

No.801-1/2012-CW/TRAI

Dated 24th February, 2012

To

Shri Sudhir Gupta,
Principal Advisor (MS),
Telecom Regulatory Authority of India,
New Delhi.

Subject: Comments on TRAI's Consultation Paper (No.03/2012) dated 10th February, 2012 on "draft guidelines for Unified Licence / Class Licence and Migration of Existing Licenses"

Sir,

1. Cable & Wireless Worldwide (C&WW) welcomes the TRAI's endeavor of starting afresh consultation process on "draft guidelines for Unified Licence / Class Licence and Migration of Existing Licenses" We are thankful to the Hon'ble Authority for accepting our Association's (ACTO) request for inclusion of migration path for the existing licensees for the proposed Unified Licensing Regime.
2. We believe that the Unified Licensing Regime (ULR) will bring down the level of perceived competition to more realistic level, which is the need of the industry for the future sustainable growth. It is also expected that the proposed ULR should be in line with the objectives stated under the present & proposed National Telecom Policy (NTP-99/Draft NTP-11).

3. We understand that at the time of finalization of the recommendations on guidelines on Unified Licence Regime, TRAI will address the present anomalies / artificial restrictions that exist in the present licenses including NLD/ILD/ISP, which were drafted way back based on that time's market conditions / level of competition / government objectives etc. Since now lot of changes have taken place in the telecom market, therefore, it is requested that TRAI may take into account the following issues before finalizing the recommendations:

- Objectives identified in the National Telecom Policy.
- Level of competition in various segments / markets.
- Double Taxation/modification in the Definition of Adjusted Gross Revenue (AGR).
- Artificial barriers / restrictions in the long distance services.
- Sharing of networks / infrastructure within various licenses.
- Recent judgments of Supreme Court
- Regulatory impact analysis (RIA) on various segments / markets.
- Responsibility /obligations of Significant Market Power (SMP) Operator

3. Our response to the specific issues raised by the Hon'ble Authority are enclosed as Annexure-I.

With kind regards,

Yours sincerely,

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Comments / inputs of Cable & Wireless Worldwide (C&WW) on Issues for Consultation on Draft Guidelines for Unified Licence / Class Licence and Migration of Existing Licenses.

Issues for Consultation

1. Kindly give your response to each clause of Chapters I to IV above.

The comments of C&WW on the relevant issues of Chapters I to IV are as follows:

I. Entry Fee

Entry Fee of Rs. 20 crore is too high for the standalone operators like C&WW. It should be levied on the principle of “pay for the bit you eat”. That is to say in case of non-integrated standalone operator who are providing data services under NLD and ILD Licenses, the entry fee after full fledged migration should not be more than Rs. 5 crore (Existing Entry fee is Rs. 2.5 crore each for NLD and ILD license) + the amount equivalent to the existing entry fee for the service it wants to provide under the new regime. Presuming that after migrating to the proposed Unified service Regime C&WW also want to provide ISP (All India) service then additional entry fee of Rs.30 lakhs may be charged. In that case the total entry fee should not be more than Rs. 5.30 crore.

In support of our suggestion for lowering the proposed entry fee, the Hon’ble Authority’s attention is drawn to the Extracts taken from DLD Consultation Paper on Introduction of Competition in Domestic Long Distance Communications dated 15.7.1999 wherein the level and modality of the entry fee were discussed at length:

“6.2.1 Entry fees

377. The level and modality of entry fees are determined by the policy objectives and competition strategy. In case of limited competition, entry fee is the key evaluation criterion, due to the bidding approach. In such cases, licenses are awarded to the highest bidders, whose bid is considered as the entry fees. In contrast, in the competitive scenario, where licenses are available on demand, entry fees are nominal pre-fixed amounts, to be paid by all licensees. At times, under restricted competition, entry fee is also used as entry barrier, wherein it is fixed at a level so high that only serious entities enter the sector.

378. In the past, governments have considered grant of licenses, as conferring of an asset which requires to be compensated through a payment of fees. Telecom licenses, too, have been used towards contributing to the exchequer. In principle, any subsidies or contributions from a sector should be appropriated through taxes instead of less efficient means, such as license and entry fees. The latter tends to distort pricing structure in the sector, since service providers add these costs to their inputs.

381. Generally, entry fees are not fixed at high levels in free markets. In Australia, the application fee is only Au \$ 10,000, while the DLD market size is in the range of Au \$ 3 billion. The EU directive on licensing requires that "...any fees imposed on the undertakings as part of authorisation procedures seek to cover only the administrative costs incurred in the issue, management, control and enforcement of the applicable licenses".

382. Among the sub continent countries, Sri Lanka requires that the applicant deposits one percent of committed investments as fees. Every time the operators expand their networks, one percent of additional investment planned has to be deposited with the government."

In view of above, we would suggest that the entry fee should not be higher than the existing level. The total entry fee after migration should not be higher than the total of existing entry fee service wise/ each service and it should be levied on the principle of "pay for the bit you eat"

II. License Fee

Para 11.2 of the guidelines says that "An annual Licence Fee as a percentage of Annual Gross Revenue (AGR), as defined in the licence agreement shall be applicable. From the second year of the effective date of the Unified Licence, this Licence Fee shall be subject to minimum of 10% of the Entry fee paid.

We believe that imposition of licence fee to a minimum of 10% of the Entry fee paid (whether operator generates any revenue or not) is against the spirit of NTP'99 which proposed revenue share as a basis for determining license fee. Since NTP 99 is still in vogue the entry fee based minimum licence fee will not be in sync with NTP 99.

In support of our view that entry fee based minimum license fee is not justified, we would like to draw your attention to the relevant extracts noted by the Hon'ble Authority in its Consultation Paper on "Introduction of Competition in Domestic Long Distance Communications" dated

15.7.1999 wherein the purpose of levying of Licence Fee was discussed at length:

“6.2.4 License Fees

*386. Regulatory expenses are recovered through annual fee contributions from operators on the basis of their revenues. The principles of proportionality are applied whereby higher license fees are sought from entities entailing higher regulation, viz. dominant entities, mostly based on revenues. **The license fees in case of facility based services may be higher since the regulatory issues pertaining to interconnection and network structure will be larger. Fees for mere service provision may be lower depending on the degree of competition. In many countries, the resellers or mere service providers do not require licensing, and hence pay no license fees.***

387. US regulators do not require any licensing for long distance telephony segment except for allocation of spectrum. However, operators are required to pay specified fees for filing tariffs, or applying for extension of networks . In addition, the FCC may levy additional fees every year to cover the cost of regulation for a particular year, which is not covered by the budgetary allocations.

6.2.5 Policy Implications

391. For levying fees or requiring contributions based on revenue which is also generally known as revenue sharing arrangement, operators are required to report their revenues. In the US for the purpose of USO levy, carriers are instructed to report the amounts actually billed to customers. This means that carriers should report revenue net of discounts, but without making any adjustments to reflect uncollectible revenue. In certain cases only end-user revenues are considered while in other cases even the revenues earned from other service providers through resale are included.”

In view of above and the government policy announced through NTP 1999, the Licence Fee should be based on Revenue Share only. Thus the proposed fixed minimum license fee as a percentage of Entry fee in the proposed Unified Licensing Regime is against the provisions and spirit of NTP 1999.

2. What are your views on the scope of Licence for Unified Licence (National level / Service area level/District level) and Class Licence? (Clause 5 of draft guidelines for Unified Licence and Clause 5 of draft guidelines for Class Licence)

Comments

1. Unified Licence –National Level

- 1.1 The scope of license for National Level Unified license should include the all telecommunication/ telegraph services covering various geographical areas using any technology. DOT's letter No. No.808-26/2003-VAS Dated the 11th Nov., 2003 also refers in this regard which was issued in pursuance of NTP 1999.
- 1.2 It has been noted that clause 5.1 c stipulates that Public network is not to be connected with leased circuits/CUGs. We believe that in the fast changing telecom scenario moving ahead for convergence of various services / networks, there does not appear any need for this artificial barrier / restriction. This restriction appears to be in contradiction of the spirit of unification of telecom services. Therefore, we suggest that, there should not be any restrictions for interconnectivity between public network/ PSTN and leased circuits /CUGs.
- 1.3 We believe that under the proposed Unified Licensing Regime, there should not be any restriction on any telecom services if telecom service providers have paid relevant revenue share (License fee) and complied with the terms & conditions i.e. security related conditions / roll out obligations etc , as stated under the license agreement.

2. Unified Licence -Service Area Level

- 2.1 This Licensee will be allowed to offer access services, Internet Telephony, Internet services including IPTV and broadband services including triple play in the designated service area. Since the spectrum has been delinked from the License, the Licensee would initially not be able to provide wireless services until it applies separately for spectrum and get it in the due course of time. In such a scenario the concept of Service Area-wise license is unattractive and the people's choice for wireline connection has already come down to a very low level. The continuous decline in the wireline subscriber base is a clear cut indication for this.

3. **Unified Licensee -District level**

3.1 This licensee would be allowed to offer only Internet/Broadband services and wireline services. We have already discussed about the wireline service in para 2 above. There does not appear any relevance of introducing this new category under the proposed unified licensing regime with such a limited scope to operate in a District. Wireline service is not feasible and only internet service one can provide by obtaining ISP Licence from the Government.

3. **What, in your opinion, are the actions that should be classified as minor violations and major violations? (Clause 10 of draft guidelines for Unified Licence)**

4. **Even within minor and major violations respectively, what, in your opinion, should be the factors to be taken into consideration while determining the actual amount of penalty? (Clause 10 of draft guidelines for Unified Licence).**

Comments

1) The above questions are very subjective and require lot of deliberations about the circumstances under which these have taken place. We believe that since the licenses are issued under Section 4 of the Indian Telegraph Act, 1885, therefore, any penalty / fine or classification of its nature into minor or major should be consistent with the provisions of the Act.

2) Section 20A of the Indian Telegraph Act¹, read with Section 74 of the Indian Contract Act, 1872(9 of 1872) and remedy available under the Specific Relief Act (47 of 1963) should be considered before reaching to any conclusion in the matter. However, as per the principle of Natural Justice the operator should be given sufficient hearing to explain his point of view in the matter.

3) After taking into account the above, if it is still considered to impose penalty, it should always be proportionate to the nature of the breach of license's terms & conditions and the harm caused to the National

¹**“20A. Breach of condition of license** – *If the holder of a license granted under section 4 contravenes any condition contained in his license, he shall be punished with fine which may extend o one thousand rupees, and with a further fine which may extend to five hundred rupees for every week during which the breach of the condition continues.”*

Exchequer or to the consumers and whether the licensee knew or ought to have known of the breach.

- 4) It has been noted that SEBI Act provides the guidance on the quantum of penalty that should be imposed on the defaulter. The relevant portion of the SEBI Act is reproduced below for ready reference:

“15J - Factors to be taken into account by the adjudicating officer

While adjudging quantum of penalty under section 15-J, the adjudicating officer shall have due regard to the following factors, namely:-

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

(b) the amount of loss caused to an investor or group of investors as a result of the default;

(c) the repetitive nature of the default.”

- 5) In view of above, we are trying to understand the basis on which such exorbitant amount of penalties is being prescribed by TRAI.
- 6) In our opinion the minor violations may be resolved through mutual discussions or negotiations without much legal involvement and imposition of penalty for minor violations may be avoided.
- 7) The following table gives the indicative details of Minor and Major Violations subject to present legal/regulatory framework of telecom industry on the subject :

Minor violations	Major violations
Issues related to operational compliances	Issues related to security aspects and misrepresentation of facts before the Authority / government agencies. Action resulting in threat to the security of nation.
Delay in compliance of orders / directions of Government / Authority	Action of the service provider resulting in heavy revenue losses to the Government
Justifiable delay in fulfilling	Illegal conduct /operations of the

rollout obligations within stipulated timeframe of the Licence Agreement.	Licensee beyond the framework and terms and Conditions of the Licence for its business interests.
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8) Perhaps the following Indicative factors can also be considered for determining the amount of penalty for minor and major violations subject to present legal frame work of Telecom industry on the subject:

Factor for determining amount of penalty for minor violations	Factor for determining amount of penalty for major violations
<p>As there is no provision for any penalty in the existing licenses for minor violations of terms & conditions of the license, we are against of concept of imposition of the proposed penalty in case of minor violations of terms & conditions of Licence Agreement.</p> <p>In our opinion the minor violations may be resolved through mutual discussions or negotiations without much legal involvement. There are other options available with the Licensor / TRAI like issue of directions /show cause notice (SCN)/ orders etc to resolve the issue of minor violations.</p> <p>For violation of Directions / orders of the Government, a prescribed procedure is in vogue to take action against the service provider.</p>	<p>(i) For first time the amount of penalty should be up to 25% of Rs.50 crores, 20 crores and Rs. 1crore in respect of National Level Unified Licensee, Service Area Level Unified Licensee and District Level Unified Licensee respectively.</p> <p>(ii) For second time violation it should be up to 50% of Rs.50 crores, 20 crores and Rs. 1 Crore in respect of National Level Unified Licensee, Service Area Level Unified Licensee and District Level Unified Licensee respectively</p> <p>(iii) For 3 or more times, it should be up to 100% of of Rs.50 crores, 5 crores and Rs.1 crores in respect of National Level Unified Licensee, Service Area Level Unified Licensee and District Level Unified Licensee respectively.</p>

5. These draft guidelines do not provide for Licensing through Authorization. In your opinion, considering the services that are already covered under Unified Licence and Class Licence, is there any need for Licensing through Authorization? If so, which are the services to be so covered? And, what should be the guidelines for such a Licence?

Comments

It appears that there is inconsistency in this Question. Clause 5.1d of the draft guidelines provides for “Licensing through Authorization” but the above Q No.5 says that there is no provision of “Licensing through Authorization” in these draft guidelines.

We suggest that those services that have been indicated in the TRAI’s Recommendation on Unified Licensing Regime dated 13th January 2005 under Licensing through Authorization may be considered under this and guidelines should be the similar to the guidelines issued by DOT for registration of Other Service Providers (OSP), with requisite changes keeping in view the services to be covered under the Authorization may be framed.

6. Whether Voice mail/Audiotex/UMS services and Radio paging should continue to be under licensing regime?

Comments

The existing service providers may be allowed to continue the services under their respective licenses till the validity of their licenses or till they surrender their respective licenses, whichever is earlier. After that, if required, the services may be allowed through registration/Authorization.

7. Is there any other service(s), which needs to be brought under licensing regime?

Comments

Only those services should be covered under the Proposed Licensing regime which requires a license under 4 of the Indian Telegraph Act, 1885 for providing specified public telecommunications services.

8. In the new licensing regime, spectrum has been delinked from the Unified Licence. In such a scenario, should TRAI be trusted with the function of granting all types of Unified Licence as is prevalent in majority of the countries in the world?

Comments

So far as TRAI is performing the function of a Regulator, the licensing work should remain with the Government. The existing TRAI Act does not vest the powers of Licensor with the Authority.

In our opinion and as per the prevailing practice in our country, there should be two separate entities for making recommendations vis-a-vis taking policy decisions after examining and implementing the same.

9. Presently, in case of IP- I, there is no restriction on the level of foreign equity in the applicant company. However, in case of Unified Licence, the total foreign equity in the total equity of the Licensee is restricted to 74%. Please indicate the maximum time which should be given to the IP-I to comply with the FDI condition of 74% after grant of Unified Licence.

Comments

One year should be sufficient period for complying with the FDI conditions of 74%. However, this shall be subject to the IP-I's existing contractual obligations with the foreign investors.

In this connection attention is also invited to the statement given by Mr. Kaplil Sibal, Hon'ble Minister for Communications & Information Technology during his press conference held on 15th February, 2012 wherein he stated that a decision on the recommendation to bring IP-I Service Providers under licensing regime, who are currently unlicensed passive infrastructure providers, has been deferred for further examination.

10. Presently, the access service licenses viz. BASIC/CMTS/UASL have restrictions regarding holding of substantial equity by a promoter in more than one access service licence in the same service area. However, apart from access service license, this condition is not applicable for any other licence. Accordingly, the proposed guidelines remove the restriction on holding of substantial equity in a company having UAS / CMTS/ Basic Licence in the same service area on migration to Unified Licence and also from the eligibility conditions given in Para 2.3 of the draft guidelines for

Unified Licence. Please comment on the pros and cons of this proposal.

No Comments.

11. Please raise any other issues you feel are relevant and offer your detailed comments on the same.

Double Taxation

Non-integrated long distance telecom / ISP operators are subject to the double-assessment of license fees because input costs (i.e. wholesale bandwidth costs which already reflect the 6% license fee), are not deductible from the adjusted gross revenue on which the license fee is calculated. Therefore, while facilities-based operators using their own networks need only pay the license fee once, wholesale services that ILDOS, NLDOs, and ISPs buy from other operators as part of their own service offerings are subject to the license fee twice – once at the wholesale level and again at the retail level.

We believe that at the time of final recommendation of ULR, TRAI will address the issues of double license fee levied on wholesale telecom services which are used as input cost by non-integrated long distance telecom operators.
