Preliminary Remarks

The vast majority of issues on which comments have been sought by the Telecom Regulatory Authority of India in this consultation paper on licensing issues relate to wireless services and spectrum.

It is important to appreciate that many of the questions arise from the current anomalies and distortions in the spectrum licensing regime. India can move to a simpler licensing regime- along world best practices- if the spectrum is delinked from current service licensing. It is important to ensure that spectrum is rationally priced – on market principles along with policy priorities. Anyone who is qualified to obtain a licence should separately compete for and pay charges for the spectrum should be able deploy any telecom service currently permitted in the country. All services should be should be given freely to those who qualify for the licence and are able to secure spectrum in a transparent manner.

Issues for consultation

Merger and Acquisition

Q1. How should the market in the access segment be defined?

Access market should be divided between fixed and mobile access based on whether end user terminals are fixed or mobile. Even though fixed is a rapidly decreasing part of the overall access market, it retains certain features that are unique to it. It is worth clarifying that fixed includes wire line telephones as well as fixed wireless telephones (or FWT). Mobility should be based on a mobile form factor. In case of dispute, only that wireless phone should be regarded as fixed which is substantially (say 30%) larger/heavier than the highest selling mobile phone in the market.

Q2. Whether subscriber base as the criteria for computing market share of a service provider in a service area be taken for determining the dominance adversely affecting competition, If yes, then should the subscriber base take into consideration home location register (HLR) or visited location register (VLR) data? Please provide the reasons in support of your answer?

Current scheme does not yield accurate subscriber data since with current rules; operators can claim more spectrum by overstating subscriber numbers. VLR data seems a better option because it must record actual users.

Q3. As per the existing guidelines, any merger/acquisition that leads to a market share of 67% or more, of the merged entity, is not permitted. Keeping in mind, our objective and the present and expected market conditions, what should be

the permissible level of market share of the merged entity? Please provide justifications for your reply?

The current 67% rule is prudent but should be used for indicative purposes only. The merger guidelines should not be overly restrictive. In a rapidly evolving and highly competitive landscape, flexibility is the key. A higher market share than 67% should not rule out mergers outright. The onus must be on the merging entities to satisfy the regulators that increasing concentration will not abuse market.

Q4. Should the maximum spectrum limit that could be held by a merged entity be specified?

If yes, what should be the limit? Should this limit be different for Mergers amongst GSM/GSM, CDMA/CDMA & GSM/CDMA Operators? If yes, please specify the respective limits?

The critical point to consider is that the licensing regime should not come in the way of effective spectrum management. Spectrum is scarce and must be allocated transparently to promote efficient use by the licensees. There is every reason to separate spectrum use from licenses. Licensing anomalies, such as those that exist between GSM and CDMA players currently, should not create incentives for operators to select specific wireless technologies. Many of the current problems are a consequence of these anomalies. The current exercise would be incomplete if it does not remove existing anomalies that encourage operators to make technology choices for reasons unrelated to the technology itself but because regulation deals differently with two competing technologies that are functionally virtually indistinguishable.

An operator should be allowed to merge with a player to get access to the other operator's spectrum. However, no operator should be able to use mergers or acquisitions to jump the queue for scarce spectrum. If an operator wishes to change his technology- GSM to CDMA or vice versa- he should be facilitated to do so but not by hurting customers or competition. Thus if a GSM player wishes to provide CDMA services his existing subscriber base in the former should not determine the quantum of spectrum he can obtain for the latter. Likewise, the same should apply, for CDMA player moving to GSM. A service provider using both technologies should not be able to expand his spectrum allocation in the same service area.

Q5. Should there be a lower limit on the number of access service providers in a service area in the context of M&A activity? What should this be and how should it be defined?

Yes. 4 competing operators are believed by many to reduce the risk of market abuse through cartels etc.

Q6. What are the qualitative or quantitative conditions, in terms of review of potential mergers or acquisitions and transfers of licenses, which should be in place to ensure healthy competition in the market?

Robust competition is the key. A technology neutral regime with easy norms for market entry and exit are central to ensure competition and consequently maximize consumer benefit. With genuine technology neutrality, markets will deliver optimal choice of technologies and efficiencies to sector.

Q7. As a regulatory philosophy, should the DoT and TRAI focus more on ex post or ex ante competition regulation, or a mix of two? How can such a balance be created?

Ex ante is unnecessarily restrictive at this stage of development in the sector. The ability to innovate and take risks is much higher today than when the process of deregulation began in the 1990's. Therefore flexibility is both necessary and desirable. The goal should be to state clear regulatory goals (e.g. competition promotion, technology neutrality, affordability etc) and move to ex post regulation. In other words, everything should be allowed unless expressly disallowed. The role of licensing in a competitive environment of the kind that exists in the telecom sector must be minimal.

Substantial Equity

Q8. Should the substantial equity clause (1.4 of UASL) continue to be part of the terms and conditions of the UAS/CMTS license in addition to the M &A guidelines? Justify.

This rule is too narrow and arbitrary and therefore, not necessary. Whether it is ownership of competing businesses, or potential cartels regulators must work within state policy goals and use economic criteria to ensure competition in the market is not compromised.

Parallel stakes in two competing businesses must be a matter for shareholders who would be more concerned about conflicts of interest, if any. A company may legitimately wish to have a stake in a business with the same licence but with a complementary strategy. For instance, a licensee may wish to concentrate its business on a particular segment e.g. business, rural subscribers etc. A promoter may therefore want stakes in two licensees in the same area albeit different business models.

Q9. If yes, what should be the appropriate limit of substantial equity? Give detailed justification.

See answer to previous question.

Q10. If no, should such acquisition in the same service area be treated under the M&A Guidelines (in the form of appropriate terms and conditions of license)? Suggest the limit of such acquisition above which, M&A guidelines will be applied.

Commercial flexibility is important at this stage of the sector. If an operator wishes to exit a business and another one wants to buy him out, then regulators cannot force such an entity to stay in the business just because the benchmarks for equity or market share cannot be met. Their recourse would be to prevent consumer abuse by imposing rules for tariff, additional disclosure etc or limiting the scope of licence by excluding some services where potential competitors may be hurt later. For instance, companies like British Telecom, AT&T and Microsoft have faced controls that their competitors do not.

Q11. Whether a promoter company/legal person should be permitted to have stakes directly or indirectly in more than one access License Company in the same service area?

In principle, yes. However regulators must ensure that effective competition in the market is not compromised.

Q12. Whether the persons falling in the category of the promoter should be defined and if so who should be considered as promoter of the company and if not the reasons therefore?

Definitions will always be required. However, overall government policy on suitability or nationality of promoters should be adequate for the telecom sector as well. The goal should be to limit sector specific rules to a bare minimum.

Q13. Whether the legal person should be defined and if so the category of persons to be included therein and if not the reasons therefore.

Definitions would be required for all legal purposes. But sector specific rules should be avoided.

Q14.Whether the Central government, State governments and public undertakings be taken out of the definition for the purpose of calculating the substantial shareholding?

No. As long as government remains a direct or indirect commercial player in the business- as it is today with its ownership of BSNL- the definition must include government and its undertakings.

Permitting combination of technology under same license

Q15. In view of the fact that in the present licensing regime, the initial spectrum allocation is based on the technology chosen by the licensee (CDMA or TDMA) and subsequently for both these technologies there is a separate growth path based on the subscriber numbers, please indicate whether a licensee using one technology should be assigned additional spectrum meant for the other technology under the same license?

A change in technology should be permitted to any operator. However, if an operator makes a claim for spectrum it should be in the same queue as other operators seeking the same spectrum. Claims for any specific part of spectrum should be decided strictly in order of their being made. An operator must not be able to claim its subscriber base in GSM or CDMA spectrum to justify priority in spectrum allocation for CDMA or GSM services respectively.

Q16. In case the licensee is permitted, then how and at what price, the licensee can be allotted additional spectrum suitable for the chosen alternate technology;

See answer to Q15

Q17. What should be the priority in allocation of spectrum among the three categories of licensees given in ¶4.16 of the chapter?

See answer to Q15

Q18. Whether there should be any additional roll out obligations specifically linked to the alternate technology, which the service provider has also decided to use?

No.

Q19. Lastly, as such service provider would be using two different technologies for providing the mobile service, therefore what should be the methodology for allocation of future spectrum to him?

The two types of spectrum should not be combined. The operator choosing two technologies must fit in to the system applicable to all competitors.

Roll out obligations

Q20. Should present roll out obligations be continued in the present form and scale for the Access service providers or should roll out obligations be removed completely and market forces be allowed to decide the extent of coverage? If yes, then in case it is not met, existing provision of license specifies LD charges upto certain period and then cancellation of license. Should it continue or after a

period of LD is over, enhancement of LD charges till roll out obligation is met. Please specify, in case you may have any other suggestion.

No. No rollout obligations are now necessary in view of the explicit subsidies that USOF provides for undertaking coverage in priority areas. A cutoff date must be set by licence amendment, to calculate an operator's liability for failure to comply with the roll out terms of current licences.

Q21. Is there a case for doing away with the performance bank guarantees as the telecom licensees are covered through the penalty provisions, which could be invoked in case of non-compliance of roll out obligations?

Performance guarantees are no longer necessary.

Q22. Should roll out obligations be again imposed on the existing NLD licensees? If yes, then what should be the roll out obligations and the penalty provisions in case of failure to meet the same?

There is absolutely no case for roll out obligations for operators whose only customers are other operators not retail consumers.

Q23. What additional roll out obligations be levied on ILD operators?

None. See previous answer.

Q24. What should be the method of verification of compliance to rollout obligations?

Not relevant in view of answers to previous questions in this section.

Q25. What indicators should be used to ensure quality of service?

QoS regulation is largely wasteful since the cost of identifying default and enforcement of rules is prohibitive. The only way to protect consumer interest is to share QofS data widely through consumer organizations, websites mailers, newspapers etc. Poor quality means markets are not sufficiently competitive. Regulatory action should therefore be focused on identifying market abuse and removing barriers to competition, if any.

Q26. As the licensees are contributing 5 per cent of AGR towards the USOF, is it advisable to fix a minimum rural roll out obligation ? If yes, what should be that. If no, whether the Universality objectives may be met through only USOF or any other suggestions.

No. USOF should be the sole agency mandated to facilitate network rollout. In case this does not happen, the levy amount can be adjusted or the USOF's mandate suitably fine-tuned. However, it is undesirable to have multiple administrative or financial mechanisms for expanding coverage. They will only create avoidable confusion.

Q27. In case of rural roll out obligation, whether number of BTS in a certain area a viable criterion for verification of rollout obligation?

This is largely academic, since as I have argued above, rollout obligations are unnecessary.

28. What should be the incentives and the penalties w.r.t. rural roll out obligations?

Markets are best placed to reward or punish rural performance. USOF subsidy must help meet the risk of market failure.

Determining a cap on number of Access provider in each service area.

Q29. Should there be a limit on number of access service providers in a service area? If yes, what should be the basis for deciding the number operators and how many operators should be permitted to operate in a service area?

A post facto limit on number of players is unfeasible. Future licences must be given after existing demand for spectrum is fully met. However it should be realized that distortions in the existing spectrum licensing regime may be creating incentives for more operators entering the market than perhaps necessary. The entry price for spectrum in India is zero since the spectrum is tied to the licence. A rational price for spectrum, that reflects its considerable scarcity and demand, would deter the less serious players. This requires that the licence to provide services is completely delinked from spectrum which the new entrant must compete to obtain at a market based price.

Q30. Should the issue of deciding the number of operators in each service area be left to the market forces?

Market forces can be relied upon to do this and in any case may be the least contentious option. However markets can deliver best results only if the underlying spectrum regime is coherent. If it is not, the risk of deterioration of quality of service will be real and serious since a new entrant will face those problems only after a

certain number is reached but the large number of subscribers of existing players will suffer if their service provider has no growth path.