REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 423 OF 2010

Centre for Public Interest Litigation and others …Petitioners

versus

Union of India and others …Respondents

With

WRIT PETITION (CIVIL) NO. 10 OF 2011

Dr. Subramanian Swamy …Petitioner

versus

Union of India and others …Respondents

J U D G M E N T

G.S. Singhvi, J.

1. The important questions which arise for consideration in these petitions, one of which has been filed by Centre for Public Interest Litigation, a registered Society formed by Shri V.M. Tarkunde (former Judge of the Bombay High Court) for taking up causes of public interest and conducting public interest litigation in an organised manner, Lok Satta, a registered Society dedicated to

political governance, reforms and fight against corruption, Telecom Watchdog and Common Cause, both Non-Governmental Organisations registered as Societies for taking up issues of public importance and national interest, Sarva Shri J.M. Lingdoh, T.S. Krishnamurthi and N. Gopalasamy, all former Chief Election Commissioners, P. Shanker, former Central Vigilance Commissioner, Julio F. Ribero, former member of the Indian Police Service, who served as Director General of Police, Gujarat, Punjab and C.R.P.F. and Commissioner of Police, Mumbai, P.G. Thakurta, an eminent Senior Journalist and visiting faculty member of various institutions including IIMs, IIT, FTII, IIFT, Delhi University, Jawaharlal Nehru University and Jamia Milia Islamia University and Admiral R.H. Tahiliyani, former Chief of Naval Staff, former Governor and former Chairman of Transparency International India and the other has been filed by Dr. Subramanian Swami, a political and social activist, are:

(i) Whether the Government has the right to alienate, transfer or distribute natural resources/national assets otherwise than by following a fair and transparent method consistent with the fundamentals of the equality clause enshrined in the Constitution?

(ii) Whether the recommendations made by the Telecom Regulatory Authority of India (TRAI) on 28.8.2007 for grant of Unified Access

Service Licence (for short 'UAS Licence') with 2G spectrum in 800, 900 and 1800 MHz at the price fixed in 2001, which were approved by the Department of Telecommunications (DoT), were contrary to the decision taken by the Council of Ministers on 31.10.2003?

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

(iv) Whether the policy of first-come-first-served followed by the DoT for grant of licences is *ultra vires* the provisions of Article 14 of the Constitution and whether the said policy was arbitrarily changed by the Minister of Communications and Information Technology (hereinafter referred to as 'the Minister of C&IT'), without consulting TRAI, with a view to favour some of the applicants?

(v) Whether the licences granted to ineligible applicants and those who failed to fulfil the terms and conditions of the licence are liable to be quashed?

2. For detailed examination of the issues raised by the petitioners, it will be useful to briefly notice the history of the growth of telecommunications in the country and the reforms introduced 1984 onwards.

3. In 1839, the first telegraph link was experimented between Calcutta and Diamond Harbour covering 21 miles. In 1851, the telegraph line was opened for traffic, mostly for the official work of the East India Company. In course of time, telegraphy service was made available for public traffic. The Indian Telegraph Act was enacted in 1885. It gave the exclusive privilege of establishing, maintaining and working of "telegraphs" to the Central Government. It also empowered the Government to grant licences on such conditions and in consideration of such payments as it thought fit, to any person to establish, maintain or work a telegraph in any part of India.

4. After independence, Government of India took complete control of the telecom sector and brought it under the Post & Telegraph Department. One major step taken for improving telecommunication services in the country was the establishment of a modern telecommunication manufacturing facility at Bangalore under the Public Sector, in the name of "Indian Telephone Industries Ltd." The reforms in the telecommunication sector started in 1984 when the Centre for Development of Telematics (C-DoT) was set up for developing indigenous technologies and permissions were given to the private sector to

manufacture subscriber-equipment. In 1986, Mahanagar Telephone Nigam Ltd., (MTNL) and Videsh Sanchar Nigam Ltd., (VSNL) were set up.

5. The New Economic Policy of India was announced on 24.7.1991. It was aimed at meeting India's competitiveness in the global market; rapid growth of exports, attracting foreign direct investment; and stimulating domestic investments. With a view to achieve standards comparable to international facilities, the sub-sector of Value Added Services was opened up to private investment in July 1992 for the following services: (a) Electronic Mail; (b) Voice Mail; (c) Data Services; (d) Audio Text Services; (e) Video Text Services; (f) Video Conferencing; (g) Radio Paging; and (h) Cellular Mobile Telephone.

In respect of services (a) to (f), the companies registered in India were permitted to operate under a licence on non-exclusive basis. For services covered by (g) and (h) mentioned above, keeping in view the constraints on the number of companies that could be allowed to operate, a policy of selection through a system of tendering was followed for grant of licences.

National Telecom Policy 1994

6. National Telecom Policy 1994 (NTP 1994) was announced on 13.5.1994. This was the first major step towards deregulation, liberalization and private sector participation. The objectives of the policy were:

(i) affording telecommunication for all and ensuring the availability of telephone on demand;

(ii) providing certain basic telecom services at affordable and reasonable prices to all people and covering all villages;

(iii) giving world standard telecom services; addressing consumer complaints, dispute resolution and public interface to receive special attention and providing widest permissible range of services to meet the customers' demand and at the same time at a reasonable price;

(iv) creating a major manufacturing base and major export of telecom equipment having regard to country's size and development; and

(v) protecting the defence and security interest of the country.

7. In furtherance of NTP 1994, licences were granted to eight Cellular Mobile Telephone Service (CMTS) operators, two in each of the four metropolitan cities of Delhi, Mumbai (Bombay), Kolkata (Calcutta) and

Chennai (Madras). In the second phase, in December 1995, after following a competitive bidding process, 14 CMTS licences were awarded in 18 state circles, 6 Basic Telephone Services (BTS) licences were awarded in 6 state circles and paging licences were awarded in 27 cities and 18 state circles. However, this did not yield the intended results apparently because revenue realised by the cellular and basic operators was less than the projections and the operators were unable to arrange finances for their projects.

New Telecom Policy 1999

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8. On the directions of the Prime Minister, a high level Group on Telecommunications (GoT) was constituted on 20.11.1998 to review the existing telecom policy and suggest further reforms. On the basis of the report of the GoT, a draft New Telecom Policy 1999 (NTP 1999) was formulated. After its approval by the Cabinet, NTP 1999 was announced to be effective from 1.4.1999. NTP 1999 had the following objectives:

(i) to make available affordable and effective communications for the citizens, considering access to telecommunications as utmost important for achievement of the country's social and economic goals;

(ii) to provide universal service to all uncovered areas including the rural areas and also provide high level services capable of

meeting the needs of the country's economy by striking a balance between the two;

(iii) to encourage development of telecommunication in remote, hilly and tribal areas of the country;

(iv) to create a modern and efficient telecommunications infrastructure taking into account the convergence of IT, media, telecom and consumer electronics which will in turn propel India to become an IT superpower;.

(v) to convert PCOs wherever justified into Public Teleinfo centres having multimedia capability such as Integrated Services Digital Network (ISDN) services, remote database access, government and community information systems, etc.;

(vi) to transform, in a time bound manner, the telecommunications sector in both urban and rural areas into a greater competitive environment providing equal opportunities and level playing field for all players;

(vii) to strengthen research and development efforts in the country and provide an impetus to build world class manufacturing capabilities;

(viii) to achieve efficiency and transparency in spectrum management;

(ix) to protect defence and security interests of the country; and

(x) to enable Indian Telecom Companies to become truly global players.

9. NTP 1999 categorized 8 services in the telecom sector, namely; (i) Cellular Mobile Service Providers (CMSPs), Fixed Service Providers (FSPs) and Cable Service Providers, collectively referred as 'Access Providers'; (ii) Radio Paging Service Providers; (iii) Public Mobile Radio Trunking Service Providers; (iv) National Long Distance Operators; (v) International Long Distance Operators; (vi) Other Service Providers, (vii) Global Mobile Personal Communication by Satellite (GMPCS) Service Providers; (viii) V-SAT based Service Providers. NTP 1999 dealt with, and provided the framework for, all these categories of telecom service providers.

10. The policy on spectrum management as enumerated in NTP 1999 was as under:

(i) Proliferation of new technologies and the growing demand for telecommunication services has led to manifold increase in demand for spectrum and consequently **it is essential that the spectrum is utilized efficiently, economically, rationally and optimally.**

(ii) **There is a need for a transparent process of allocation of frequency spectrum for use by a service provider and making it available to various users under specific conditions.**

(iii) With the proliferation of new technologies it is essential to revise the National Frequency Allocation Plan (NFAP) in its

entirety so that it becomes the basis for development, manufacturing and spectrum utilization activities in the country amongst all users. NFAP was under review and the revised NFAP was to be made public by the end of 1999 detailing information regarding allocation of frequency bands for various services, without including security information.

(iv) NFAP would be reviewed no later than every two years and would be in line with radio regulations of the International Telecommunication Union (ITU).

(v) Adequate spectrum is to be made available to meet the growing need of telecommunication services. Efforts would be made for relocating frequency bands assigned earlier to defence and others. Compensation for relocation may be provided out of spectrum fee and revenue share.

(vi) There is a need to review the spectrum allocation in a planned manner so that required frequency bands are available to the service providers.

(vii) **There is a need to have a transparent process of allocation of frequency spectrum which is effective and efficient and the same would be further examined in the light of ITU guidelines. In this regard the following course of action shall be adopted viz.:**

(a)**spectrum usage fee shall be charged**;

(b)an Inter-Ministerial Group to be called Wireless Planning Coordination Committee, as a part of the Ministry of Communications for periodical review of spectrum availability and broad allocation policy, should be set up; and

(c)massive computerization in WPC Wing would be started in the next three months so as to achieve the objective of making all operations completely computerized by the end of the year 2000.

(emphasis supplied)

Establishment of the Telecommunication Commission (for short, 'the Telecom Commission') and the Telecom Regulatory Authority of India.

11. On 11.4.1989, the Council of Ministers passed a resolution and decided to establish the Telecom Commission. The relevant portions of that resolution are extracted below:

"CABINET SECRETARIAT

New Delhi the 11th April, 1989

RESOLUTION

CONSTITUTION OF TELECOM COMMISSION

No. 15/1/2/87-Cab. 1. Telecommunication service is an essential infrastructure for national development. It has impact on social and economic activities. Besides, business, industry and administration depends heavily on information and telecom for productivity, efficiency and their day-to-day operations. Its development, therefore, is vital for nation building.

In order to promote rapid development in all aspects of telecommunications including technology, production and services, the Government of India consider it necessary to set up an organisation, which will have responsibility in the entire field of telecommunications.

After careful consideration, the Government of India have decided to establish a Telecommunication Commission with full executive and financial powers modelled on the lines of the Atomic Energy Commission.

2. Constitution of the Commission

(a) The Commission will consist of full time and part time Members;

(b) The Secretary to the Government of India in the Department of Telecommunications shall be the ex-officio Chairman of the Commission;

(c) The full time Members of the Commission shall be ex-officio Secretary to the Government of India in the Department of Telecommunications. One of these Members shall be Member for Finance; and

(d) The Secretary and the full time Members of the Commission shall be drawn from the best persons available, including from within the Department of Telecommunications.

3. Functions

The Telecom Commission shall be responsible :

(a) For formulating the policy of the Department of Telecommunications for approval of the Government;

(b) For preparing the budget for the Department of Telecommunications for each financial year and getting it approved by the Government; and

(c) Implementation of the Government's policy in all matters concerning telecommunication**.**

4. Within the limits of the budget provision, approval by the Parliament, the Commission shall have the powers of the Government of India, both administrative and financial, for carrying out the work of the Department of Telecommunications.

5. Chairman

(a) The Chairman, in his capacity as Secretary to the Government of India in the Department of Telecommunications, shall be responsible under the Minister of Communications for arriving at decisions on technical questions and advising Government on policy and allied matters of telecommunication. All recommendations of the Commission on policy and allied matters shall be put to the Minister of Communications through the Chairman.

(b) In case of any difference of opinion in the meetings of the Commission, the decision of the Chairman shall be final, but in financial matters, Member (Finance) of the Commission will have access to Finance Minister.

(c) The Chairman may authorise any Member of the Commission to exercise on his behalf, subject to such general or special orders as he may issue from time to time, such of his powers and responsibilities as he may decide.

6. Member Finance

The Member of Finance shall exercise powers of the Government of India in financial matters concerning the Department of Telecommunications except in so far as such powers have been, or may in future be conferred on or delegated to the Department.

7. The Commission shall have power to frame its own rules and procedures. The Commission shall meet at such time and places as fixed by the Chairman.

8. The Telecom Commission shall take over all legal and statutory authority vested with the Telecom Board."

12. The Rules of Business for the Telecom Commission were also framed in 1989. In terms of para 2 of the Rules of Business read with item 1 of Annexure 'A' appended thereto, all important matters of policy relating to Telecommunications are required to be brought before the Telecom Commission.

13. In 1997, Parliament enacted the Telecom Regulatory Authority of India Act, 1997 (for short, 'the 1997 Act') to provide for the establishment of TRAI. By Act No.2 of 2000, the 1997 Act was amended and provision was made for establishment of the Telecom Disputes Settlement and Appellate Tribunal (TDSAT). Sections 11 and 13, which have bearing on the decision of these petitions read as under:

> "11. Functions of Authority. - (1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to-
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> (a) to make recommendations, either *suo motu* or on a request from the licensor, on the following matters, namely:-
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> (i) need and timing for introduction of new service provider;
> (ii) terms and conditions of licence to a service provider;
> (iii) revocation of licence for non- compliance of terms and conditions of licence;
> (iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;
> (v) technological improvements in the services provided by the service providers;

(vi) type of equipment to be used after inspection of equipment used in the network;
(vii) measures for the development of telecommunication technology and any other matter relatable to telecommunication industry in general;
(viii) efficient management of available spectrum;

(b) discharge the following functions, namely:-

(i) ensure compliance of terms and conditions of licence;
(ii) (ii)notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;
(iii) ensure technical compatibility and effective inter-connection between different service providers;
(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;
(v) lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;
(vi) lay-down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;
(vii) maintain register of interconnect agreements and of all such other matters as may be provided in the regulations;
(viii) keep register maintained under clause (vii) open for inspection to any member of public on payment of such fee and compliance of such other requirement as may be provided in the regulations;

(ix) ensure effective compliance of universal service obligations;

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

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

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

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

Provided also that the Authority may request the Central Government to furnish such information or documents as may be necessary for the purpose of making recommendations under sub-clauses (i) and (ii) of clause (a) of this subsection and that Government shall supply such information within a period of seven days from receipt of such request:

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

Provided also that if the Central Government having considered that recommendation of the Authority, comes to a prima facie conclusion that such recommendation cannot be accepted or needs modifications, it shall, refer the recommendation back to the Authority for its

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

(2) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India:

Provided that the Authority may notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefor.

(3) While discharging its functions under sub-section (1) or sub-section (2) the Authority shall not act against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions.

13. Power of Authority to issue directions. - The Authority may, for the discharge of its functions under sub-section (1) of section 11, issue such directions from time to time to the service providers, as it may consider necessary:

Provided that no direction under sub-section (4) of section 12 or under this section shall be issued except on the matters specified in clause (b) of sub-section (1) of section 11."

14. After its establishment, TRAI made various recommendations either *suo motu* or on the request of the licensor, i.e., the Central Government or the

Telegraph Authority. On a reference made by the Ministry of Communications and Information Technology on four issues including the issues of appropriate level of entry fee, basis of selection of new operators and entry of 4th cellular operator, TRAI made its recommendations, which were communicated to Secretary, DoT vide D.O. No. 250-14/2000-Fin (DF) (Vol. II) dated 23.6.2000. Paragraphs 4.1 to 4.3, 4.5 to 4.6 and 4.11 to 4.15 of that letter are extracted below:

> "4. For the purposes of clarity each issue on which TRAI's recommendation has been sought has been stated separately and recommendations have been given therefor.
>
> 4.1(A) Appropriate level of entry fee, basis for selection of new operators and entry of fourth operator
> The issues under this head can be broken under three main subheads. These are :
> (i) Level of entry fee;
> (ii) Basis for selection of new operation;
> (iii) Entry of the fourth operator.
> We take these issues sequentially.
>
> 4.2(1) Level of Entry Fee:-
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> New operators are to be licensed in the following vacant circles/slots:
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> (a)Jammu & Kashmir - Andamans & Nicobar Islands;
> (b) Assam and West Bengal;
> (c) DOT/MTNL as the third operator.
> (d)Fourth operator in circles where migration has been permitted.
>
> 4.3 DOT/MTNL wherever they come in as the third operator as also the fourth operator to be introduced will be required to pay as licence fee the same percentage share of their revenue as

recommended by TRAI for the existing CMSPs who are being allowed to migrate to revenue sharing arrangement in accordance with NTP 99. The fourth operator will also pay an entry fee which will be fixed through a process of bidding.

4.5 (ii) Selection of new operators:

The TRAI recommends that all new operators barring DOT/MTNL be selected through a competitive process. This is recommended to be a multi stage bidding process preceded by a pre-qualification round.

4.6 Pre-qualification

Prospective operators would be required to meet pre-determined criteria in order to qualify to bid for the licence. Pre-qualifications will mainly be on the following grounds :-

- Financial strength and experience as Telecom Service Provider
- Minimum roll out obligation
- Technical Plan
- Business Plan
- Payment terms and other commercial conditions

It is recommended that prospective bidders who meet the pre-determined threshold as set out in the pre-qualification criteria be short-listed for bidding for entry fee in the next stage. No weightages need be attached to the pre-qualification criteria. The criteria for pre-qualification could be developed on the following lines:-

4.11 The Structure of the Bidding Process

Selection from amongst all those who pass the pre-qualification round will be by a process of bidding. The bids will be carefully structured so as to guard against the possible misuses of the process such as preemptive over-bidding or cartelisation. For this purpose, a bid structure involving “Multi Stage Informed Ascending Bids” is recommended. It is also recommended that such bids be invited for the entry fee for selection of operations and issuing licenses to them. Although, as recommended earlier in

the case of NLDO, TRAI is primarily of the opinion that because of its greater relevance, direct impact on operations and being equitable, revenue sharing is a better basis on which to invite bids for licenses, in the case of CMSPs this choice is not available except in two vacant circles/slots. The 34 incumbent operators have already been given licenses through a process of bidding and it would not be correct to subject them to yet another process of bidding, this time concerning revenue sharing. They have already been asked to pay as license fee, albeit on a provisional basis a fixed amount of the revenue share viz. 15%. It is, therefore, recommended that a fixed percentage of revenue share be paid by all operators as the license fee and this percentage be the same for all the operators barring the exceptions specifically mentioned in the paragraph 5.9 below.

4.12 While, the detailed bid structure can be prepared at the time bids are being called and assistance/advise of experts may be taken in doing so, based on the experience of such successful bids elsewhere, the basic outlines of the proposed structure can be given. Bids can be invited for more than one licence at a time. The total number of rounds in which the bids will be finalised will be pre-determined and all bidders should be eligible to bid for all licenses on offer in each of the rounds. The licensor, may, however, if it so desires, stipulate beforehand the total number of licences that can be finally allotted to a single bidder. The TRAI's recommendation in this regard is that the number of licences that can go to a single bidder need not be restricted. This will favour the serious and techno-financially strong bidders and will help keep the bids at operationally feasible optimal levels.

4.13 After each stage of bidding, bids received will be made public and all bidders (those lower than the highest bidder as well as the highest bidder) will be permitted to raise their bids in the subsequent rounds of bidding. The process will be deemed complete only on the completion of the pre-determined number of bid rounds at the end of which the highest bidder for each licence will have the claim to the license in question. Licences will become effective on payment of the amount of the winning bid for the entry fee within a period specified in the tender document.

4.14 The same process of bidding will also enable selection of operators where two slots in the same circle are vacant viz. J & K and Andaman and Nicobar where no operators exist. In these circles, two bidders may be selected and it is recommended in this regard that while the second highest bidder in these circles may be considered for the second slot available, he need not be asked to match the bid of the highest bidder. It may be provided though that if the difference between the first and the second highest bids is substantial, say more than 25 %, fresh bids for the second slot will be invited. Such an arrangement while being equitable will act as a good incentive for attracting bids for these circles which have not proved to be attractive in the past.

(III). Entry of the Fourth Operator:

4.15 DOT/MTNL, the incumbent in basic services, are to enter the field of cellular mobile services as the third operator in terms of NTP 99 with the existing availability of spectrum. TRAI, however, has no information about the availability of spectrum either for the third or the fourth operator. The financial analysis conducted by the TRAI for the purpose of studying the revenue share which the operators can part with as licence fee assumes entry of the third operator in the sixth year of licence i.e. in the current year and of another i.e. the fourth operator two years later in accordance with NTP 99. The analysis reveals that even if the business in each of these metropolitan areas and circles is required to produce a reasonable IRR say 16-18 % and a decent return on the capital say around 20%, it would still enable the operators to share upto about 25% of the Gross (adjusted) revenue as the licence fee. In the circumstances, it would be reasonable to assume that on purely economic grounds, in most circles there is even at present, a fair case for the entry of the fourth operator. In this context, however, more than the market, the determining factor has to be the availability of a spectrum and its optimal utilisation. Moreover, it is also a matter for careful consideration that even when additional spectrum is released, whether it should be utilised to augment the number of service providers or for improving the quality and coverage of the already available services. In the GSM 900 band the maximum frequency spectrum made available to the operators in a large number of countries is a pair of 12.5 MHz. Against this in India the circle operators have been given a pair of less than 5

> MHz and the metro operators of less than 7 MHz. It is learnt that in a number of metros and circles, no further expansion of services is possible unless additional spectrum is made available to the existing operators. Paucity of frequency spectrum is also adversely affecting the quality of service in a number of service areas. In the circumstances a fair balance between the two objectives of increasing competition on the one hand and improving the quality, coverage and price-efficiency of the service on the other will have to be struck so that the larger objective of providing quality services at affordable prices is not jeopardised. A sub-optimal cost structure and quality of service may finally turn out to be detrimental to the growth of tele-density notwithstanding a higher number of service providers. Similar views were expressed also by the BICP in their report on Cellular Mobile Services (para 20 page-V) of the report). Accordingly, TRAI is of the opinion that a view can be taken in this matter only after getting a full report from the DOT on the quantum of spectrum being made available for the CMSPs, existing as well as the proposed new entrants and its location i.e. whether it is going to be in the 900 MHz or in 1800 MHz bands."
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> (underlining is ours)

15. On 5.1.2001, the Government of India issued guidelines for issue of licence for CMTS. These guidelines envisaged a detailed bidding process for selection of the new service providers.

16. On 27.10.2003, TRAI made recommendations under Section 11(1)(a)(i), (ii), (iv) and (vii) of the 1997 Act on Unified Licensing. TRAI referred to international practices, NTP 1994 and NTP 1999 and growth of telephone density - national objective and priority. Para 7.2 of those recommendations read as under:

> "7.2 The Guidelines would be notified by the licensor based on TRAI recommendations to include nominal entry fee, USO, etc. The charges for spectrum shall be determined separately. The operator shall be required to approach the licensor mainly for spectrum allocation. Since, spectrum is a scarce resource, it needs to be regulated separately. Spectrum should be distributed using such a mechanism that it is allocated optimally to the most efficient user."

17. Paragraphs 7.15 to 7.19 of the 2003 recommendations contained various alternatives for deciding the benchmark for the entry fee for Unified Access Licensing Regime. In paragraph 7.30, TRAI laid emphasis on efficient utilization of spectrum by all service providers and indicated that it would make further recommendations on efficient utilization of spectrum, spectrum pricing, availability and spectrum allocation procedure shortly, and the DoT may like to issue spectrum related guidelines based on its recommendations.

18. In the meanwhile, a Group of Ministers was constituted on 10.9.2003 with the approval of the Prime Minister to consider the following matters:

i) To recommend how to ensure release of adequate spectrum needed for the growth of the telecom sector;

ii) To recommend measures for ensuring adequate resources for the realization of the NTP targets of rural telephony;

iii) To resolve issues relating to the enactment of the Convergence Bill;

iv) To chart the course to a Universal Licence;

v) To review adequacy of steps and enforcing limited mobility within the SDCA for WLL(M) services of basic operators, and recommend the future course of action;

vi) To appraise FDI limits in the telecom sector and give recommendations thereon;

vii) To identify issues relating to mergers and acquisitions in the telecom sector and recommend the way forward; and

viii) To consider issues relating to imposition of trade tax on telecom services by the State Governments.

19. After considering the entire matter, the Group of Ministers made detailed recommendations on 30.10.2003, the relevant portions of which are extracted below:

> "2.1 1st Term of Reference: to recommend how to ensure release of adequate spectrum needed for the growth of the telecom sector.
>
> 2.1.1 The GOM was informed that the availability of adequate spectrum in appropriate frequency bands, i.e. 1800 MHz in a timely manner is crucial, for the growth of mobile telephone services. The growth of mobile services and resultant spectrum needs are mainly in metro, major and main cities having population above 1 million. However, the frequency bands of 1800 MHz are extensively used by Defence services, thus severely limiting their availability for the mobile telecom operators.
>
> 2.1.2 In the above context, GoM recommended the following:
>
> (1) Adequate spectrum be made available for the unimpeded growth of telecom services, modalities for which will be jointly worked out by Wireless Planning & Coordination (WPC) Wing of Department of Telecom and Defence services. The Ministry of Defence would coordinate release additional spectrum in a number of cities for which requirements have been projected within a month.

(2) The Ministry of Finance will provide necessary budgetary support to Ministry of Defence for modernization of their existing equipment to facilitate release of required spectrum. The actual fund requirements including its phasing will be worked out between the Ministry of Defence Ministry of Finance and the Department of Telecom in a time bound manner.

(3) **The Department of Telecom and Ministry of Finance would discuss and finalise spectrum pricing formula which will include incentive for efficient use of spectrum as well as disincentive for sub-optimal usages**

(4) **The allotment of additional spectrum be transparent fair and equitable, avoiding monopolistic situation regarding spectrum allotment usage**

(5) The long term 15-20 years, spectrum requirements along with time frames would also be worked out by Department of Telecom.

(6) As per the directions of GoM, a Task Force has been constituted under the chairmanship of Wireless Adviser to the Govt. of India with representatives from Department of Telecom, Ministry of Defence and Ministry of Finance. The terms of reference of the Task Force and the progress of its work so far are given in Annexures II & III.(Page 17-18).

2.4 4th Term of Reference:- To chart the course to a Universal Licence:

2.4.1 The GoM took note of the exercise that had already been indicated by Telecom Regulatory Authority of India (TRAI), in regard to Unified Licensing Regime in the Telecom Sector Chairman, TRAI and Chairman HDFC were specially invited made presentations before the GoM.

2.4.2 TRAI submitted its recommendations to the Government on this matter on 27.10.2003. TRAI has recommended that the present system of licensing in the Telecom Sector should be replaced by Unified Licensing/Automatic Authorization Regime. The Unified Licensing/Automatic Authorization Regime has been recommended to be achieved in a two-stage process with the Unified Access Regime for basic and cellular services in the first phase to be implemented immediately. This is to be followed by a process of consultation to define the guidelines and rules for achieving a fully Unified Licensing/Authorization Regime. TRAI has recommended that it will enter into a consultation process so that the replacement of the existing licensing regime by a Unified Licensing Regime gets initiated within 6 months. Broad rationale key recommendations and some key policy issues that have been addressed by TRAI are listed in the Annexure IV(pages 19-21).

2.4.3 The salient points of TRAI recommendations in regard to the Unified Access Licensing (basic and cellular mobile), are as under:

(i) Unification of licenses to be done in two stages

(a) Unified access regime for basic and cellular services in the first phase immediately
(b) Unified authorization regime encompassing all telecom services in the second phase.

(ii) Fee paid by fourth cellular operator to be benchmark for migration of basic players to the new access regime.

(iii) Cellular operators not to pay any entry fee for migration to the unified access regime while basic operators to pay the differences between fourth

cellular operators licence fee and the BSO fee already paid by them

(iv) Reliance Infocom required to pay Rs. 1096 crores for migration in addition to penalty of Rs. 485 crores for offering cellular type services.

(v) Process of migration to the new regime to be voluntary.

(vi) The existing BSOs after migration to Unified Access Licensing Regime may offer full mobility however WLL(M) operators after migration will be required to offer limited mobility service to such customers who so desire.

(vii) No additional fee to be paid for any of the circles where there is no fourth cellular operator.

2.4.4 Enhancing the scope of current Telecom Policy (NTF-99) to provide category of Unified License and Unified Access Service License

NTP-99 recognises access service providers as a distinct class. For the purpose of licensing, this has been sub-divided into cellular fixed and cable service providers. NTP-99 also states that convergence of both markets and technologies is a reality that is forcing realignment of the industry. This convergence now allows operators to use their facilities to deliver some services reserved for other operators necessitating a re-look at NTP-94 policy framework.

For bringing into effect the regime of Unified Access Service for basic and cellular service licenses and Unified Licensing comprising all telecom services, it would be necessary to enhance the scope of NTP-99 to include these as distinct categories of licenses as pet of NTP-99.

2.4.5 TRAI recommendations on entry fee of WLL(M) based on TDSAT judgement:

TRAI has also submitted its recommendations in regard to additional entry fee payable by basic service operators for providing WLL(M) services on which Government had sought its recommendations based on the judgment of TDSAT dated 8/8/03 in the WLL(M) case. TRAI has given detailed reasoning on this matter and has recommended additional entry fee for such of the Basic Service Operators who provide WLL(M) service. The salient features are in Annexure-V (page 22).

2.4.6 Based on the above the GoM has recommended the following course of action

(i) The scope of NTP-99 may be enhanced to provide for licensing of Unified Access Service for basic and cellular license services and Unified Licensing comprising all telecom services. Department of Telecommunications may be authorized to issue necessary addendum to NTP-99 to this effect.

(ii) The recommendations of TRAI with regard to implementation of the Unified Access Licensing Regime for basic and cellular services may be accepted.

DoT may be authorized to finalise the details of implementation with the approval of the Minister of Communication & IT in this regard including the calculation of the entry fee depending upon the date of payment based on the principles given by TRAI in its recommendations.

(iii) The recommendations of TRAI in this regard to the course of action to be adopted subsequently in regard to the implementation of the fully Unified License Authorisation Regime may be approved.

DoT may be authorized to finalise the details of implementation with the approval of the Minister of

Communications & IT on receipt of recommendations of TRAI in this behalf.

(iv) The recommendations of TRAI in regard to additional entry fee payable by basic service operators for providing WLL(M) service on which Government sought its recommendations based on the judgment of TDSAT dated 8.8.2003 in the WLL(M) case may be accepted.

(v) While there appears to be no case for giving any compensation package to them, because of the perception that the finances of the cellular operators are strained and because of the effect these may have on financial institutions. Finance Ministry would address the difficulties of the cellular operators, if any, separately and appropriately.

(vi) If new services are introduced as a result of technological advancements which require additional spectrum over and above the spectrum already allotted/contracted allocation of such spectrum will be considered on payment of additional fee or charges, these will be determined as per guidelines to be evolved in consultation with TRAI."

(emphasis supplied)

20. The recommendations of the Group of Ministers were accepted by the Council of Ministers on 31.10.2003.

21. Thereafter, DoT issued Office Memorandum dated 11.11.2003 and made some additions to NTP 1999. The same day, DoT issued new guidelines for UAS Licences. Two salient features of these guidelines were that the existing

operators would have an option to continue under the existing licensing regime or to migrate to new UAS Licence and the licence fee, service area, rollout obligations and performance bank guarantee under UAS Licence was to be the same as the 4th CMTS.

22. Vide letter dated 14.11.2003, the Chairman, TRAI, on his own, made recommendation regarding entry fee to be charged from the new UAS Licensees. On 24.11.2003, the Minister of C&IT accepted the recommendation that entry fee for new UAS Licensees will be the entry fee of 4th cellular operator and where there is no 4th cellular operator, it will be the entry fee fixed by the Government for the basic operator. A decision was also taken by him in F. No.20-231/2003-BS-III (LOIs for UASL) at 4/N that,

> "As regards the point raised about the grant of new licences on first-come-first-served basis, the announced guidelines have made it open for new licences to be issued on continuous basis at any time. However, the spectrum is to be allotted subject to availability. This in effect would imply that an applicant who comes first will be granted the spectrum first so it will result in grant of licence on first-come-first-served basis."

Although, in terms of the decision taken by the Minister of C&IT, the applications for grant of UAS Licence could be made on continuous basis and were required to be processed within 30 days, some applications were made in 2004 and 2006 and the same were kept pending.

23. On 13.5.2005, TRAI made comprehensive recommendations on various issues relating to spectrum policy, i.e., efficient utilisation of spectrum, spectrum allocation, **spectrum pricing**, spectrum charging and allocation for other terrestrial wireless links. These recommendations were not placed before the Telecom Commission. Though, the then Secretary, DoT submitted the file to the then Minister of C&IT on 16.8.2005 for information with a note that he will go through the recommendations and put up the file to the Minister for policy decision, the file was returned on 12.9.2006, i.e., after one year and no further action appears to have been taken.

24. In the meanwhile, on 23.2.2006, the Prime Minister approved constitution of a Group of Ministers, consisting of the Ministers of Defence, Home Affairs, Finance, Parliamentary Affairs, Information and Broadcasting and C&IT, to look into issues relating to vacation of spectrum. Deputy Chairman, Planning Commission was special invitee. The Terms of Reference of the Group of Ministers, among other things, included suggesting a **Spectrum Pricing Policy** and examining the possibility of creation of a spectrum relocation fund. After five days, the Minister C&IT wrote letter dated 28.2.2006 to the Prime Minister that the Terms of Reference of the GoM were much wider than what was

discussed in his meeting with the Prime Minister. He appears to have protested that the Terms of Reference would impinge upon the work of his Ministry and requested that the Terms of Reference be modified in accordance with the draft enclosed with the letter. Interestingly, the Minister's draft did not include the important issue relating to Spectrum Pricing. Thereafter, vide letter 7.12.2006, the Cabinet Secretary conveyed the Prime Minister's approval to the modification of the Terms of Reference. The revised Terms of Reference did not include the issue relating to Spectrum Pricing.

25. On 14.12.2005, the DoT issued revised guidelines for UAS Licence. Paragraph 11 of the new guidelines reads as under:

> "The licences shall be issued without any restriction on the number of entrants for provision of unified access services in a Service Area."

In terms of paragraph 14 of the guidelines, the licensee was required to pay annual licence fee at 10/8/6% of Adjusted Gross Revenue (AGR) for category A/B/C service areas, respectively excluding spectrum charges. This was in addition to the non-refundable entry fee. In terms of paragraph 19 the licensee was required to pay spectrum charges in addition to the licence fee on revenue share basis. However, while calculating AGR for limited purpose of levying spectrum charges, revenue from wireless subscribers was not to be taken into account.

26. After one year and about six months, the DoT vide its letter dated 13.4.2007, requested TRAI to furnish its recommendations under Section 11(1)(a) of the 1997 Act on the issues 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 the letter. Paragraph 2 of that letter is extracted below:

> "2. Fast changes are happening in the Telecommunication sector. In order to ensure that the policies keep pace with the changes/developments in the Telecommunication sector, the government is contemplating to review the following terms and conditions in the Access provider (CMTS/UAS/Basic) license
>
> i. Substantial equity holding by a company / legal person in more than one licensee 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 30.1.2004 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 license.
> v. Roll-out obligations (Clause 34 of UASL).
> vi. Requirement to publish printed telephone directory."

27. In furtherance of the aforesaid communication, TRAI made recommendations dated 28.8.2007. The main emphasis of these recommendations was the principles of fair competition, no restriction on the number of access service providers in any service area, need for spectrum

management, measures to increase spectrum efficiency, allocation of spectrum and compliance of roll out obligations by the service providers. It was also recommended that in future all spectrum excluding the spectrum in 800, 900 and 1800 MHz bands in 2G services should be auctioned. In paragraphs 2.33, 2.39, 2.41, 2.54 and 2.63, TRAI repeatedly mentioned about scarce availability of spectrum. Paragraphs 2.37, 2.40, 2.69 and 2.73 to 2.79 of the TRAI's recommendations dated 28.8.2007 are extracted below:

> "2.37 Accordingly, the Authority recommends that no cap be placed on the number of access service providers in any service area.
>
> 2.40 The present spectrum allocation criteria, pricing methodology and the management system suffer from a number of deficiencies and therefore the Authority recommends that this whole issue is not to be dealt with in piecemeal but should be taken up as a long term policy issue. There is an urgent need to address the issues linked with spectrum efficiency and its management.
>
> 2.69 The Entry fee for acquiring a UASL license enables the licensee to become eligible for spectrum allocation in certain specified bands without any additional fee for acquisition of spectrum which means that allocation of spectrum follows the grant of license subject however to availability of spectrum. There is only one direct cost to the operator for spectrum i.e. spectrum charge in the form of royalty.
>
> 2.73 The allocation of spectrum is after the payment of entry fee and grant of license. The entry fee as it exists today is, in fact, a result of the price discovered through a markets based mechanism applicable for the grant of license to the 4th cellular operator. In today's dynamism and unprecedented growth of telecom

sector, the entry fee determined then is also not the realistic price for obtaining a license. Perhaps, it needs to be reassessed through a market mechanism. On the other hand spectrum usage charge is in the form of a royalty which is linked to the revenue earned by the operators and to that extent it captures the economic value of the spectrum that is used. Some stakeholders have viewed the charges/fee as a hybrid model of extracting economic rent for the acquisition and also meet the criterion of efficiency in the utilization of this scarce resource. The Authority in the context of 800, 900 and 1800 MHz is conscious of the legacy i.e. prevailing practice and the overriding consideration of level playing field. Though the dual charge in present form does not reflect the present value of spectrum it needed to be continued for treating already specified bands for 2G services i.e. 800, 900 and 1800 MHz. It is in this background that the Authority is not recommending the standard options pricing of spectrum, however, it has elsewhere in the recommendation made a strong case for adopting auction procedure in the allocation of all other spectrum bands except 800, 900 and 1800 MHz.

2.74 Some of the existing service providers have already been allocated spectrum beyond 6.2 MHz in GSM and 5 MHz in CDMA as specified in the license agreements without charging any extra one time spectrum charges. The maximum spectrum allocated to a service provider is 10 MHz so far. However, the spectrum usage charge is being increased with increased allocation of spectrum. The details are available at Table 8.

2.75 The Authority has noted that the allocation beyond 6 2 MHz for GSM and 5 MHz for CDMA at enhanced spectrum usage charge has already been implemented. Different licensees are at different levels of operations in terms of the quantum of spectrum. Imposition of additional acquisition fee for the quantum beyond these thresholds may not be legally feasible in

view of the fact that higher levels of usage charges have been agreed to and are being collected by the Government. Further, the Authority is conscious of the fact that further penetration of wireless services is to happen in semi-urban and rural areas where affordability of services to the common man is the key to further expansion.

2.76 However, the Authority is of the view that the approach needs to be different for allocating and pricing spectrum beyond 10 MHz in these bands i.e. 800, 900 and 1800 MHz. In this matter, the Authority is guided by the need to ensure sustainable competition in the market keeping in view the fact that there are new entrants whose subscriber acquisition costs will be far higher than the incumbent wireless operators. Further, the technological progress enables the operators to adopt a number of technological solutions towards improving the efficiency of the radio spectrum assigned to them. A cost- benefit analysis of allocating additional spectrum beyond 10 MHz to existing wireless operators and the cost of deploying additional CAPEX towards technical improvements in the networks would show that there is either a need to place a cap on the maximum allocable spectrum at 10 MHz or to impose framework of pricing through additional acquisition fee beyond 10 MHz. The Authority feels it appropriate to go in for additional acquisition fee of spectrum instead of placing a cap on the amount of spectrum that can be allocated to any wireless operator. In any case, the Authority is recommending a far stricter norm of subscriber base for allocation of additional spectrum beyond the initial allotment of spectrum. <u>The additional acquisition fee beyond 10 MHz could be decided either administratively or through an auction method from amongst the eligible wireless service providers.</u> In this matter, the Authority has taken note of submissions of a number of stakeholders who have cited evidences of the fulfillment of the quality of service benchmarks of the existing wireless operators at 10 MHz and even below in almost all the licensed service areas.

Such an approach would also be consistent with the Recommendation of the Authority in keeping the door open for new entrant without putting a limit on the number of access service providers.

2.77 The Authority in its recommendation on "Allocation and pricing of spectrum for 3G and broadband wireless access services" had recommended certain reserve price for 5 MHz of spectrum in different service areas. The recommended price are as below:

Service Areas	Price (Rs.in million) for 2X5 MHz
Mumbai, Delhi and Category A	800
Chennai, Kolkatta and Category B	400
Category C	150

The Authority recommends that any licensee who seeks to get additional spectrum beyond 10 MHz in the existing 2G bands i.e. 800,900 and 1800 MHz after reaching the specified subscriber numbers shall have to pay a onetime spectrum charge at the above mentioned rate on prorata basis for allotment of each MHz or part thereof of spectrum beyond 10 MHz. For one MHz allotment in Mumbai, Delhi and Category A service areas, the service provider will have to pay Rs. 160 million as one time spectrum acquisition charge.

2.78 As far as a new entrant is concerned, the question arises whether there is any need for change in the pricing methodology for allocation of spectrum in the 800, 900 and 1800 MHz bands. Keeping in view the objective of growth, affordability, penetration of wireless services in semi-urban and rural areas, the Authority is not in favour of changing the spectrum fee regime for a new entrant. Opportunity for equal competition has always been one of the prime principles of the Authority in suggesting a regulatory framework in telecom services. Any differential treatment to a new entrant vis-a-vis incumbents in the wireless sector will go against the principle of level playing field. This is specific and

restricted to 2G bands only i.e. 800, 900 and 1800 MHz. This approach assumes more significance particularly in the context where subscriber acquisition cost for a new entrant is likely to be much higher than for the incumbent wireless operators.

2.79 In the case of spectrum in bands other than 800, 900 and 1800 MHz i.e. bands that are yet to be allocated, the Authority examined various possible approaches for pricing and has come to the conclusion that it would be appropriate in future for a market based price discovery systems. In response to the consultation paper, a number of stakeholders have also strongly recommended that the allocation of spectrum should be immediately de-linked from the license and the future allocation should be based on auction. The Authority in its recommendation on "Allocation and pricing of spectrum for 3G and broadband wireless access services" has also favored auction methodology for allocation of spectrum for 3G and BWA services. It is therefore recommended that in future all spectrum excluding the spectrum in 800, 900 and 1800 bands should be auctioned so as to ensure efficient utilization of this scarce resource. In the 2G bands (800 MHz/900 MHz/1800 MHz), the allocation through auction may not be possible as the service providers were allocated spectrum at different times of their license and the amount of spectrum with them varies from 2X4.4 MHz to 2X10 MHz for GSM technology and 2X2.5 MHz to 2X5 MHz in CDMA technology. Therefore, to decide the cut off after which the spectrum is auctioned will be difficult and might raise the issue of level playing field."

(underlining is ours)

28. The aforesaid recommendations of TRAI were first considered by an Internal Committee of the DoT constituted vide letter dated 21.9.2007 under the Chairmanship of Member, Telecommunication. The report of the Committee

was placed before the Telecom Commission on 10.10.2007. However, the four non-permanent members, i.e., Finance Secretary; Secretary, Department of Industrial Policy and Promotion; Secretary, Department of Information Technology and Secretary, Planning Commission were not even informed about the meeting. In this meeting of the Telecom Commission, which was attended by the officials of the DoT only, the report of the Internal Committee was approved. On 17.10.2007, the Minister of C&IT accepted the recommendations of the Telecom Commission and thereby approved the recommendations made by TRAI. However, neither the Internal Committee of the DoT and the Telecom Commission nor the Minister of C&IT took any action in terms of paragraph 2.40 of the recommendations wherein it was emphasised that the existing spectrum allocation criteria, pricing methodology and the management system suffer from a number of deficiencies and the whole issue should be addressed keeping in view issues linked with spectrum efficiency and its management. The DoT also did not get in touch with the Ministry of Finance to discuss and finalise the spectrum pricing formula which had to include incentive for efficient use of spectrum as well as disincentive for sub-optimal usage in terms of the Cabinet decision of 2003.

29. In the meanwhile, on 24.9.2007, Shri A.K. Srivastava, DDG (AS), DoT prepared a note mentioning therein that as on that date, 167 applications had

been received from 12 companies for 22 service areas and opined that it may be difficult to handle such a large number of applications at any point of time. He suggested that 10.10.2007 may be announced as the cut-off date for receipt of new UAS Licence applications. Shri A. Raja who was, at the relevant time, Minister of C&IT did not agree with the suggestion and ordered that 1.10.2007 be fixed as the cut-off date for receipt of applications for new UAS Licence. Accordingly, press note dated 24.9.2007 was issued by the DoT stating that no new application for UAS Licence will be accepted after 1.10.2007.

30. It is borne out from the record that Vodafone Essar Spacetel Ltd. (respondent No.12) had made an application for UAS Licence in 2004 and 3 others, namely, Idea Cellular Ltd. (respondent No.8), Tata Teleservices Ltd. (respondent No.9) and M/s. Aircel Ltd. (respondent No.11) had made similar applications in 2006. However, the same were not disposed of by the DoT and they were included in the figure of 167. Between 24.9.2007 and 1.10.2007, over 300 applications were received for grant of UAS Licences. Member (Technology), Telecom Commission and Ex-officio Secretary to Government of India sent a letter dated 26.10.2007 to Secretary, Department of Legal Affairs, Ministry of Law and Justice seeking the opinion of the Attorney General of India/Solicitor General of India on the issue of the mechanism to deal with what he termed as an unprecedented situation created due to receipt of

large number of applications for grant of UAS Licence. The statement of case accompanying the letter of Member (Technology) contained as many as 14 paragraphs. Paragraph 11 outlined the following four alternatives:

(I) The applications may be processed on first-come-first-served basis in chronological order of receipt of applications in each service area as per existing procedure. LoI may be issued simultaneously to applicants (the numbers will vary based on availability of spectrum to be ascertained from WPC Wing) who fulfil the eligibility conditions of the existing UASL Guidelines and are senior most in the queue. The time limit for compliance should be 7 days as per the existing provision of LoI and 15 days for submission of PBG, FBG, entry fee, etc. as per the existing procedure. However, those who fulfil the conditions of LoI within stipulated time, their seniority of license/spectrum will be on the basis of their application date. The compliance of eligibility conditions as on the date of issue of LoI may be accepted. No relaxation of this time limit will be given and LoI shall stand terminated after the stipulated time period (however, the applicant may have the right to apply for new UAS Licence again as and when the window for submission of new UAS Licence is opened again). Subsequent applications may be considered for issue of LoI if the spectrum is available.

(II) LoIs to all those who applied by 25.9.2007 (date on which the cut-off date for receipt of applications were made public through press) may be issued in each service area as it is expected that only serious players will deposit the entry fee and seniority for license/spectrum be based on (i) the date of application or (ii) the date/time of fulfilment of all LoI conditions.

(III) DoT may issue LoIs to all eligible applications simultaneously received up to cut-off date. Since LoIs will clearly stipulate that spectrum allocation is subject to availability and is not guaranteed, the LoI holders are supposed to pay the entry fee if their business case permits them top wait for spectrum allocation subject to availability an initial roll out using wire line technology.

(IV) Any other better approach which may be legally tenable and sustainable for issue of new licences.

Paragraph 13 of the statement of case is extracted below:

> "Issue of LoIs to M/s. TATA and others for usage of Dual Technology spectrum based on their applications received after 18.10.2007. Whether
>
> (i) To treat their request prior to existing applicants
>
> or
>
> (ii) To treat their request after processing all 575 applications."

31. The Law Secretary placed the papers before the Minister of Law and Justice on 1.11.2007, who recorded the following note:

> "I agree. In view of the importance of the case and various options indicated in the statement of the case, it is necessary that whole issue is first considered by an empowered Group of Ministers and in that process legal opinion of Attorney General can be obtained."

32. When the note of the Law Minister was placed before the Minister of C&IT, he recorded the following note on 2.11.2007 – "Discuss please". On the same day, i.e., 2.11.2007 the Minister of C&IT did two things. He approved the note prepared by Director (AS-1) containing the following issues:

(i) Issuing of LoIs to new applicants as per the existing policy,

(ii) Number of LoIs to be issued in each circle,

(iii) Approval of draft LoI,

(iv) Considering application of TATAs for dual technology after the decision of TDSAT on dual technology, and

(v) Authorising Shri R.K. Gupta, ADG (AS-1) for signing the LoIs on behalf of President of India.

33. While approving the note, the Minister of C&IT on his own recorded the following – "LoI may be issued to the applicants received upto 25th Sept. 2007". Simultaneously, he sent D.O. No.20/100/2007-AS.I dated 2.11.2007 to the Prime Minister and criticised the suggestion made by the Law Minister by describing it as totally out of context. He also gave an indication of what was to

come in the future by mentioning that the DoT has decided to continue with the existing policy of first-come-first-served for processing of applications received up to 25.9.2007 and the procedure for processing the remaining applications will be decided at a later date, if any spectrum is left available after processing the applications received up to 25.9.2007. Paragraphs 3 and 4 of the letter of the Minister of C&IT are extracted below:

> "3. The Department wanted to examine the possibility of any other procedure in addition to the current procedure of allotment of Licences to process the huge number of applications. A few alternative procedures as debated in the Department and also opined by few legal experts were suggested by the Department of Telecom to Ministry of Law & Justice to examine its legal tenability to avoid future legal complications, if any. Ministry of Law and Justice, instead of examining the legal tenability of these alternative procedures, suggested referring the matter to empowered Group of Ministers. Since, generally new major policy decisions of a; Department or inter-departmental issues are referred to GOM, and, needless to say that the present issue relates to procedures, the suggestion of Law Ministry is totally out of context.
>
> 4. Now, the Department has decided to continue with the existing policy (first-come-first-served) for processing of applications received up to 25th September 2007, i. e. the date when the news-item on announcement of cut-off date appeared in the newspapers. The procedure for processing the remaining applications will be decided at a later date, if any spectrum is left available after processing the applications received up to 25th September 2007.
>
> 4. As the Department is not deviating from the existing procedure, I hope this will satisfy the Industry."

34. In the meanwhile, the Prime Minister who had received representations from telecom sector companies and had read reports appearing in a section of media sent letter dated 2.11.2007 to the Minister of C&IT and suggested that a fair and transparent method should be adopted for grant of fresh licences. That letter reads as under:

"Prime Minister

New Delhi
2 November, 2007

Dear Shri Raja,

A number of issues relating to allocation of spectrum have been raised by telecom sector companies as well as in sections of the media. Broadly, the issues relate to enhancement of subscriber linked spectrum allocation criteria, permission to CDMA service providers to also provide services on the GSM standard and be eligible for spectrum in the GSM service band, and the processing of a large number of applications received for fresh licenses against the backdrop of **inadequate spectrum to cater to overall demand**. Besides these, there are some other issues recommended by TRAI that require early decision. The key issues are summarized in the annexed note.

I would request you to give urgent consideration to the issues being raised with a view to ensuring fairness and transparency and let me know of the position before you take any further action in this regard.

With regards,

Yours sincerely,
Sd/-
(Manmohan Singh)

Shri A. Raja
Minister of Communications and IT

New Delhi.

Annexure

1. Enhancement of subscriber linked spectrum allocation criteria

In August 2007, the TRAI has recommended interim enhancement of subscriber linked spectrum allocation criteria. Service providers have objected to these recommendations, alleging errors in estimation / assumptions as well as due procedure not having been followed by the TRAI while arriving at the recommendations.

2. Permission to CDMA service providers to also provide services on the GSM standard and be eligible for spectrum in the GSM service band

Based on media reports, it is understood that the DoT has allowed 'cross technology' provision of services by CDMA service providers and three such companies have already paid the license fee. With the deposit of the fee, they would be eligible for GSM spectrum, for which old incumbent operators have been waiting since last several years. The Cellular Operators Association of India (COAI), being the association of GSM service providers, has represented against this. It is understood that the COAI has also approached the TDSAT against this.

3. Processing of a large number of applications received for fresh licenses against the backdrop of inadequate spectrum to cater to overall demand

The DoT has received a large number of applications for new licenses in various telecom circles. Since spectrum is very limited, even in the next several years all these licensees may never be able to get spectrum. The Telecom Policy that had been approved by the Union Cabinet in 1999 specifically stated that new licenses would be given subject to availability of spectrum.

4. **In order that spectrum use efficiency gets directly linked with correct pricing of spectrum, consider (i)**

introduction of a transparent methodology of auction, wherever legally and technically feasible, and (ii) revision of entry fee, which is currently benchmarked on old spectrum auction figures

5. Early decision on issues like rural telephony, infrastructure sharing, 3G, Broadband, Number Portability and Broadband Wireless Access, on which the TRAI has already given recommendations."

(emphasis supplied)

35. The Minister of C&IT did not bother to consider the suggestion made by the Prime Minister, which was consistent with the Constitutional principle of equality, that keeping in view the inadequate availability of spectrum, fairness and transparency should be maintained in the allocation of spectrum, and within few hours of the receipt of the letter from the Prime Minister, he sent a reply wherein he brushed aside the suggestion made by the Prime Minister by saying that it will be unfair, discriminatory, arbitrary and capricious to auction the spectrum to new applicants as it will not give them a level playing field. The relevant portions of paragraph 3 of the Minister's letter are extracted below:

"3. Processing of a large number of applications received for fresh licenses against the backdrop of inadequate spectrum to cater to overall demand

The issue of auction of spectrum was considered by the TRAI and the Telecom Commission and was not recommended as the existing licence holders who are already having spectrum upto 10 MHz per Circle have got it without any spectrum charge. It will be unfair, discriminatory, arbitrary and capricious to auction the

> spectrum to new applicants as it will not give them level playing field.
>
> I would like to bring it to your notice that DoT has earmarked totally 800 MHz in 900 MHz and 1800 MHz bands for 2G mobile services. Out of this, so for a maximum of about 35 to 40 MHz per Circle has been allotted to different operators and being used by them. The remaining 60 to 65 MHz, including spectrum likely to be vacated by Defence Services, is still available for 2G services.
>
> Therefore, there is enough scope for allotment of spectrum to few new operators even after meeting the requirements of existing operators and licensees. An increase in number of operators will certainly bring real competition which will lead to better services and increased teledensity at lower tariff. Waiting for spectrum for long after getting licence is not unknown to the Industry and even at present Aircel, Vodafone, Idea and Dishnet are waiting for initial spectrum in some Circles since December 2006."

36. On 20.11.2007, the Secretary, DoT had made a presentation on the spectrum policy to the Cabinet Secretary. The Finance Secretary, who appears to have witnessed the presentation, dispatched letter dated 22.11.2007 to the Secretary, DoT and expressed his doubt as to how the rate of Rs.1600 crores determined in 2001, could be applied without any indexation for a licence to be given in 2007. He also emphasized that in view of the financial implications, the Ministry of Finance should have been consulted before the matter was finalised at the level of the DoT. Secretary, DoT promptly replied to the Finance Secretary by sending letter dated 29.11.2007 in which he mentioned that as per the Cabinet decision dated 31.10.2003, the DoT had been authorised

to finalise the details of implementation of the recommendations of TRAI and in its recommendations dated 28.8.2007, TRAI had not suggested any change in the entry fee/licence fee.

37. In the context of letter dated 22.11.2007 sent by the Finance Secretary, Member (Finance), DoT submitted note dated 30.11.2007 suggesting that the issue of revision of rates should be examined in depth before any final decision is taken in the matter. When the note was placed before the Minister of C&IT, he observed that the matter of entry fee has been deliberated in the department several times in light of various guidelines and the TRAI recommendations and accordingly decision was taken not to revise the entry fee and that the Secretary, DoT had also replied to the Finance Secretary's letter on the above lines.

38. Although, the record produced before this Court does not show as to when the policy of first-come-first-served was distorted by the Minister of C&IT, in an apparent bid to show that he had secured the Prime Minister's approval to this act of his, the Minister C&IT sent letter dated 26.12.2007 to the Prime Minister, paragraphs 1 and 2 of which are extracted below:

> "1. Issue of Letter of Intent (LOI): DOT follows a policy of First-cum-First Served for granting LOI to the applicants for UAS licence, which means, an application received first will be processed first and if found eligible will be granted LOI.

> 2. Issue of Licence: The First-cum-First Served policy is also applicable for grant of licence on compliance of LOI conditions. Therefore, any applicant who complies with the conditions of LOI first will be granted UAS licence first. This issue never arose in the past as at one point of time only one application was processed and LOI was granted and enough time was given to him for compliance of conditions of LOI. However, since the Government has adopted a policy of "No Cap" on number of UAS Licence, a large number of LOI's are proposed to be issued simultaneously. In these circumstances, an applicant who fulfils the conditions of LOI first will be granted licence first, although several applicants will be issued LOI simultaneously. The same has been concurred by the Solicitor General of India during the discussions."
>
> (underlining is ours)

39. After 12 days, DDG (AS), DoT prepared a note incorporating therein the changed first-come-first-served policy to which reference had been made by the Minister of C&IT in letter dated 26.12.2007 sent to the Prime Minister. On the same day the Minister of C&IT approved the change.

40. The meeting of the full Telecom Commission, which was scheduled to be held on 9.1.2008 to consider two important issues i.e., performance of telecom sector and pricing of spectrum was postponed to 15.1.2008.

41. On 10.1.2008 i.e., after three days of postponement of the meeting of the Telecom Commission, a press release was issued by the DoT under the signature of Shri A.K. Srivastava, DDG (AS), DoT. The same reads as under:

"In the light of Unified Access Services Licence (UASL) guidelines issued on 14th December 2005 by the department regarding number of Licenses in a Service Area, a reference was made to TRAI on 13-4-2007. The TRAI on 28-08-2007 recommended that No cap be placed on the number of access service providers in any service area. The government accepted this recommendation of TRAI. Hon'ble Prime Minister also emphasized on increased competition while inaugurating India Telecom 2007. Accordingly, DOT has decided to issue LOI to all the eligible applicants on the date of application who applied up-to 25-09-2007.

UAS license authorises licencee to rollout telecom access services using any digital technology which includes wire-line and/or wireless (GSM and/or CDMA) services. They can also provide Internet Telephony, Internet Services and Broadband services. UAS licence in broader terms is an umbrella licence and does not automatically authorize UAS licensees usage of spectrum to rollout Mobile (GSM and/or CDMA) services. For this, UAS licencee has to obtain another licence, i.e. Wireless Operating Licence which is granted on first-come-first-served basis subject to availability of spectrum in particular service area.

DOT has been implementing a policy of First-cum-First Served for grant of UAS licences under which initially an application which is received first will be processed first and thereafter if found eligible will be granted LOI and then who so ever complied with the conditions of LOI first will be granted UAS licence.

Department of Telecom
(AS Cell)

10-01-2008"

(underlining is ours)

42. On the same day, another press release was issued asking all the applicants to assemble at the departmental headquarters within 45 minutes to collect the response(s) of the DoT. They were also asked to submit compliance

of the terms of LoIs within the prescribed period. The second press release is also reproduced below:

"Department of Telecommunications

Press Release

Date : 10th January 2008

Sub : UASL applicants to depute their authorised representative to collect responses of DOT on 10.1.2008.

The applicant companies who have submitted applications to DOT for grant of UAS licences in various service areas on or before 25.9.2007 are requested to depute their Authorised signatory/Company Secretary/ authorised representative with authority letter to collect response(s) of DOT. They are requested to bring the company's rubber stamp for receiving these documents to collect letters from DOT in response to their UASL applications. Only one representative of the Company/group Company will be allowed. Similarly, the companies who have applied for usage of dual technology spectrum are also requested to collect the DOT's response.

All above are requested to assemble at 3:30 pm on 10.1.2008 at Committee Room, 2nd Floor, Sanchar Bhawan, New Delhi. The companies which fail to report before 4:30 P.M. on 10.1.2008, the responses of DOT will be dispatched by post.

All eligible LOI holders for UASL may submit compliance to DOT to the terms of LOIs within the prescribed period during the office hours i.e. 9:00 A.M. to 5:30 P.M. on working days.

File No.20-100/2007-AS-I

Dated 10.1.2008

(A.K. Srivastava)
DDG(AS)
Dept. of Telecom

DDG(C&A): The above Press Release may kindly be uploaded on DOT website immediately."

43. All the applicants including those who were not even eligible for UAS Licence collected their LoIs on 10.1.2008. The acceptance of 120 applications and compliance with the terms and conditions of the LoIs for 78 applications was also received on the same day.

44. Soon after obtaining the LoIs, 3 of the successful applicants offloaded their stakes for thousands of crores in the name of infusing equity, their details are as under:

(i) Swan Telecom Capital Pvt. Ltd. (now known as Etisalat DB Telecom Pvt. Ltd.) which was incorporated on 13.7.2006 and got UAS Licence by paying licence fee of Rs. 1537 crores transferred its 45% (approximate) equity in favour of Etisalat Mauritius Limited, a wholly owned subsidiary of Emirates Telecommunications Corporation of UAE for over Rs.3,544 crores.

(ii) Unitech which had obtained licence for Rs.1651 crores transferred its stake 60% equity in favour of Telenor Asia Pte. Ltd., a part of Telenor

Group (Norway) in the name of issue of fresh equity shares for Rs.6120 crores between March, 2009 and February, 2010.

(iii) Tata Tele Services transferred 27.31% of equity worth Rs. 12,924 crores in favour of NTT DOCOMO.

(iv) Tata Tele Services (Maharashtra) transferred 20.25% of equity worth Rs. 949 crores in favour of NTT DOCOMO.

45. S. Tel Ltd., who had applied for grant of licence pursuant to press note dated 24.9.2007, but was ousted from the zone of consideration because of the cut-off date fixed by the Minister of C&IT, filed Writ Petition No.636 of 2008 in the Delhi High Court with the prayer that the first press release dated 10.1.2008 may be quashed. After hearing the parties, the learned Single Judge vide his order dated 1.7.2009 declared that the cut-off date, i.e., 25.9.2007 was totally arbitrary and directed the respondents in the writ petition to consider the offer made by the writ petitioner to pay Rs.17.752 crores towards additional revenue share over and above the applicable spectrum revenue share. The observations made by the learned Single Judge on the justification of fixing 25.9.2007 as the cut-off date read as under:

> "Thus on the one hand the respondent has accepted the recommendation of the TRAI in the impugned press note, but acted contrary thereto by amending the cut-off date and thus placed a cap on the number of service providers. The stand taken by respondent and the justification sought to be given for fixing a cut-off date retrospectively is on account of large volume of

applications, is without any force in view of the fact that neither any justification was rendered during the course of argument, nor any justification has been rendered in the counter affidavit as to what is the effect of receipt of large number of applications in view of the fact that a recommendation of the TRAI suggests no cap on the number of access service providers in any service area. This recommendation was duly accepted and published in the newspaper. Further as per the counter affidavit 232 UASL applications were received till 25.9.2007 from 22 companies. Assuming there was increase in the volume of applications, the respondent has failed to answer the crucial question as to what was the rationale and basis for fixing 25.9.2007 as the cut-off date. Even otherwise, admittedly 232 applications were made by 25.9.2007 and between 25.9.2007 and 1.10.2007 only 76 were applications were received. It was only on 1.10.2007 that 267 applications were made. Thus on 28.09.2007 it cannot be said that large number of applications were received. Thus taking into consideration the opinion of the expert body, which as per the press note of the respondent itself was accepted by the respondent, certainly the respondent cannot be allowed to change the rules of the game after the game had begun, to put it in the words of the Apex Court especially when the respondent has failed to give any plausible justification or the rationale for fixing the cut-off date by merely a week. Taking into consideration that on 13.4.2007 the Government of India had recommended TRAI to furnish its recommendation in terms of 11 (e) of the TRAI Act, 1997 on the issue as to whether a limit should be put on the number of access service providers in each service area. The TRAI having given its recommendations on 28.8.2007 which were duly accepted by the Government, the respondent cannot be allowed to arbitrarily change the cut-off date and that too without any justifiable reasons."

46. The letters patent appeal filed against the order of the learned Single Judge was dismissed by the Division Bench of the High Court vide judgment dated 24.11.2009, paragraphs 13 and 14 whereof are reproduced below:

"13. We are unable to agree with the submission of the learned Attorney General that the parameters that would apply to revising a cut-off date that has been earlier fixed prior to the receipt of the applications would be no different from fixing a cut-off date in the first place. While the decision in D.S. Nakara which has subsequently been distinguished in N. Subbarayudu is about fixing a cut-off date which might be an exercise in the discretion of the Appellant, those decisions are not helpful in deciding the revision of a cut-off date after applications have been received in terms of the previous cut-off date, is amenable to judicial review on administrative and constitutional law parameters. We are of the view that the two situations cannot be equated. The Government would have to justify its decision to revise a cut-off date already fixed, after applications have been received from persons acting on the basis of the earlier cut-off date. It would be for the court to be satisfied when a challenge is made, that the decision to revise a cut-off date after receiving applications on the basis of the cut-off date earlier fixed was based on some rational basis and was not intended to benefit a few applicants while discriminating against the rest. In the present case, for the reasons pointed out by the learned Single Judge, with which we concur, the Appellant has been unable to show that its decision to revise the cut-off date after receiving the application of the Respondent was based on some rational criteria. It is vulnerable to being labelled arbitrary and irrational.

14. We are not able to appreciate, in the instant case, the submission of the learned Attorney General that the mere advancing of the cut-off date would not tantamount to changing the rules after the game has begun. In a sense it does. It makes ineligible for consideration the applicants who had applied, after 25th September 2007 but on or before 1st October 2007. Further this ineligibility is announced after the applications have been made. In other words, while at the time of making the application there was no such ineligibility, it is introduced later and that too for a select category of applicants. This cannot but be a change in the rule after the game has begun. We do not think that the decisions relied upon by the learned Attorney General contemplate such a situation. On the other hand the decisions in Monarch Infrastructure (P) Ltd. and K. Manjushree fully support the Respondent's case for invalidation

> of the Appellant's impugned decision revise the cut-off date from 1st October 2007 to 25th September 2007, long after receiving the application from the Respondent."

47. The Union of India challenged the judgment of the Division Bench in SLP(C) No.33406/2009. During the pendency of the special leave petition, some compromise appears to have been reached between the writ petitioner and the authorities and, therefore, an additional affidavit was filed along with agreed minutes of order before this Court on 12.3.2010. In view of this development, the Court disposed of the appeal arising out of the special leave petition but specifically approved the findings recorded by the High Court with regard to the cut-off date by making the following observations:

> "Taking the additional affidavit and the suggestions made by the learned Attorney General, this appeal is disposed of as requiring no further adjudication.
>
> However, we make it clear that the findings recorded by the High Court with regard to the cut off date is not interfered with and disturbed by this Court in the present case."

GROUNDS OF CHALLENGE

48. The petitioners have questioned the grant of UAS Licences to the private respondents by contending that the procedure adopted by the DoT was arbitrary, illegal and in complete violation of Article 14 of the Constitution. They have relied upon the order passed by the learned Single Judge of the Delhi

High Court as also the judgment of the Division Bench, which was approved by this Court and pleaded that once the Court has held that the cut-off date, i.e., 25.9.2007 fixed for consideration of the applications was arbitrary and unconstitutional, the entire procedure adopted by the DoT for grant of UAS Licences with the approval of the Minister of C&IT is liable to be declared illegal and quashed. Another plea taken by the petitioners is that the DoT violated the recommendations made by TRAI that there should be no cap on the number of Access Service Providers in any service area and this was in complete violation of Section 11(1) of the 1997 Act. The petitioners have relied upon the report of the Comptroller and Auditor General (CAG) and pleaded that the consideration of large number of ineligible applicants and grant of LoIs and licenses to them is *ex facie* illegal and arbitrary. The petitioners have also pleaded that the entire method adopted by the DoT for grant of licence is flawed because the recommendations made by TRAI for grant of licences at the entry fee determined in 2001 was wholly arbitrary, unconstitutional and contrary to public interest. Yet another plea of the petitioners is that while deciding to grant licences, which are bundled with spectrum, at the price fixed in 2001 the DoT did not bother to consult the Finance Ministry and, thereby, violated the mandate of the decision taken by the Council of Ministers in 2003. The petitioners have also pleaded that the

policy of first-come-first-served is by itself violative of Article 14 of the Constitution and in any case distortion thereof by the Minister of C&IT and the consequential grant of licences is liable to be annulled. Another ground taken by the petitioners is that even though a number of licensees failed to fulfil the roll out obligations and violated conditions of the licence, the Government of India did not take any action to cancel the licences.

COUNTER AFFIDAVITS OF THE RESPONDENTS

49. Most of the respondents have filed separate but similar counter affidavits in both the petitions. The main points raised by the respondents are:

(i) The petitioners are not entitled to challenge the recommendations made by TRAI and the policy decisions taken by the Government for grant of UAS Licences.

(ii) The Court cannot review and nullify the recommendations made by TRAI in the matter of allocation of spectrum in 800, 900 and 1800 MHz bands at the rates fixed in 2001.

(iii) The report prepared by the CAG cannot be relied upon for the purpose of recording a finding that the procedure adopted for the grant of UAS Licences is contrary to Article 14 of the Constitution. The private respondents have also

claimed that the observations made by the CAG and the conclusions recorded by him are seriously flawed and are based on totally unfounded assumptions.

(iv) The UAS Licences were given strictly in accordance with the modified first-come-first-served policy. That the respondents were able to fulfil LoI conditions because newspapers had already published stories about the possible grant of licences in the month of January, 2008.

(v) That those who had made applications in 2004 and 2006 cannot be clubbed with those who had applied in the month of August and September, 2007 because in terms of the existing UASL guidelines they were entitled to licences.

(vi) That private respondents have made huge investments for creating infrastructure to provide services in different parts of the country and if the licences granted to them are cancelled at this stage, public interest would be adversely affected.

(vii) That the private respondents have been able to secure foreign direct investment of thousands of crores for providing better telecom services in remote areas of the country and any intervention by the Court would result in depriving the people living in those areas of telecom services.

(viii) The Government and TRAI have already initiated action for levy of penalty/liquidated damages for non-compliance of the roll out obligations and violation of conditions of the license. That the licensees have not violated any conditions of the license and that the notices issued by TRAI alleging the same have already been challenged before TDSAT and in most cases, interim orders have been passed. That the remedy, if any, available to the petitioners is to approach the TDSAT.

(ix) Some of the respondents have also questioned the application of the policy of first-come-first-served by asserting that even though they had applied in 2004 and 2006, and licences had been granted to them before 25.9.2007, the allocation of spectrum was delayed till 2008 and those who had applied in 2007 were placed above them because they could fulfil the conditions of LoI in terms of the distorted version of the policy first-come-first-served.

50. The petitioners have filed rejoinder affidavit and reiterated the assertions made in the main petition that the grant of UAS Licences is fundamentally flawed and is violative of the Constitutional principles. They have also placed on record report dated 31.1.2011 submitted by the One Man Committee, (hereinafter referred to as 'One-Man Committee Report'), comprising Justice Shivaraj V. Patil (former Judge of this Court), which was constituted by the

Government of India vide Office Memorandum dated 13.12.2010 to examine the appropriateness of the procedure followed by the DoT in issuance of licences and allocation of spectrum during the period 2001 to 2009. They have also placed on record photostat copies of the notings recorded on the files of the DoT.

ARGUMENTS

51. Shri Prashant Bhushan, learned counsel for the petitioners in Writ Petition (C) No. 423 of 2010 and Dr. Subramanian Swamy, who is petitioner-in-person in Writ Petition (C) No. 10 of 2011 made the following submissions:

(i) The spectrum, which is a national asset, cannot be distributed by adopting the policy of first-come-first-served on the basis of the application received by the DoT without any advertisement and without holding auction.

(ii) The grant of licences bundled with spectrum is *ex-facie* arbitrary illegal and violative of Article 14 of the Constitution.

(iii) The decision of the Minister of C&IT to pre-pone the cut-off date from 1.10.2007 to 25.9.2007, which eliminated large number of applications, is violative of Article 14 of the Constitution and the entire exercise undertaken with reference to this cut-off date has resulted in discrimination vis-à-vis other eligible applicants.

(iv) Once the cut-off date fixed by the Minister of C&IT for consideration of the applications received in the light of the earlier press release fixing the last date as 1.10.2007 has been declared to be arbitrary and unconstitutional by the High Court, the consequential actions taken by the DoT on that basis are liable to be annulled.

(v) The first-come-first-served policy suffers from a fundamental flaw inasmuch as there is no defined criterion for operating that policy. There is no provision for issue of advertisement notifying obligations for grant of licence and allocation of spectrum and any person who makes an application becomes entitled to get licence and spectrum.

(vi) The first-come-first-served policy was manipulated by the Minister of C&IT to favour some of the applicants including those who

were not even eligible. Shri Bhushan pointed out that, out of 122 applications, 85 were found to be ineligible and those who could obtain information either from the concerned Minister or the officers of DoT about the change of the criteria for implementing the first-come-first-served policy got advantage and acquired priority over those who had applied earlier.

(vii) The meeting of the Telecom Commission scheduled for 9.1.2008 was deliberately postponed because vide letter dated 22.11.2007 the Finance Secretary had strongly objected to the charging of entry fee fixed in 2001.

(viii) Shri Bhushan pointed out that the recommendations made by TRAI on 28.8.2007 were contrary to public interest as well as financial interest of the nation because at the time of entry of 4th cellular operator the same TRAI had suggested multi-stage bidding and even for allocation of 3G spectrum the methodology of auction was suggested but, for no ostensible reason, the so-called theory of level playing field was innovated for grant of UAS Licences in 2007 on the basis of the entry fee fixed in 2001. Learned counsel emphasized that the transfer of equity by three of the licensees

immediately after issue of licences for gain of many thousand crores shows that if the policy of auction had been followed, the nation would have been enriched by many thousand crores.

(ix) Both, Shri Prashant Bhushan and Dr. Subramanian Swamy pointed out that although the Prime Minister had suggested that a fair and transparent method be adopted for grant of UAS Licences through the process of auction, the Minister of C&IT casually and arbitrarily brushed aside the suggestion and granted licence to the applicants for extraneous reasons.

(x) Shri Prashant Bhushan also questioned the grant of the benefit of the policy of dual technology to Tata Teleservices Ltd. by contending that this was a result of manipulation made by the service provider. Dr. Subramanian Swamy also raised a concern regarding the national security and pointed out that some of the applicants who have trans-border connections have received licences and they may ultimately prove to be dangerous for the nation.

52. Shri G.E. Vahanvati, learned Attorney General referred to NTP 1994 and NTP 1999 and submitted that the policy decision taken by the Government of

India for private sector participation, which could bring in the funds required for expansion of telecommunication services in different parts of the country, cannot be scrutinized by the Court. He submitted that in the last more than 20 years, the telecom services have expanded beyond anybody's expectation because of private sector participation and it cannot be said that granting UAS Licences by charging the entry fee determined at 2001 prices is unconstitutional. Learned counsel referred to the history of development in the field of telecommunications and the concept of spectrum, and submitted that the policy decision taken by the DoT for migration of CDMA service providers was neither illegal nor unconstitutional.

53. Shri Salve, learned senior counsel appearing for respondent No. 9, pointed out that Tata Teleservices had sent an application through fax for grant of GSM for the existing licences which were issued on 19.10.2007 and no exception can be taken to this because Reliance Telecom, which had applied for GSM on 6.2.2006, was given the benefit of migration to dual technology on 18.10.2007, i.e. even before the policy was made public. Learned senior counsel argued that the decision not to auction UAS Licences was based on the recommendations of TRAI and as the petitioners have not challenged the recommendations for two years, the exercise undertaken by the DoT for grant of UAS Licences in 2008 and subsequent allotment of spectrum should not be

nullified. Shri Salve argued that the question of institutional integrity is involved in the matter and if the Court comes to the conclusion that auction is the only method for grant of licences and allocation of spectrum then everything should be annulled right from 2001. Learned senior counsel submitted that multi-stage bidding was done only for the purpose of entry of 4th cellular operator but, thereafter, no auction was held. He submitted that if the spectrum was allotted free of charge till 2007, there could be no justification for auction of licences or spectrum in 2007.

54. Shri C.A. Sundaram, learned counsel appearing for respondent Nos. 2 and 4, heavily relied on paragraphs 7.2, 7.4, 7.12, 7.29, 7.30, 7.37 and 7.39 of TRAI's recommendations dated 27.10.2003 and argued that the recommendations made in 2007 were nothing but a continuation of the old policy and, therefore, the petitioners are not entitled to question the method adopted for grant of UAS Licences pursuant to the 2007 recommendations. Learned senior counsel submitted that the policy for grant of UAS Licences and allocation of spectrum cannot be said to be *per se* arbitrary because the same was decided after great deliberations and consideration of international practices. He also relied upon the speech made by the Prime Minister on 2.11.2007 and submitted that the action of the DoT should not be nullified

because that will have a far-reaching adverse impact on the availability of telecommunication services in the country.

55. Shri Vikas Singh, learned senior counsel appearing for respondent no. 10, argued that the recommendations made by TRAI in 2007, which were approved by the Minister of C&IT are in national interest because the same would attract investment by foreign players and would benefit the people at large. Learned counsel emphasised that his client has already invested Rs. 6,000 crores and it would be totally unjust if the licence granted in 2008 is cancelled. Shri Vikas Singh also submitted that after the grant of licences and allocation of spectrum the people have been hugely benefited inasmuch as the telecom services have become competitive with the international market and even cheaper than that.

56. Shri C. S. Vaidyanathan, learned senior counsel appearing for respondent No. 8, argued that the application made by his client was pending since June, 2006 and its priority was pushed down due to the application of the distorted version of the first-come-first-served policy. Shri Vaidyanathan pointed out that when the Minister of C&IT announced that applications will not be received after 1.10.2007, there was a huge rush of applications and a large number of players who had no experience in the field of telecom made applications and got the licences.

57. Dr. Abhishek Manu Singhvi, learned senior counsel appearing for respondent nos. 11 and 12, argued that his clients had made applications much prior to 2007 but they were unfairly clubbed with those who had applied in 2007 and in this manner the principle of equality was violated. Dr. Singhvi submitted that if the applications made prior to 2007 had been processed as per the existing policy, respondent Nos. 11 and 12 would have received licences bundled with spectrum without competition/objection from anyone.

58. Shri Dayan Krishnan, learned counsel for respondent No. 6, adopted the arguments of other learned counsel and submitted that the licences granted in 2007 should not be quashed at this belated stage.

59. Shri Rakesh Dwivedi, learned senior counsel for TRAI, referred to TRAI's written submissions to justify why it had not recommended auction of licences. Learned senior counsel extensively referred to the recommendations made by TRAI in 2007 and submitted that even though it was specifically suggested that the DoT should take a comprehensive decision on the allocation of spectrum, no effort was made in that direction and the licences were granted without determining availability of spectrum. Shri Dwivedi also submitted that TRAI has already initiated action for cancellation of licences of those

respondents who have violated the terms of licence and/or failed to fulfil roll-out obligations.

60. Learned counsel for both the sides relied upon a large number of decisions. Shri Prashant Bhushan and Dr. Subramanian Swamy relied upon the following judgements: K. Manjusree v. State of Andhra Pradesh (2008) 3 SCC 512, Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corpn. (2000) 5 SCC 287, Home Communication Ltd. and Anr. v. Union of India and Ors. 52 (1993) DLT 168, Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai (2004) 3 SCC 214, Chaitanya Kumar v. State of Karnataka (1986) 2 SCC 594, Shivsagar Tiwari v. Union of India, (1996) 6 SCC 558, Common Cause, A Registered Society (Petrol pumps matter) v. Union of India (1996) 6 SCC 530 and Nagar Nigam v. Al Faheem Meat Exports (P) Ltd. (2006) 13 SCC 382. Learned Attorney General and learned counsel appearing for the private respondents relied upon Delhi Science Forum v. Union of India (1996) 2 SCC 405, BALCO Employees' Union (Regd.) v. Union of India (2002) 2 SCC 333, Villianur Iyarkkai Padukappu Maiyam v. Union of India (2009) 7 SCC 561, Ministry of Labour and Rehabilitation v. Tiffin's Barytes Asbestos & Paints Ltd. (1985) 3 SCC 594, United India Fire and General Insurance Co. Ltd. v. K.S. Vishwanathan (1985) 3 SCC 686, State of T.N. v. M.N. Sundararajan (1980) 4 SCC 592, Sunil Pannalal Banthia v. City &

Industrial Development Corporation of Maharashtra Ltd. (2007) 10 SCC 674, Bombay Dyeing & Mfg. Co. Ltd. (3) v. Bombay Environmental Action Group (2006) 3 SCC 434, Prem Chand Somchand Shah v. Union of India (1991) 2 SCC 48 and Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd. (1983) 1 SCC 147.

61. Before dealing with the arguments of the learned counsel for the parties and adverting to some of the precedents, we consider it necessary to mention that during the course of hearing, Shri Prashant Bhushan and Dr. Subramanian Swamy heavily relied upon the CAG report as also the One-Man Committee Report. Learned Attorney General and learned senior counsel appearing for some of the private respondents also referred to the One-Man Committee Report. However, as the CAG report is being examined by the Public Accounts Committee and Joint Parliamentary Committee of Parliament we do not consider it proper to refer to the findings and conclusions contained therein. Likewise, we do not consider it necessary to advert to the observations made, and the suggestions given by the One-Man Committee because the Government of India has already taken a decision to segregate spectrum from licence and allot the same by auction. This is evident from the following extracts of the press statement dated 29.1.2011 issued by the present Minister of C&IT:

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

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

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

TRAI had made recommendations in May 2010 and indicated that it would apprise the Government of the findings of a study on the question of pricing of 2G spectrum in future. This is expected shortly. We would examine their recommendations speedily as soon as they are received, keeping the perspectives that I have outlined, while finalizing our new policy. I am confident that we will be able to design a policy that ensures that existing licence holders get the spectrum they need and are entitled to, while simultaneously, ensuring that the Government also receives revenues commensurate with the current market value of spectrum."

62. We shall now consider the questions enumerated in the opening paragraph of the judgment.

63. **Question No.1:**

At the outset, we consider it proper to observe that even though there is no universally accepted definition of natural resources, they are generally understood as elements having intrinsic utility to mankind. They may be renewable or non renewable. They are thought of as the individual elements of the natural environment that provide economic and social services to human society and are considered valuable in their relatively unmodified, natural, form. A natural resource's value rests in the amount of the material available and the demand for it. The latter is determined by its usefulness to production. Natural resources belong to the people but the State legally owns them on behalf of its people and from that point of view natural resources are considered as national assets, more so because the State benefits immensely from their value. The State is empowered to distribute natural resources. However, as they constitute public property/national asset, while distributing natural resources, the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest. Like any other State action, constitutionalism must be reflected

at every stage of the distribution of natural resources. In Article 39(b) of the Constitution it has been provided that the ownership and control of the material resources of the community should be so distributed so as to best sub-serve the common good, but no comprehensive legislation has been enacted to generally define natural resources and a framework for their protection. Of course, environment laws enacted by Parliament and State legislatures deal with specific natural resources, i.e., Forest, Air, Water, Costal Zones, etc.

64. The ownership regime relating to natural resources can also be ascertained from international conventions and customary international law, common law and national constitutions. In international law, it rests upon the concept of sovereignty and seeks to respect the principle of permanent sovereignty (of peoples and nations) over (their) natural resources as asserted in the 17th Session of the United Nations General Assembly and then affirmed as a customary international norm by the International Court of Justice in the case of Democratic Republic of Congo v. Uganda. Common Law recognizes States as having the authority to protect natural resources insofar as the resources are within the interests of the general public. The State is deemed to have a proprietary interest in natural resources and must act as guardian and trustee in relation to the same. Constitutions across the world focus on establishing natural resources as owned by, and for the benefit of, the country. In most

instances where constitutions specifically address ownership of natural resources, the Sovereign State, or, as it is more commonly expressed, 'the people', is designated as the owner of the natural resource.

65. Spectrum has been internationally accepted as a scarce, finite and renewable natural resource which is susceptible to degradation in case of inefficient utilisation. It has a high economic value in the light of the demand for it on account of the tremendous growth in the telecom sector. Although it does not belong to a particular State, right of use has been granted to States as per international norms.

66. In India, the Courts have given an expansive interpretation to the concept of natural resources and have from time to time issued directions, by relying upon the provisions contained in Articles 38, 39, 48, 48A and 51A(g), for protection and proper allocation/distribution of natural resources and have repeatedly insisted on compliance of the constitutional principles in the process of distribution, transfer and alienation to private persons. The doctrine of public trust, which was evolved in Illinois Central Railroad Co. v. People of the State of Illinois 146 U.S. 387 (1892), has been held by this Court to be a part of the Indian jurisprudence in M.C. Mehta v. Kamal Nath (1997) 1 SCC 388 and has been applied in Jamshed Hormusji Wadia v. Board of Trustee, Port of

Mumbai (2002) 3 SCC 214, Intellectuals Forum, Tirupathi v. State of A.P. (2006) 3 SCC 549 and Fomento Resorts and Hotels Limited v. Minguel Martins (2009) 3 SCC 571. In Jamshed Hormusji Wadia's case, this Court held that the State's actions and the actions of its agencies/instrumentalities must be for the public good, achieving the objects for which they exist and should not be arbitrary or capricious. In the field of contracts, the State and its instrumentalities should design their activities in a manner which would ensure competition and non-discrimination. They can augment their resources but the object should be to serve the public cause and to do public good by resorting to fair and reasonable methods. In Fomento Resorts and Hotels Limited case, the Court referred to the article of Prof. Joseph L. Sax and made the following observations:

> "53. The public trust doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. This doctrine puts an implicit embargo on the right of the State to transfer public properties to private party if such transfer affects public interest, mandates affirmative State action for effective management of natural resources and empowers the citizens to question ineffective management thereof.
>
> 54. The heart of the public trust doctrine is that it imposes limits and obligations upon government agencies and their administrators on behalf of all the people and especially future generations. For example, renewable and non-renewable resources, associated uses, ecological values or objects in which the public has a special interest (i.e. public lands, waters, etc.) are held subject to the duty of the State

> not to impair such resources, uses or values, even if private interests are involved. The same obligations apply to managers of forests, monuments, parks, the public domain and other public assets. Professor Joseph L. Sax in his classic article, "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention" (1970), indicates that the public trust doctrine, of all concepts known to law, constitutes the best practical and philosophical premise and legal tool for protecting public rights and for protecting and managing resources, ecological values or objects held in trust.
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> 55. The public trust doctrine is a tool for exerting long-established public rights over short-term public rights and private gain. Today every person exercising his or her right to use the air, water, or land and associated natural ecosystems has the obligation to secure for the rest of us the right to live or otherwise use that same resource or property for the long-term and enjoyment by future generations. To say it another way, a landowner or lessee and a water right holder has an obligation to use such resources in a manner as not to impair or diminish the people's rights and the people's long-term interest in that property or resource, including down slope lands, waters and resources."

67. In Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal, (1995) 2 SCC 161, the Court was dealing with the right of organizers of an event, such as a sport tournament, to its live audio-visual broadcast, universally, through an agency of their choice, national or foreign. In paragraph 78, the Court described the airwaves/frequencies as public property in the following words:

> "There is no doubt that since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of the society and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies."

68. In Reliance Natural Resources Limited v. Reliance Industries Limited, (2010) 7 SCC 1, P. Sathasivam J., with whom Balakrishnan, C.J., agreed, made the following observations:

> "It must be noted that the constitutional mandate is that the natural resources belong to the people of this country. The nature of the word "vest" must be seen in the context of the public trust doctrine (PTD). Even though this doctrine has been applied in cases dealing with environmental jurisprudence, it has its broader application."

The Learned Judge then referred to the judgments, In re Special Reference No. 1 of 2001 (2004) 4 SCC 489, M.C. Mehta v. Kamal Nath (1997) 1 SCC 388 and observed:

> "This doctrine is part of Indian law and finds application in the present case as well. It is thus the duty of the Government to provide complete protection to the natural resources as a trustee of the people at large."

The Court also held that natural resources are vested with the Government as a matter of trust in the name of the people of India, thus it is the solemn duty of the State to protect the national interest and natural resources must always be used in the interests of the country and not private interests.

69. As natural resources are public goods, the doctrine of equality, which emerges from the concepts of justice and fairness, must guide the State in determining the actual mechanism for distribution of natural resources. In this

regard, the doctrine of equality has two aspects: *first*, it regulates the rights and obligations of the State vis-à-vis its people and demands that the people be granted equitable access to natural resources and/or its products and that they are adequately compensated for the transfer of the resource to the private domain; and *second*, it regulates the rights and obligations of the State vis-à-vis private parties seeking to acquire/use the resource and demands that the procedure adopted for distribution is just, non-arbitrary and transparent and that it does not discriminate between similarly placed private parties.

70. In Akhil Bharatiya Upbhokta Congress v. State of M.P. (2011) 5 SCC 29, this Court examined the legality of the action taken by the Government of Madhya Pradesh to allot 20 acres land to an institute established in the name of Kushabhau Thakre on the basis of an application made by the Trust. One of the grounds on which the appellant challenged the allotment of land was that the State Government had not adopted any rational method consistent with the doctrine of equality. The High Court negatived the appellant's challenge. Before this Court, learned senior counsel appearing for the State relied upon the judgments in Ugar Sugar Works Ltd. v. Delhi Administration (2001) 3 SCC 635, State of U.P. v. Choudhary Rambeer Singh (2008) 5 SCC 550, State of Orissa v. Gopinath Dash (2005) 13 SCC 495 and Meerut Development

Authority v. Association of Management Studies (2009) 6 SCC 171 and argued that the Court cannot exercise the power of judicial review to nullify the policy framed by the State Government to allot Nazul land without advertisement. This Court rejected the argument, referred to the judgments in Ramanna Dayaram Shetty v. International Airport Authority of India (1979) 3 SCC 489, S.G. Jaisinghani v. Union of India AIR 1967 SC 1427, Kasturilal Lakshmi Reddy v. State of J & K (1980) 4 SCC 1, Common Cause v. Union of India (supra), Shrilekha Vidyarthy v. State of U.P. (1991) 1 SCC 212, LIC v. Consumer Education and Research Centre (1995) 5 SCC 482, New India Public School v. HUDA (1996) 5 SCC 510 and held:

> "What needs to be emphasised is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence, etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State."

71. In Sachidanand Pandey v. State of West Bengal (1987) 2 SCC 295, the Court referred to some of the precedents and laid down the following propositions:

> "State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism."

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

73. **Question No.2**:

Although, while making recommendations on 28.8.2007, TRAI itself had recognised that spectrum was a scarce commodity, it made recommendation for allocation of 2G spectrum on the basis of 2001 price by invoking the theory of level playing field. Paragraph 2.40 of the recommendations dated 28.8.2007

shows that as per TRAI's own assessment the existing system of spectrum allocation criteria, pricing methodology and the management system suffered from number of deficiencies and there was an urgent need to address the issues linked with spectrum efficiency and its management and yet it decided to recommend the allocation of spectrum at the price determined in 2001. All this was done in the name of growth, affordability, penetration of wireless services in semi urban and rural areas, etc. Unfortunately, while doing so, TRAI completely overlooked that one of the main objectives of NTP 1999 was that spectrum should be utilised efficiently, economically, rationally and optimally and there should be a transparent process of allocation of frequency spectrum as also the fact that in terms of the decision taken by the Council of Ministers in 2003 to approve the recommendations of the Group of Ministers, the DoT and Ministry of Finance were required to discuss and finalise the spectrum pricing formula. To say the least, the entire approach adopted by TRAI was lopsided and contrary to the decision taken by the Council of Ministers and its recommendations became a handle for the then Minister of C&IT and the officers of the DoT who virtually gifted away the important national asset at throw away prices by willfully ignoring the concerns raised from various quarters including the Prime Minister, Ministry of Finance and also some of its own officers. This becomes clear from the fact that soon after obtaining the

licences, some of the beneficiaries off-loaded their stakes to others, in the name of transfer of equity or infusion of fresh capital by foreign companies, and thereby made huge profits. We have no doubt that if the method of auction had been adopted for grant of licence which could be the only rational transparent method for distribution of national wealth, the nation would have been enriched by many thousand crores.

74. While it cannot be denied that TRAI is an expert body assigned with important functions under the 1997 Act, it cannot make recommendations overlooking the basic constitutional postulates and established principles and thereby deny people from participating in the distribution of national wealth and benefit a handful of persons. Therefore, even though the scope of judicial review in such matters is extremely limited, as pointed out in Delhi Science Forum v. Union of India (supra) and a large number of other judgments relied upon by the learned counsel of the respondents, keeping in view the facts which have been brought to the notice of the Court that the mechanism evolved by TRAI for allocation of spectrum and the methodology adopted by the then Minister of C&IT and the officers of DoT for grant of UAS Licences may have caused huge loss to the nation, we have no hesitation to record a finding that the recommendations made by TRAI were flawed in many respects and

implementation thereof by the DoT resulted in gross violation of the objective of NPT 1999 and the decision taken by the Council of Ministers on 31.10.2003.

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

that the consideration of maintaining a level playing field prevented a realistic reassessment of the entry fee.

76. **Question Nos.3 and 4:**

There is a fundamental flaw in the first-come-first-served policy inasmuch as it involves an element of pure chance or accident. In matters involving award of contracts or grant of licence or permission to use public property, the invocation of first-come-first-served policy has inherently dangerous implications. Any person who has access to the power corridor at the highest or the lowest level may be able to obtain information from the Government files or the files of the agency/instrumentality of the State that a particular public property or asset is likely to be disposed of or a contract is likely to be awarded or a licence or permission is likely to be given, he would immediately make an application and would become entitled to stand first in the queue at the cost of all others who may have a better claim. This Court has repeatedly held that wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition. To put it differently, the State and its agencies/instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy

applicants. When it comes to alienation of scarce natural resources like spectrum etc., it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest. In our view, a duly publicised auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like first-come-first-served when used for alienation of natural resources/public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values. In other words, while transferring or alienating the natural resources, the State is duty bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process.

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

(i) Soon after his appointment as Minister of C&IT, he directed that all the applications received for grant of UAS Licence should be kept pending till the receipt of TRAI recommendations.

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

(iii) The officers of the DoT who attended the meeting of the Telecom Commission held on 10.10.2007 hardly had any choice but to approve the recommendations made by TRAI. If they had not done so, they would have incurred the wrath of the Minister of C&IT.

(iv) In view of the approval by the Council of Ministers of the recommendations made by the Group of Ministers in 2003, the DoT had to discuss the issue of spectrum pricing with the Ministry of Finance. Therefore, the DoT was under an obligation to involve the Ministry of Finance before any decision could be taken in the context of paragraphs 2.78 and 2.79 of TRAI's recommendations. However, as the Minister of C&IT was very much conscious of the fact that the Secretary, Finance, had objected to the allocation of 2G spectrum at the rates fixed in 2001, he did not consult the Finance Minister or the officers of the Finance Ministry.

(v) The Minister of C&IT brushed aside the suggestion made by the Minister of Law and Justice for placing the matter before the Empowered Group of Ministers. Not only this, within few hours of the receipt of the suggestion made by the Prime Minister in his letter dated 2.11.2007 that keeping in view the inadequacy of spectrum, transparency and fairness should be maintained in the matter of allocation thereof, the Minister of C&IT rejected the same by saying that it will be unfair, discriminatory, arbitrary and capricious to auction the spectrum to new applicants because it will not give them level playing field.

(vi) The Minister C&IT introduced cut off date as 25.9.2007 for consideration of the applications received for grant of licence despite the fact that only one day prior to this, press release was issued by the DoT fixing 1.10.2007 as the last date for receipt of the applications. This arbitrary action of the Minister of C&IT though appears to be innocuous, actually benefitted some of the real estate companies who did not have any experience in dealing with telecom services and who had made applications only on 24.9.2007, i.e., one day before the cut off date fixed by the Minister of C&IT on his own.

(vii) The cut off date, i.e. 25.9.2007 decided by the Minister of C&IT on 2.11.2007 was not made public till 10.1.2008 and the first-come-first-served policy, which was being followed since 2003 was changed by him on 7.1.2008 and was incorporated in press release dated 10.1.2008. This enabled some of the applicants, who had access either to the Minister or the officers of the DoT to get the demand drafts, bank guarantee, etc. prepared in advance for compliance of conditions of the LoIs, which was the basis for determination of seniority for grant of licences and allocation of spectrum.

(viii) The meeting of the full Telecom Commission, which was scheduled to be held on 9.1.2008 to consider issues relating to grant of

licences and pricing of spectrum was deliberately postponed on 7.1.2008 so that the Secretary, Finance and Secretaries of three other important Departments may not be able to raise objections against the procedure devised by the DoT for grant of licence and allocation of spectrum by applying the principle of level playing field.

(ix) The manner in which the exercise for grant of LoIs to the applicants was conducted on 10.1.2008 leaves no room for doubt that every thing was stage managed to favour those who were able to know in advance the change in the implementation of the first-come-first served policy. As a result of this, some of the companies which had submitted applications in 2004 or 2006 were pushed down in the priority and those who had applied between August and September 2007 succeeded in getting higher seniority entitling them to allocation of spectrum on priority basis.

78. The argument of Shri Harish Salve, learned senior counsel, that if the Court finds that the exercise undertaken for grant of UAS Licences has resulted in violation of the institutional integrity, then all the licences granted 2001 onwards should be cancelled does not deserve acceptance because those who have got licence between 2001 and 24.9.2007 are not parties to these petitions

and legality of the licences granted to them has not been questioned before this Court.

79. In majority of judgments relied upon by learned Attorney General and learned counsel for the respondents, it has been held that the power of judicial review should be exercised with great care and circumspection and the Court should not ordinarily interfere with the policy decisions of the Government in financial matters. There cannot be any quarrel with the proposition that the Court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of those who are entrusted with the task of framing the policies. We are also conscious of the fact that the Court should not interfere with the fiscal policies of the State. However, when it is clearly demonstrated that the policy framed by the State or its agency/instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the Court to exercise its jurisdiction in larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond the recognised parameters. When matters like these are brought before the judicial constituent of the State by public spirited citizens, it becomes the duty of the Court to exercise its power in larger public interest and ensure that the institutional integrity is not compromised by those in whom the people have

reposed trust and who have taken an oath to discharge duties in accordance with the Constitution and the law without fear or favour, affection or ill will and who, as any other citizen, enjoy fundamental rights and, at the same time, are bound to perform the duties enumerated in Article 51A. Reference in this connection can usefully be made to the judgment of the three Judge Bench headed by Chief Justice Kapadia in Centre for P.I.L. v. Union of India (2011) 4 SCC 1.

80. Before concluding, we consider it imperative to observe that but for the vigilance of some enlightened citizens who held important constitutional and other positions and discharged their duties in larger public interest and Non Governmental Organisations who have been constantly fighting for clean governance and accountability of the constitutional institutions, unsuspecting citizens and the Nation would never have known how the scarce natural resource spared by the Army has been grabbed by those who enjoy money power and who have been able to manipulate the system.

81. In the result, the writ petitions are allowed in the following terms:

(i) The licences granted to the private respondents on or after 10.1.2008 pursuant to two press releases issued on 10.1.2008 and subsequent allocation of spectrum to the licensees are declared illegal and are quashed.

(ii) The above direction shall become operative after four months.

(iii) Keeping in view the decision taken by the Central Government in 2011, TRAI shall make fresh recommendations for grant of licence and allocation of spectrum in 2G band in 22 Service Areas by auction, as was done for allocation of spectrum in 3G band.

(iv) The Central Government shall consider the recommendations of TRAI and take appropriate decision within next one month and fresh licences be granted by auction.

(v) Respondent Nos.2, 3 and 9 who have been benefited at the cost of Public Exchequer by a wholly arbitrary and unconstitutional action taken by the DoT for grant of UAS Licences and allocation of spectrum in 2G band and who off-loaded their stakes for many thousand crores in the name of fresh infusion of equity or transfer of equity shall pay cost of Rs.5 crores each. Respondent Nos. 4, 6, 7 and 10 shall pay cost of Rs.50 lakhs each because they too had been benefited by the wholly arbitrary and unconstitutional exercise undertaken by the DoT for grant of UAS Licences and allocation of spectrum in 2G band. We have not imposed cost on the respondents who had submitted their applications in 2004 and 2006 and whose applications were kept pending till 2007.

(vi) Within four months, 50% of the cost shall be deposited with the Supreme Court Legal Services Committee for being used for providing legal aid to poor

and indigent litigants. The remaining 50% cost shall be deposited in the funds created for Resettlement and Welfare Schemes of the Ministry of Defence.

(vii) However, it is made clear that the observations made in this judgment shall not, in any manner, affect the pending investigation by the CBI, Directorate of Enforcement and others agencies or cause prejudice to those who are facing prosecution in the cases registered by the CBI or who may face prosecution on the basis of chargesheet(s) which may be filed by the CBI in future and the Special Judge, CBI shall decide the matter uninfluenced by this judgment. We also make it clear that this judgment shall not prejudice any person in the action which may be taken by other investigating agencies under Income Tax Act, 1961, Prevention of Money Laundering Act, 2002 and other similar statutes.

…….J.
(G.S. SINGHVI)

……....J.
(ASOK KUMAR GANGULY)

New Delhi;
February 02, 2012.