RESPONSE TO TRAI'S CONSULTATION PAPER

ON

REVIEW OF LICENSE TERMS AND CONDITIONS AND CAPPING OF NUMBER OF ACCESS PROVIDERS

Merger and Acquisition

Q1. How should the market in the access segment be defined (see para 2.2)?

The licensed area / circle should continue to be the basic entity for market definition.

Furthermore, we propose that within every circle, Wireline and Wireless be defined as different access markets for the following reasons:

- As explained subsequently, the spectrum available to a merged entity will be the principal catalyst for mergers. It will be a key determinant for valuations, and also by way of the subscriber base and services that it can support, will impact the extent of market dominance by merged entities. Hence, it makes sense to make 'Wireless' as one category.

- Wireline growth is expected to be marginal in the coming years, and limited M&A activity is likely to happen in the Wireline area. However, one can expect developments in fixed-mobile convergence during the next year or two. We, therefore propose that the categorization be reviewed for any anomalies/ changes that may be created/ take place in the market structure due to those developments when they occur.

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?

We recommend the following two criteria to be applied for computing market share of a service provider in a service area, for determining market share:

1. Subscriber base in the VLR.

AND

2. Audited AGR as submitted to DoT.

The subscriber base and revenues are both widely used for determining the valuation of telecom businesses and, therefore, are natural choices. Since VLR is a more accurate representative of active subscribers than HLR, the VLR count is recommended.

In a merger/ acquisition situation in a particular service area, each of the above two criteria should be applied separately to define the market share of each access business i.e., wireless and wireline, of the operators in question. Hence, the merger/ acquisition would need to satisfy the market share conditions using ***each*** of four parameters, namely, Wireless VLR subscriber base, Wireline subscriber base from Exchange Data Records, Wireless AGR and Wireline AGR.

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?

As per international practice, a market share of 40 % to 50% is indicative of dominance. In the European Union (EU), the presumption of market dominance is if a firm has a market share consistently above 50%. In the United States, markets in which an HHI above 1800 points translates to 45% market share are considered to be concentrated. We recommend a maximum market share of 45 % for the merged entity.

Whereas, TRAI's M&A recommendations dated 30th January 2004 had proposed a threshold of Concentration Ratio – 2 (CR2) of 75%, this was not adopted in DOT's final recommendations. In the public interest, to avoid the formation of virtual duopolies, it may be advisable to cap the CR2. We propose a cap of 75%.

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

a. **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**?

Yes, there should be a limit on the spectrum that could be held by a merged entity.

The case of GSM and CDMA merger is complex, and with the advent of new technologies, it will become even more so. In the near future, more spectrally efficient technologies will also be available to operators within their existing assigned bands. Assigning spectrum on the basis of spectral efficiency will therefore become an increasingly impossible task. Recognizing this, TTL had made various representations to the Department of Telecom to suggest a spectrum allocation policy that addresses the issue. TRAI's recommendation of 27.09.2006 on Allocation and pricing of spectrum for 3G and broadband wireless access (BWA) services established 3 fundamental principles:

- Upfront allotment of adequate spectrum
- Technology neutrality
- Pricing of Spectrum

Extending the principles to 2G, 3G or "Any G" spectrum, TTL had mooted that:

1. Subscriber base as a criterion for allocating additional spectrum be done away with. This flows naturally from the two principles that, (a) adequate spectrum be allocated upfront, (b) without considerations of the technology being used (and therefore without considerations of perceived spectral efficiency / subscriber capacity).
2. The contracted spectrum be given to operators upfront.
3. Any allocations beyond the contracted amount be paid for.

If the above recommendations are accepted, most of the issues arising from cross technology holdings would be resolved. We propose as follows:

- Annexure IX of the consultation paper confirms that the current contracted spectrum of GSM and CDMA operators is 6.2 MHz and 5 MHz respectively. The UASL license agreement presently does not provide for spectrum allocations beyond those amounts. However, unlike the CDMA operators, GSM operators have already been

assigned spectrum beyond their contracted amount to upto 10 MHz in many circles, without the payment of any additional fee.

- Therefore, in the interest of a level playing field, and keeping the technology neutrality principle in mind, CDMA and GSM operators who hold less than 10 MHz should also be upfront assigned 10 MHz each immediately. In the event that adequate spectrum is not available for CDMA operators in the existing 800 MHz band, the additional spectrum should be provided in the globally aligned 1900 MHz band. Such a natural progression was done for the GSM operators when the spectrum in the 900 MHz band ran out, and they were given additional spectrum in the 1800 MHz band.
- The spectrum beyond 6.2 MHz and 5 MHz for GSM and CDMA operators respectively should be charged for at a pro-rata rate derived from the entry fee under the current UASL guidelines. **The rate per MHz should be identical for CDMA and GSM spectrum.** In the event of there being more buyers than the spectrum available, the buyers may be asked to bid on the revenue share percentage in addition to the payment above. Those GSM operators, who already hold more than 6.2 MHz, should be asked to pay retrospectively for the differential amount.
- **Alternatively**, in the event that the Government feels that it may not be possible to make the said GSM operators pay for the additional spectrum retrospectively, the spectrum beyond 6.2 MHz/ 5 MHz, upto 10 MHz, should be given to the other GSM/ CDMA operators without payment of any additional fee.
- Any further spectrum beyond 10 MHz for either GSM or CDMA operators may also be assigned, but after payment of additional fee.

As on date, combined CDMA / GSM spectrum can be held in 800/900/1800 MHz bands. We have proposed above that any shortfall in spectrum availability in the 800 MHz band for CDMA operators be met out of the 1900 MHz band. **We propose that the cap in the current M&A guidelines on the spectrum of the merged entity of 15 MHz be retained for the above bands.** Companies belonging to the same group holding different access service licenses in the same circle should be treated as a merged entity. Caps on other spectrum outside these bands, such as the so-called “3G” bands of 450 MHz, 1900 MHz (to the extent not allocated for making up the 10 MHz requirement for CDMA operators), and 2100 MHz, should be defined in a comprehensive, transparent and technology neutral spectrum policy, and the M&A guidelines should be revisited after such a new spectrum policy is put in place.

b. **If no, give reasons in view of effective utilisation of scarce spectrum resource?**

Not applicable in view of the above.

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?

It is essential that virtual duopolies are not created subsequent to mergers. At the same time for deriving maximum operational efficiencies through a free market, mergers should be encouraged. We feel that the current lower limit of three operators reasonably addresses both the issues, and should therefore continue. This should be accompanied by the requirement that CR2 be defined as being capped at 75%.

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?

Lock-in period i.e., no sale / merger/transfer of licenses to be allowed for a period of 5 years from the effective date of license.

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?

It should be primarily ex ante competition regulation with some ex post regulation to the extent that it is necessary. Ex ante regulations, which include obtaining prior approval of Licensor, are required as Indian markets are not mature to the extent where only ex post regulations may work.

Furthermore, with the continuing dominant market power of the incumbent in the wireline area there is an urgent need for the Authority to consider the imposition of ex post asymmetric regulation vis-a-vis the incumbent and the merged entity if it has Substantial Market Power.

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.

Yes, the substantial equity clause (1.4 of UASL) should continue to be part of the terms and conditions of the UAS/CMTS license. The limit should remain at 10% to dissuade collusive conduct through cross ownership in more than one licensee in the same service area.

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

The present limit of substantial equity of 10 % should continue, based on the reasons given in answer to question no.8 as above.

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.

Not Applicable.

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?

Currently, a promoter of a licensee company in a service area cannot hold any equity in any other licensee company in the same service area. Other entities may hold upto 10% equity (directly or indirectly) in more than one licensee company. The same should continue.

It is acknowledged that when the access providers existing in November 2003 migrated to UASLs, a special dispensation, allowing more than one company from the same Group to hold separate access licenses in the same service area, was made. The advantage of the dispensation continues to be available today to one such Group. **It is proposed that with respect to all conditions pertaining to merger/ acquisition, like market share and spectrum caps, such companies belonging to a single Group, be treated as a single entity.**

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?

At present there is no clear definition of the promoter in the License Agreement. However, we suggest the following definition be considered:-

Promoter includes:

(i) persons in control of the company, directly or indirectly; or
(ii) persons identified as promoter / promoters in the offer document at listing or in the statement in lieu of the prospectus filed with the RoC, in case of an unlisted Indian public company; or
(iii) Such persons directly or in combination with a group, or persons acting in concert, hold 25% or more of the voting shares of the company;

Provided further that the promoter or a group identified as the promoter group shall not be inter-locked through shareholding or management control to the extent of 25% or more of the board of directors, or through key executive management positions, or 25% or more of the shareholding in one or more licensee companies operating in the same telecom circle.

(**Note**: the interlocking of shareholding and control in excess of 25% is intended to prevent dominance over spectrum allocations in the same telecom circle); and shall include a group acting in concert with the immediate promoter shareholders or person in control of management (group as defined under the MRTP Act, 1970).

Explanation: "Change in promoter" with reference to any telecom license shall exclude changes of indirect nature in tiered, layered, upstream, holding or operating companies above the great grand father tier from the shareholder having an interest in a licensee company, *except* where changes in shareholding at the tiered, layered, upstream, holding or operating companies at any level is subject to any arrangement, whether as a voting arrangement or otherwise, providing affirmative voting rights being granted in favour of new shareholders or minority shareholders of indirect holding or operating companies or reservation or nomination rights for such new or minority shareholders for directors in downstream investee companies, including the licensee company, or any rights of first refusal in relation to any share sale for such new or minority shareholders in any tiered, layered, upstream, holding or operating company or downstream investee company including the licensee company.

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

There is no need to define.

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

In a liberalized and free market, the Central government, State governments and public undertakings **should not be** taken out of the definition for the purpose of calculating the substantial equity shareholding, and they should be treated at par with other stake / share holders.

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?

Yes, a licensee using one technology may be assigned, on request, additional spectrum meant for the other technology under the same license. For the spectrum so assigned, the licensee should pay the charges applicable for the additional spectrum as per the current UASL norms. For any GSM/ CDMA spectrum allocated thereafter beyond 6.2 MHz/ 5 MHz, a further fee may be charged as described in our reply to question 4. (If the Government adopts the alternate option discussed in our reply to question 4, then these figures would be amended to 10 MHz each for CDMA/ GSM technologies).

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;

The additional spectrum beyond 10 MHz may be given to the existing operator. It should be charged as explained in our reply to question 4.

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

Ideally, enough spectrum should be made available after getting it vacated from other users (non telecom operators) to meet the requirements of the existing operators.

We suggest that the priority in terms of allocation of spectrum should be in the following order:

Priority – 1

Priority should be given to the existing UASL operators in the circle in question. They should be guaranteed spectrum upto 10 MHz.

Priority – 2

Existing licensees who already hold UASLs in more than 50% of the country's 23 telecom circles, wanting spectrum in the same/ alternate technology in another circle. These are the operators that have already made heavy investments on the ground and are seeking to increase their footprint across the country.

Priority - 3

Existing UASL licensees wanting spectrum in an alternate technology in the same circle. These are operators who have already made significant investments on the ground.

Priority – 4

All other applicants / operators, who have submitted their applications for UASLs, in accordance with their date of application.

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?

There should be no roll out obligations specifically linked to the alternate technology which the existing service provider has decided to use. Keeping in view of the changing pace of technological innovations and developments, no roll out obligations are called for which are linked to alternate technologies. In fact, roll out obligations have hardly been successful, and become even more redundant when viewed in the light of the intense competition in the market which is leading service providers to rapidly expand their networks to remote areas.

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?

Answers provided in our replies to questions 4 and 15.

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.

- The mandatory requirement in terms of roll out was justified when the sector was opening up. There were ambitious targets to be achieved and it was to be ensured that the sector grew in the right direction.
- Today, the telecom scenario has completely changed. The urban markets are becoming saturated. Operators are perforce finding / exploring new markets / niche areas, including rural areas, for growth.
- The Government's offer of subsidies to service providers to extend their networks to remote areas was greeted, in many instances, by offers from the service providers to instead pay the Government to undertake such responsibilities.

In view of the above, the present roll out obligations should be discontinued for both, existing and new licenses.

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?

Yes, there is a case for doing away with the performance bank guarantees.

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.

No, the roll out obligation should not be imposed against either on the existing or new NLD licensees. There is enough competition in the markets today with 17 operators, and more operators are lined up to enter the market. When competition makes the major markets less lucrative, operators will perforce reach out to the more remote areas with their connectivity.

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

No roll out obligations should be imposed.

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

Not Applicable.

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

We are comfortable with TRAI's present QoS regulations except that pertaining to in-building coverage.[1]

The existing parameter for in-building coverage prescribed by the Authority is too stringent and virtually impossible to implement. Moreover, internationally, wireless operators are not mandatorily required to provide any specific level of in-building coverage. We therefore, recommend that the level of in-building coverage be left to market forces. The stipulation of in-building coverage may be dropped from both, the DOT/ TEC's norms, and from TRAI's QOS regulations.

Besides, the view point of the industry should be kept in mind that TRAI benchmarks on QOS cannot be fully complied with unless timely allocation of desired spectrum and interconnection are made available equally to all operators.

[1] It may be noted that the existing parameter for in-building coverage is applicable equally to GSM and CDMA networks and does not recognize the difference in characteristics between the two technologies. Since CDMA networks are designed for "Mobile Transmit Power", Mobile Transmit Power would have been the more appropriate parameter for CDMA networks then Mobile Receive Power.

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

No, it is not advisable to fix a minimum rural roll out obligation. TRAI has itself noted that the past experience shows that specifying rural obligations did not meet the objective in a major way for providing telecommunication facilities in rural areas. Furthermore, it may be noted that the slow pace of rural roll out is attributable largely to the fact that the USOF has so far been unable to adequately utilize the huge funding available with it.

The universal service objectives can be met entirely with incentives from the USOF instead by imposition of roll out obligations.

- The RDEL tender resulted in an increase in teledensity by 1.6% in the SDCAs served by TTL. This percentage could further increase if the RDEL scheme is extended by another two years as requested by the industry.
- As per TRAI, the present geographic coverage of mobile networks is around 39% and population coverage is around 60%. The recently concluded Phase – I of infrastructure sharing project by USO aims at setting up of 7,871 infrastructure sites in 500 districts all over India and through which coverage to 2.12 lakh villages, 4.98 crore households and 26.93 crore population will be achieved. This will increase the population coverage to 83%.
- USO is planning to come out with Phase – II of infrastructure sharing tender for setting up additional 10,000 sites. This will entail that the population coverage of 83% will increase to more than 95%.

Considering that the USOF is making plans (like a Phase – II of its rural infrastructure sharing project) for utilizing its cache of Rs. 9000 crores, we believe that with incentives from the USOF, there will be no need for fixing any roll out obligations for meeting India's rural roll out objectives.

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

There should be no roll out obligations.

Q28. What should be the incentives and the penalties w.r.t. rural roll out obligations?

Incentives should be given in the form of:

- Judicious use of USO funds to encourage the operators to provide services in the rural areas as per TRAI's recent recommendations on Infrastructure Sharing including:
  - Subsidies from USO fund equal to 80% of the amount decided under USO Phase 1 scheme.
  - Backhaul sharing.
- Reduction in customs duty on equipments imported for rural coverage.
- Reduction in license fee once the network is completely rolled out in the rural areas.

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 of operators and how many operators should be permitted to operate in a service area?

and

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

TRAI has cited the following key considerations for the licensor while determining the new licenses to mobile telephony service providers: Competitive Scenario, Financial Sustainability and Availability of Spectrum.

Competitive Scenario and Financial Sustainability are issues best left to market forces. However, spectrum availability will clearly determine the decision on number of players that may be allowed to be licensed in a circle.

Existing UASL licensees should be ensured a growth path upto 10 MHz. Thereafter, spectrum should be allocated to new UASL applicants who already operate access services in more than 50% of the country's 23 telecom circles. Subsequently, all other applicants should be considered for spectrum allocation based on its availability.

For other operators like Cable / ISPs there should not be any cap on the number of players to the extent they would not be requiring CDMA / GSM spectrum. The BWA spectrum policy should indicate the number of operators based on the availability of spectrum for the same.