kolkata have subscriber base even less than what was prescribed in the Order dated 29.3.2006. In all other cases however, the subscriber base is close to the figure recommended by TRAI. It is agreed by all parties that the problem of spectrum availability is more in the Metro circles than in the non-Metro circles. It would therefore be reasonable to assume that the figures in the Metro areas reasonably represent the overall situation. Accordingly, we hold that the DOT, particularly given the background brought out above, was right in adopting the criteria recommended by TRAI as an interim measure. We would however direct DOT to appropriately revise these figures within one month of the receipt of the report of the Committee constituted by it in June 2008, and apply the same to all the allotments that were made in pursuance of the 17.1.2008 order.

TABLE

(referred to in para 99)

A statement showing the available spectrum, recommended subscriber linked criteria and subscriber base (VLR) as on 31.12.2008 in four Metro cities.

S. No.	SERVICE AREA	OPERATOR	Spectrum Allotted*	Subscriber linked criteria (Figures in Lakh)			Subs-criber Base (VLR) as on 31.12.08 (in lakh) (as reported by UOI)
				Order dt. 29.3.06	TRAI Recommen-dation dt. 28.8.2007	TEC Recommen-dation dt. 26.10.07	
1.	Delhi	Bharti Airtel Ltd	10+10 MHz	16	30	48	34.29
		Vodafone Essar	10+10 MHz	16	30	48	28.32
		MTNL	12.4+12.4 MHz	21	50	63	--
		Idea Cellular Ltd	8+8 MHz	10	20	34	16.49
2.	Mumbai	BPL Mobile	10+10 MHz	16	30	58	10.88
		Vodafone Essar	10.2+10.2 MHz	16	30	58	29.74
		MTNL	12.4+12.4 MHz	21	50	75	10.25
		Bharti Airtel	9.2+9.2 MHz	16	30	58	21.73
3.	Kolkata	Bharti Airtel	8+8 MHz	6	20	36	18.34
		Vodafone Essar	9.8+9.8 MHz	10	30	50	20.67
		BSNL	10+10 MHz	10	30	50	7.52
		Reliable Internet Ltd	6.2+6.2 MHz	4	15	20	3.75
		Dishnet Wireless Ltd	4.4+4.4 MHz	2	5	6	1.64
4.	Chennai	Aircel Cellular	8.6+8.6 MHz	6	20	31	11.96
		Bharti Airtel	9.2+9.2 MHz	6	20	31	--
		BSNL	10+10 MHz	10	30	43	8.26
		Vodafone Essar	8 + 8 MHz	6	20	31	9.95

101. We now turn to **the fourth issue** raised by the petitioners which is one of alleged impropriety in allocation of additional spectrum to BSNL and MTNL even while the applications of some of the GSM operators were pending. A principal grievance of the Petitioners is that their applications for allocation for

additional spectrum which were made long before the receipt of TRAI's Recommendations were kept in cold storage and that they were not allocated spectrum in time. It is contended that it is unfair on the part of the DOT to now deny the spectrum to which they were admittedly entitled, on the ground that the subscriber linked criteria have now been revised. The learned counsel for Petitioners brought to our attention letters written by the DOT to M/s Bharti Airtel stating that their applications for additional spectrum have been examined and found eligible but that the additional spectrum can only be allocated on its availability. It is their contention that the applications must be disposed off with reference to the rules prevailing at the time of application and not on the date of decision.

102. It is also contended by the counsel for petitioner that BSNL and MTNL were allocated spectrum of 10 MHz to BSNL in all service areas (8 MHz and West Bengal) and 12.5 MHz to MTNL in Delhi and Mumbai. And they have been given the spectrum in March/May 2007, in accordance with the criteria laid down in the Order dated 29.3.2006. He argued that by giving spectrum to these two PSUs in excess of their eligibility under the subscriber linked criteria and also out of turn allotment vis-à-vis other GSM applicants, DOT had not only discriminated against private GSM operators but also violated the principle of level playing field. Everywhere, BSNL was given 10+10 MHz except in respect of West Bengal. But strangely, Bharti Airtel whose application was found meeting the criteria in September 2006 was not given spectrum and it was required to abide by the criteria adopted in January 2008. He states that NTP-99 enjoins a level playing field among all operators including the public sector operators. He states that the NTP-99 document talks of 'level playing field' even with reference to DOT. He also refers to the Press Note dated 13.9.1999 which states that "the Deptt. of Telecom/MTNL would operate cellular services under the same terms and conditions of licence has would be applicable to private operators", as well as the judgement in the case of **Cellular Operators Association of India and Others v. Union of India and Others [(2003) 3 said SCC 186].**

103. The learned counsel also cited the decisions of the Hon'ble Supreme Court in the cases of **Union of India and Others v. Asian Food Industries [(2006) 13 SCC 542]**; **Y.V. Rangaiah and Others v. J. Sreenivasa Rao and Others [(1983) 3 SCC 284]**; and **Union of India and Others v. Dev Raj Gupta and Others [(1991) 1 SCC 63]** to support his case that the petitioners have a vested right because the rule prevailing at the time of application was the relevant rule. His contention is that his client's application was found eligible but spectrum was not allotted only because of lack of availability. It would now be iniquitous and unjust to apply the revised criteria, particularly when BSNL and MTNL were allotted Spectrum in March/May 2007.

104. Countering this charge, Mr. Vikas Singh, learned counsel for Union of India stated that firstly, the criteria laid down on 29.3.2006 are outdated and are no longer relevant. It is precisely because of this that DOT had asked TEC to look into this issue and make its recommendations. Secondly, he states that PSUs can be treated differently and cited the judgement of the Honourable Supreme Court in the case of **Indian Drugs and Pharmaceuticals Ltd and Others v. Punjab Drug Manufacturers Association and Others [(1999) 6 SCC 247]** in support of his contention.

105. We have carefully considered the matter. The licence conditions clearly state that spectrum will be made available subject to availability and justification on a case by case basis. In this particular case, DOT had given letters to Bharti Airtel in November 2006 and January 2007 stating that the applications in respect of Mumbai Metro service area (letter dated 16.11.2006), West Bengal Telecom service area (letter dated 24.11.2006), Rajasthan Telecom service area (letter dated 3.1.2007) and UP-East service area (letter dated 11.1.2007) have been found to be meeting the applicable criteria. The issue of these letters have not been controverted nor is the fact that both BSNL and MTNL were given additional spectrum. There are two issues here. Firstly, whether the petitioners are entitled for the spectrum on the basis of the letters issued by DOT. The letters from DOT to Bharti Airtel are more or less uniform in their language. The letters state in each case that "your requirement for additional GSM spectrum vide letter dated .... has been received and found to be meeting the applicable criteria. However, as no spectrum is presently available, your requirement has been noted and will be considered along with other similar pending requirements and in its order of priority, once the spectrum becomes available." Now the question is whether these letters confer any legitimate right on the party for spectrum allocation irrespective of changes, if any, in the allocation criteria.

106. The counsel for Petitioner sought to rely on the judgements cited above, to support his case. As we have already held in para 43 above, the *Asian food industries case* does not apply. For the reasons elucidated by us, the petitioners do not have any vested right. In the *Y.V. Rangaiah case*, cited supra, the Apex Court held that "posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules." In the *Dev Raj Gupta case,* cited supra, the appellants, Union of India, made a demand for conversion charges on the basis of the rate prevalent in April 1981 instead of the rate prevalent on February 15, 1978. The Apex Court held that February 27, 1981 was the date on which a proper application was made by Dev Raj Gupta and others. Noting that the appellant had not replied to this letter till January 12, 1984, the court directed that "(14) ......in the absence of anything else on record, it will have to be held that the date with reference to which conversion charges are to be counted is February 27, 1981. (15) The authority has calculated additional premium with reference to May 27, 1981 on the footing that the outer limit for granting permission was three months from the date of receipt of the application. There is no justification for the authority to hold thus, for they are expected to process the application as early as possible and not to wait till the end of three months."

107. We hold that these two cases are not relevant to the present case. There is a material difference between the two situations. The *Dev Raj Gupta case* is really one of admonition that every application must be dealt with expeditiously and that there cannot be an assumption that delay would be involved. In the present case, there is no such allegation that the application was not responded to quickly. The allegation is only that the follow-up action was not taken and that in the meanwhile the criteria have changed. The principle in the Y.*V. Rangaiah case* also does not apply. In that case, the issue involved was one of promotion to certain posts. In the present case, on the other hand, there is a clear stipulation in the license conditions itself that additional spectrum would be allocated subject to eligibility and availability on a case-to-case basis. Suffice it to say, we do not agree with the contention of the petitioners that they are entitled to spectrum on the basis of the letters received by them from DOT.

108. Technology, particularly in a sector like telecommunications, is forever evolving and the demand is always growing. Spectrum being a scarce resource has to be utilised most efficiently and the parameters of the efficiency also have to keep pace with the advances in technology. It would therefore be incorrect to assume or to argue that criteria once established will remain frozen. It is noteworthy that three Committees which went into the issue -- TRAI, TEC, and the DOT Spectrum Review Committee -- have all stated that the criteria need revision. In a situation such as this, it would be inappropriate to argue that the criteria laid down in March 2006 should be applied. There is also no evidence on record to indicate that the Petitioners, who have received the above letters from the DOT, have reminded the Government about allocation of spectrum. It is also true that the subscriber base of these petitioners has also increased and could be accommodated within the available spectrum. The country is adding about 9-10 million subscribers every month and a majority of this addition is in the GSM segment. The very fact that there has been admittedly no allocation of spectrum to the petitioners for the last one half years shows that the spectrum available with the GSM operators was adequate to absorb the increased subscriber base. And this itself justifies the revised subscriber linked criteria. Under such circumstances, it cannot be said that it would be in the public interest to give additional spectrum to the Petitioners on the basis of March 2006 norms. We notice that the Delhi High Court has, in its judgement of 22.8.2008, also held that even if it was to be held that the letters mentioned above contained a promise or created any vested right in the petitioners or individuals, interests of the public at large as well as equity would override any individual rights. Our view is that no vested rate is created." The Delhi High Court also observed that the reports of the three committees mentioned above have separately found that the petitioners and other GSM operators are catering to a subscriber base well beyond the parameters indicated by the government for the spectrum allocated to them. It has also observed that "it is also an admitted position that no capital expenditure has been incurred and no technology advancement has been effected by the GSM operators to improve efficiency. On the contrary, there is a reluctance to upgrade systems for optimum and efficient utilisation of the allocation." In their Petition as well as in the course of arguments, the petitioners have attempted to show that they have indeed invested in new and advanced technology in order to more efficiently use the spectrum available with them. We would not like to go into this issue since we do not have adequate material before us to judge the position either way. It is for expert bodies such as the Committee constituted by DOT to examine the case of each licensee in a service area and determine whether the service providers have achieved the desired spectral efficiency, keeping in view the available technology and the costs involved.

109. We now come to the question of, both BSNL and MTNL having been given additional spectrum. There is no satisfactory explanation as to why BSNL and MTNL were given the additional spectrum. There is no material available before us to indicate whether these two Public Sector Undertakings (PSUs) applied for the spectrum for the respective Circles, and whether they satisfied the subscriber linked criteria for allocation of additional spectrum. As can be seen from the statement at **Para 93** above, at least in respect of Mumbai, even on 31.12.2008, MTNL had only 10.25 lakh subscribers with 12.4 MHz whereas as per the subscriber base criteria fixed vide the order dated 29.3.2006, the subscriber base required was 10 lakh even for allocation of spectrum of 10 MHz. It can reasonably be assumed that the subscriber base of MTNL in Mumbai would have been even less than 10.25 lakh when they were allocated spectrum of 12.4 MHz. It is possible that similar is the case with some of the BSNL circles, since the statement at **para 93** above also indicates that BSNL's subscriber base was below the prescribed limits in Kolkata and Chennai circles. There is therefore reasonable ground to infer that BSNL did not perhaps meet, in the first instance, the criteria even of 29.3.2006. Even if they did, there was no rationale for treating the PSUs differently and giving them additional spectrum when the same was not being given to the other operators. Level playing field is a principle specifically laid down in NTP-99. In fact, NTP-99 laid out a principle of level playing field even with respect to DOT, which as Government is sovereign. The learned counsel for Union of India sought to apply the judgement in the *Indian Drugs & Pharmaceuticals case*, cited supra, and argued that the PSUs can be treated differently and that the principle of level playing field does not apply vis-à-vis them. A perusal of this judgement shows that what was under challenge was the validity of the policy decision of the Government of Punjab, which was set aside by the Punjab & Haryana High Court, whereby directions were issued to the purchasing authority that certain medicines used in the government hospitals and dispensaries were to be purchased from public sector manufacturers only. The Hon'ble Supreme Court referred, in this context, to the case of **Sarkari Anaj Vikreta Sangh v. State of M.P [(1981) 4 SCC 471]** where the Supreme Court held that "if the government took a policy decision to prefer consumers co-operative societies for appointment as agents to run fair price shops,.... there can be no discrimination." The Supreme Court also referred to the case of **Hindustan Paper Corporation Ltd v. Govt. of Kerala [(1986) 3 SCC 398]** wherein the Apex Court held that "preference shown to government companies cannot be considered to be discriminatory as they stand in a different class altogether and the classification made between government companies and others for the purpose of the Act is a valid one." Accordingly, the Supreme Court observed that " in our opinion, the High Court in that case has not considered the various judgements referred to by us hereinabove, some of which are of a Constitution Bench of this Court, which has upheld the classification made between private undertakings and public sector undertakings." Accordingly, the Supreme Court set aside the decision of the Punjab & Haryana High Court.

110. We have carefully considered this judgement. In the present case, there is a document NTP-99 which clearly upholds the principle of level playing field. The relevant portion of this document reads as follows:

"Availability of adequate frequency spectrum is essential not only for providing optimal bandwidth to every operator but also for entry of additional operators. Based on the immediately available frequency spectrum band, apart from the two private operators already licenced, DOT/MTNL would be licensed to be the third operator in the service area in case they want to enter, in a time bound manner. In order to ensure a level playing field between different service providers in similar situations, licence fee would be payable by DOT also. However, as DOT is the national service provider having immense rural and social obligations, the Government will reimburse full licence fee to the DOT. "

112. Secondly, it is not the contention of the Union of India that the discrimination in favour of BSNL and MTNL is a matter of policy in public interest. In this case, both BSNL and MTNL are licensees and are covered by all the conditions of the licence. Allocation of spectrum to them would be on the same basis as for the private operators. We therefore hold that the ratio laid down by the Apex Court in the various cases cited above in the *Indian Drugs & Pharmaceuticals case* do not apply to the present case. Besides, in this era of liberalisation, there cannot be any discrimination between public and private sector operators. We accordingly hold that allocation of additional spectrum to BSNL and MTNL on the basis of the criteria laid down in the order dated 29.3.2006 is a discrimination against the private GSM operators. Strictly speaking, since the plea taken by the Union of India as well as both these PSUs is that this additional spectrum was allocated only on trial basis, there should be no difficulty if we order that this additional spectrum should be withdrawn forthwith. But, as brought to our notice, BSNL has already advised its offices to put this spectrum to commercial use. And these instructions must have been acted upon. Given this position, we are conscious that withdrawal of the spectrum given to these two PSUs would most likely cause inconvenience to the Public and we would like to avoid the same. We accordingly direct the DOT to immediately review the subscriber base of these two PSUs in all the Circles and withdraw such spectrum which is beyond the criteria laid down by the DOT in their Order dated 17.1.2008. This will restore the level playing field between the private and public sector operators. Further, our direction to DOT in para 100 above to apply the revised criteria to all the operators would apply to BSNL and MTNL as well. Needless to say, BSNL and MTNL must utilise their spectrum with as much efficiency as is expected of the private sector.

113. One of the issues raised by the Respondents is that the Petitioners herein are desirous of continuing their monopoly in the GSM arena and that they are against competition. This is fiercely contested by the learned counsels for Petitioners who have marshalled certain facts to indicate that their clients are not against competition. We feel it is unnecessary to go into this issue. It is in the nature of business that Companies compete with each other. It is also natural that those who occupy the field would be loath to see new entrants coming in and sharing the pie. It is equally natural for new entrants to want to enter into areas which are found to be commercially attractive. We, therefore, feel it unnecessary and, in fact, futile to go into this question and have deliberately avoided dealing with this issue.

114. In conclusion, we hold as follows in respect of the issues identified by us in para 14 above:

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

II. On technology neutrality, we hold that the concept of technology neutrality was very clearly enunciated as early as 1999 and definitely after November 2003. We hold that a reading of the NTP-99 document and the licence conditions reveals that the concept of dual technology is not a new concept and that this is contained in the above documents. We are of the view that in analysing the issue of technology neutrality, TRAI did not exhibit the required degree of care and has avoidably given the impression that the concept of technology neutrality was something new. We hold that in taking the decision reflected in the letter dated 18.10.2007 or the Press Release dated 19.10.2007, no impropriety was committed by DOT. We do not find any ground to level mala fide intention on the part of DOT and accordingly hold that the issue of early completion of formalities is not a matter that would require intervention at our level. We are unable to agree with the petitioners that the impugned decision of DOT dated 19.10.2007 has disturbed the level playing field. We hold that there is nothing irregular in grant of 4.4 MHz as start up spectrum to the Respondents. We do not agree with the contention of the Petitioners that those with dual technology and dual spectrum should be charged the spectrum usage charges on the basis of the combined spectrum. We do not agree with the Petitioners' contention that the DOT has disregarded the Recommendations of TRAI in respect of contingent roll-out obligation.

III. On the issue of subscriber linked criteria, we hold that the Petitioners' contention that the subscriber linked criteria were designed to adversely affect the interests of the existing GSM operators does not merit consideration. We hold that in arriving at the subscriber linked criteria, TRAI failed to observe the principle of transparency. It is expected of institutions like TRAI to follow a uniform procedure while making its Recommendations. It cannot choose the procedure to suit its convenience. We hold that TRAI was wrong in arriving at revised subscriber norms based on a theoretical simulation and that too, without an opportunity being given to all stakeholders to debate the issue. TRAI ought to have been more careful, painstaking and transparent in attempting this exercise. However, an analysis of the actual subscriber of different service providers in the Metro Circles reveals that the figures are close

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

IV. We hold that allocation of additional spectrum to BSNL and MTNL on the basis of the criteria laid down in the order dated 29.3.2006 is a discrimination against the private GSM operators. We accordingly direct the DOT to immediately review the subscriber base of these two PSUs in all the Circles and withdraw such spectrum that is beyond the criteria laid down by the DOT in their Order dated 17.1.2008. Further, our direction to DOT to apply the revised criteria to all the operators would apply to BSNL and MTNL as well.

115. Before leaving, we would like to point out that considerably avoidable confusion was caused on account of three factors. The first is the fact that, as indicated above, TRAI did not interpret the licence conditions properly with reference to the concept of Technology neutrality. It has now taken the stand that what is detailed in the earlier part of their Recommendations on this subject is the popular perception. If this is truly so, it could have been made explicit alongwith the reasons why this perception is incorrect and that TRAI does not agree with it. Secondly, while we have held that the DOT was not wrong in adopting the subscriber linked criteria recommended by TRAI and we also see that the figures therein are reasonable, we cannot help but comment on the manner in which these criteria were arrived at. It is important that TRAI should have subjected this exercise to a proper process of consultation as per their normal practice.

116. The third and more important aspect is the Recommendation of TRAI on the number of service providers in each service area. TRAI's Recommendation was that there should be no cap and that this should be left to market forces. In their affidavit filed on 18.8.2008, Union of India have indicated that "after receipt of the TRAI recommendations on no capping of number of licences in any service area, there has been a spurt in the number of applications for grant of UAS licenses received by DOT." Therefore, DOT announced, through a Press Release dated 25.9.2007, a cut-off date of 1.10.2007. It was indicated that till the cut-off date, 575 applications for UAS licences were received of which 343 applications were received after 25.9.2007. As per the affidavit, keeping in view the large volume of applications, the competent authority decided to issue Letters of Intent to only those eligible applicants who applied on or prior to 25.9.2007 in each service area. This number was 232. Even here, as per a Statement in the affidavit, Only 24 new UAs licensees of 2008 could be allocated spectrum and as many as 88 new licensees of 2008 are awaiting allotment of initial GSM spectrum. Now, it is common knowledge that spectrum is a scarce commodity. It can be argued that a licence, per se, does not entitle the licensee to receive spectrum and that in the absence of spectrum, the licensee is required to roll out services using wireline technologies. This would however be a specious argument as it is common knowledge that, today, the Cellular Mobile service is the preferred service, for reasons of cost and popular choice. It is also a well-known that for efficient and economic operations, including laying out of networks, a certain minimum spectrum is essential. The average spectrum allocation per operator in other countries is higher than in our country. Already, as indicated by TRAI itself, there are 6 to 9 operators in each service area and there is demand for additional spectrum. It is therefore puzzling as to why TRAI recommended a no cap policy on the number of service providers. In our view, DOT would be well advised to review this policy keeping in view the various relevant parameters and take an appropriate decision. We also note that the Press Release dated 19.10.2007 speaks of guidelines regarding merger and acquisition to be issued separately. We are confident that Government in DOT would keep in view the requirements of adequate spectrum for efficiency of spectrum utilisation while expeditiously formulating the merger and the acquisition guidelines.

117. At the end, we must record that we have been greatly helped, in dealing with this case, by the arguments and wisdom of the various counsels. We would like to convey our sincere appreciation to all the arguing counsels as well as those who have assisted them for making our task easy by taking us through the various facets of the case.

118. The petition is accordingly disposed of. Taking into consideration the various aspects of the case, we decide not to impose costs on any of the parties.

........................J

(Arun Kumar)
Chairperson

....

(J.S. Sarma)
Member

....

(G.D. Gaiha)
Member