भारतीय दूरसंचार विनियामक प्राधिकरण

Telecom Regulatory Authority of India

Recommendations

on

Reforming the Guidelines for Transfer/Merger of Telecom Licenses

(Response to back-reference dated 14th October 2021 received from Department of Telecommunications on recommendations dated 21st February 2020)

27th November 2021

Mahanagar Doorsanchar Bhawan

Jawahar Lal Nehru Marg,

New Delhi- 110002

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CHAPTER-I: INTRODUCTION

1. The Department of Telecommunications (DoT) through its letter No. 20-281/2010-AS-I Vol.XII (pt) dated 8th May 2019, inter-alia, informed that the National Digital Communications Policy (NDCP), 2018 released by the Government of India under its 'Propel India' mission envisages Catalysing Investments for Digital Communications sector as one of the strategies, and simplifying and facilitating Compliance Obligations by reforming the Guidelines for Mergers & Acquisitions, 2014 to enable simplification and fast tracking of approvals is one of the action plan for fulfilling the afore-mentioned strategy. Through the said letter dated 8th May 2019, DoT, inter-alia, requested TRAI to furnish recommendations on 'Reforming the Guidelines for Mergers & acquisitions, 2014', under the terms of the clause (a) of sub-section (1) of Section 11 of the Telecom Regulatory Authority of India Act, 1997 (as amended) by TRAI Amendment Act, 2000.

2. Through its subsequent letter dated 11th June 2019, DoT provided further inputs and requested that the same may be considered while providing recommendations on Reforming the Guidelines for Mergers & Acquisitions, 2014 to enable simplification and fast tracking of approvals. Vide letter dated 11th June 2019, DoT informed that it has examined several proposals for transfer/merger of licenses in the past five years. After examining the proposal for transfer/merger of licenses, DoT conveys its approval to take the transfer/merger on record subject to fulfilment of applicable conditions based on the existing guidelines. At many instances in the past, the entities have filed petitions before the Hon'ble TDSAT praying to quash and set aside certain conditions imposed upon them by DoT in terms of, inter-alia, the paragraphs 3(i) and 3(m) of the Guidelines for Transfer/Merger of licenses. The Hon'ble TDSAT, on several occasions has granted stay to the operation of some of such conditions. This has resulted in uncalled-for delays in mergers being taken on record.

3. After a detailed consultation process, on 21st February 2020, the Authority submitted its recommendations on "Reforming the Guidelines for Transfer/Merger of Telecom Licenses".

4. DoT, through its letter dated 14th October 2021 (**Annexure**), has informed that the above-mentioned TRAI recommendations dated 21st February 2020 have been considered and the Government has come to a prima facie conclusion that some of the recommendations needs to be reconsidered. Accordingly, some of the recommendations have been referred back to the Authority by DoT for reconsideration. The Authority's earlier recommendations, the views of the DoT thereon, and the response of the Authority are given in Chapter II.

CHAPTER-II: PARAWISE RESPONSE

1. Para No. 3.4, 3.5 and 3.6 of the TRAI Recommendations

3.4 The Authority recommends that it should be explicitly mentioned in the guidelines that consequent upon payment of market determined price for spectrum, such spectrum would be treated as liberalized i.e. technology neutral.

3.5 The Authority reiterates its earlier recommendation that if a transferor company holds a part of spectrum, which has been assigned against the entry fee paid, the transferee company/ resultant entity should be liable to pay the differential amount for the spectrum assigned against the entry fee paid by the transferor company from the date of written approval of transfer/merger of licences by DoT. However, while raising the demand for payment of differential amount, DoT shall calculate tentative demand from the date of NCLT approval, and upon grant of merger approval, the actual demand of differential amount shall be recalculated based upon the date of grant of approval. Excess amount paid by the transferee company/resultant entity, if any, shall be refunded back to the transferee company/resultant entity or set off against other dues.

3.6 The Authority recommends that in the last sentence of clause 3(i) "transferee (i.e. acquiring company)" should be replaced with "transferor company (i.e. acquired company)"

DoT's View

The Recommendation Nos. 3.4, 3.5 and 3.6, which are in respect of the clause 3(i) of the Merger Guidelines, 2014, need reconsideration. The Government is of the prima facie view that the clause 3(i) of the Merger Guidelines, 2014 may be amended by the suggested text given below:

"If a transferor company holds administratively allocated spectrum, assigned against the entry fee paid, the transferee company, shall pay to the Government, the differential between the market determined price of the entire administratively allocated spectrum held by the transferor company and the entry fee paid by the transferor company for such spectrum, from the date of written approval to the transfer/merger of licenses by the Department on a pro-rata basis for the remaining period of validity of the license(s). No separate charge shall be levied for spectrum acquired through auctions conducted from year 2010 onwards. Since auction determined price of the spectrum is valid for a period of one year, the last auction determined price shall be indexed by SBI MCLR upto the date of written approval to the transfer/merger of licenses by DoT to arrive at market determined price after a period of one year. Upon receipt of the payment of differential amount, such spectrum shall be treated as liberalized i.e. technology neutral.

However, while raising the demand for payment of differential amount, the Department shall calculate tentative demand from the date of NCLT's approval to the merger scheme. Upon grant of written approval to the transfer of license by the Department, the actual demand of differential amount shall be recalculated based upon the date of grant of approval. Deficit, if any, in the differential amount paid by the transferee company shall be replenished by the transferee company. Excess amount, if any, paid by the transferee company shall be refunded back to the transferee company or set off against other dues.

In case the demands raised for one time spectrum charges in respect of the spectrum holding beyond 4.4 MHz in GSM band/2.5 MHz in CDMA band before merger in respect of transferor company have not yet been paid and are under

judicial intervention, the Department shall revise such demands keeping the end date as the date of written approval to the transfer/merger of licenses by DoT. At the time of merger, the transferee company shall submit a bank guarantee for an amount equal to the revised demand for one time spectrum charge in respect of the transferor company pending final outcome of the court case.

However, while raising the demand for bank guarantee for one time spectrum charges in respect of the transferor company, the Department shall calculate a tentative demand keeping the end date as the date of NCLT's approval to the merger scheme. The Transferee company shall submit a bank guarantee equivalent to the tentative demand for one time spectrum charges in respect of the transferor company to the Department.

Upon grant of written approval of the transfer of license by DoT, the actual demand for one time spectrum charges in respect of the transferor company shall be recalculated based upon the date of grant of approval. At this stage, the transferee company shall submit a fresh bank guarantee equivalent to the actual demand for one time spectrum charges in respect of the transferor company to the Department. Upon submission of the fresh bank guarantee, the bank guarantee (equivalent to the tentative demand for one time spectrum charges in respect of the transferor company) submitted earlier by the transferee company will be returned back."

Response of TRAI

On examination of the text suggested by DoT, it is observed that recommendations made vide para 3.4 and 3.6 of the TRAI recommendations on, the Authority submitted its recommendations on 'Reforming the Guidelines for

Transfer/Merger of Telecom Licenses' dated 21st February 2020, have been incorporated suitably in the suggested text.

As regards recommendation made vide para 3.5 of the said recommendations, it may be noted that it was a reiteration of an earlier recommendation made vide recommendations on "Ease of Doing Telecom Business" dated 30th November 2017 and response dated 20th July 2018 to the back-reference received from DoT, wherein, considering that a merger is effective only after the written approval by the Licensor and the transferee company/ resultant entity will be able to derive benefits of merger (including spectrum holding of the transferor company), only after the approval from DoT; therefore, the Authority had recommended that if a transferor company holds a part of spectrum, which (4.4 MHz/2.5 MHz) has been assigned against the entry fee paid, the transferee company/ resultant entity should be liable to pay the differential amount for the spectrum assigned against the entry fee paid by the transferor company from the date of written approval of transfer/merger of licences by DoT and not from the date of approval of such arrangement by NCLT/Company Judge.

After considering the TRAI recommendations on Ease of doing telecom business, DoT vide its back-reference dated 6th June 2018 to those recommendations, inter-alia, informed that DoT is of view that the Merger Guidelines dated 20th February 2014, be modified as under:

> ***"When the licensee applies for transfer / merger of licenses to DoT, DoT will raise demand upon transferee of One Time Spectrum Charges (OTSC), from the date of NCLT approval, with a stipulation that such demand is subject to revision after the grant of approval of transfer of licenses by DoT. The demand of OTSC will be recalculated***

based upon the date of grant of approval. Excess amount paid, if any, will be refunded back to the transferee / set off against other dues."

The Authority considered the suggestion made by DoT and noted that DoT raises the demand for payment of OTSC before giving the written approval to the merger. Therefore, the Authority agreed with the proposal of DoT and recommended that:

"If a transferor company holds a part of spectrum, which (4.4 MHz/2.5 MHz) has been assigned against the entry fee paid, the transferee company/ resultant entity should be liable to pay the differential amount for the spectrum assigned against the entry fee paid by the transferor company from the date of written approval of transfer/merger of licences by DoT. However, while raising the demand for payment of OTSC, DoT shall calculate tentative demand from the date of NCLT approval, and upon grant of merger approval, the actual demand of OTSC shall be recalculated based upon the date of grant of approval. Excess amount paid by the transferee company/resultant entity, if any, shall be refunded back to the transferee company/resultant entity or set off against other dues."

The above recommendation was reiterated in para 3.5 of the recommendations on 'Reforming the Guidelines for Transfer/Merger of Telecom Licenses' dated 21st February 2020. While reiterating this recommendation the Authority had mentioned that ideally market determined price should be sought for any administratively assigned spectrum held by the transferor company from the date of merger for the remaining validity, as it is getting transferred to the transferee company.

Relevant para (para 2.47) of the recommendations is reproduced below:

> ***"At the time of merger, ideally, market determined price should be sought for any administratively assigned spectrum held by the transferor company from the date of merger for the remaining validity, as it is getting transferred to the transferee company. However, since DoT has already raised the demand for OTSC (which includes the period before merger also) in respect of administratively assigned spectrum beyond 4.4 MHz/2.5 MHz for GSM/CDMA, the guidelines seek bank guarantee for the amount equivalent to the demand raised for OTSC, but in respect of transferee company and not for transferor company. It is the spectrum holding of transferor company which is changing hands and not of the transferee company. Evidently, there is some error. Therefore, the Authority is of the view that in the last sentence of clause 3(i) "transferee (i.e. acquiring company)" should be replaced with "transferor company (i.e. acquired company)"."***

Through the text suggested by DoT in its back-reference, DoT has agreed with the view of TRAI that market determined price should be sought for any administratively assigned spectrum held by the transferor company from the date of merger for the remaining validity, as it is getting transferred to the transferee company. Further, DoT has also suitably incorporated recommendation made vide para 3.5 of the TRAI recommendation.

In view of the above, all the three recommendations made vide para 3.4, 3.5 and 3.6, along with the view of the Authority noted in the para number 2.47 of the recommendations, have been suitably incorporated. Therefore, the Authority agrees

with the text suggested by DoT for revision of Clause 3(i) of the Merger Guidelines dated 20th February 2014. However, DoT may examine the 'revising of OTSC demand keeping the end date as the date of written approval to the transfer/merger of licenses' from legal perspective, as the OTSC matter is sub-judice.

2. Para No. 3.7 of the TRAI Recommendations

The Authority recommends that the guidelines on transfer/merger of licenses should not hard-code the spectrum caps. Instead, it should be linked with the relevant clause of the license.

DoT View

The Government is of the prima facie view that the sub-clauses (i), (ii) and (iii) of the clause 3(k) of the Merger Guidelines, 2014 may be amended by the suggested text given below:

"Consequent upon the implementation of the scheme of compromises, arrangements or amalgamation and merger of licenses in a service area thereupon, the spectrum cap on the resultant entity will be governed by the relevant clause(s) of the license and the extant spectrum cap guidelines, if any, issued by DoT"

Response of TRAI

The existing guidelines on transfer/merger of license hard-codes the existing spectrum caps for access spectrum. As mentioned in the Recommendations on 'Reforming the Guidelines for Transfer/Merger of Telecom Licenses' dated 21st February 2020, the spectrum caps were revised on 30th May 2018 based on the views expressed by the Authority vide its letter dated 21st November 2017. Since applicable spectrum caps are part of the Notice Inviting Applications (NIA), to make the revised spectrum cap effective on already assigned spectrum, DoT issued an

amendment to the Unified Licence and appended Clause 42.11 on 'Limit of Cap for spectrum holding' under spectrum allotment and use, Chapter VII of part I. The Merger Guidelines dated 20th February 2014 were also amended by DoT on 30th May 2018 to incorporate the revised spectrum caps.

Considering that since limit of Cap for spectrum holding (spectrum cap) has been included in the license itself, and any change would certainly be reflected in the license, the Authority had recommended that the guidelines on transfer/merger of licenses should not hard-code the spectrum caps. Instead, it should be linked with the relevant clause of the license.

DoT through its back-reference has suggested that the clause 3(k) of the Merger Guidelines, 2014 may be amended as follows:

> ***"Consequent upon the implementation of the scheme of compromises, arrangements or amalgamation and merger of licenses in a service area thereupon, the spectrum cap on the resultant entity will be governed by the relevant clause(s) of the license and the extant spectrum cap guidelines, if any, issued by DoT"***

It is observed that DoT has agreed with the recommendation of the Authority that the Merger guidelines should not hard-code the access spectrum caps instead, it should be linked with the relevant clause of the license. However, DoT in the suggested text for revision of clause 3(k), while linking the spectrum cap with the relevant clause(s) of the licence, it has also been linked with the extant spectrum cap guidelines (if any). The Authority is of the opinion that once spectrum cap has been included in the License itself, any future change, will also get reflected in the License. Presently, there is no separate guideline for access spectrum cap and it is governed by the extant clause of the license agreement itself. Further, DoT has not given any rationale for

linking spectrum cap with spectrum cap guidelines (if any) in addition to the relevant clause(s) of the license agreement.

In view of the above, the Authority reiterates its earlier recommendation.

3. Para No. 2.51 of the TRAI Recommendations

Para No. 2.51 along with relevant paras of the TRAI recommendations, providing background information are reproduced below:

"2.49 Clause 3(j) of the existing guidelines is reproduced below:

"The Spectrum Usage Charge (SUC) as prescribed by the Government from time to time, on the total spectrum holding of the resultant entity shall also be payable."

2.50 The spectrum usage charges are prescribed separately by the Government from time to time. Different SUC rates are applicable for spectrum acquired through different auctions. SUC on the spectrum acquired in the last auctions held in 2016 is charged at the rate of 3% of AGR excluding revenues from wireline services. In case of combination of access spectrum assigned to an operator (whether assigned administratively or through auctions or through trading), weighted average of SUC rates across all access spectrum assigned to the TSP applies to the entire access spectrum held by the TSP. The clause 3(j) of the guidelines, prescribes that the SUC as prescribed, would be payable on total spectrum held by the resultant entity.

2.51 No comments have been received from the stakeholders on this clause. The Authority is also of the view that this clause does not require any change to be made."

DoT View

The recommendation made by TRAI through the para 2.51 of the TRAI's Recommendations dated 21.02.2020 with a request to provide its considered view on the spectrum related charges to be levied upon the resultant entity (transferee company). For a ready reference, a brief summary of the regime for spectrum related charges in India has been enclosed as Annexure-III to the back-reference.

Response of TRAI

The clause 3(j) of the Merger Guidelines dated 20th February 2014, prescribes that the Spectrum Usage Charges (SUC) as prescribed by the Government from time to time, on the total spectrum holding of the resultant entity shall also be payable. As mentioned in the Recommendations on 'Reforming the Guidelines for Transfer/Merger of Telecom Licenses' dated 21st February 2020, the spectrum usage charges are prescribed separately by the Government from time to time; further, considering that different SUC rates are applicable for spectrum acquired through different auctions, in case of combination of access spectrum assigned to an operator (whether assigned administratively or through auctions or through trading), weighted average of SUC rates across all access spectrum assigned to the TSP applies to the entire access spectrum held by the TSP. In case of merger, the spectrum holding of the transferor company gets transferred to the transferee company and on the total spectrum holding of the resultant company, weighted average SUC would be calculated as per the existing guidelines. Therefore, the Authority had opined that this clause does not require any change to be made.

In the Annexure-III to the back reference dated 14th October 2021, DoT has, inter-alia, mentioned as follows:

1. **The clause 18.3 of the Unified License (UL) provides as below:**

   "18.3 Spectrum Related Charges:

   In case the Licensee obtains spectrum, the licensee shall pay spectrum related charges, including payment for allotment and use of spectrum, as per provisions specified in the relevant NIA document of the auction of spectrum or

conditions of spectrum allotment / LoI / directions / instructions of the Licensor / WPC Wing in this regard. The spectrum related charges shall be payable in addition to the License fee."

2. The spectrum related charges payable by the Access Service licensees include, inter-alia, spectrum usage charge (SUC) for access spectrum, and spectrum charge for microwave spectrum held by them.

...

18. The foregoing description may be summed up as below:

(a) The licensees, which have obtained microwave spectrum under the DoT's Guidelines of 2015 on Microwave spectrum, hold only 3 or 4 MWA carriers in an LSA while the remaining licensees hold generally higher number of MWA carriers in an LSA.

(b) At present, access service licensees are paying spectrum charges in respect of microwave spectrum under two separate charging regimes. For this purpose, the access service licensees may be categorized as below:

Category-I: The licensees which are paying spectrum charges for microwave spectrum in accordance with the DoT's Order of 2006 on Microwave Spectrum (as amended).

Category-II: The licenses which are paying spectrum charges for microwave spectrum in accordance with the DoT's Order of 2002 on Microwave Spectrum under the Hon'ble TDSAT's order dated 22.04.2010 passed in Petition No. 122

of 2007. The matter is sub-judice; the applicability of spectrum charges may change upon the outcome of the Civil Appeal No. 2018 of 2011 (Union of India vs. COAI & Ors.).

19. A situation may arise in which, prior to the merger, the transferor company and transferee company may be paying spectrum charges for microwave spectrum under different charging regimes (viz. charging regime of 2002, and charging regime of 2006); besides, one of them may be having a restriction on the maximum number of MWA carrier holding while the other may not be having any such restriction. Under such a situation, the microwave spectrum holding and spectrum charges on microwave spectrum in respect of the resultant entity (transferee company) require to be regulated through a suitable provision."

As can be seen from the above, issues raised by DoT are w.r.t. spectrum charges for microwave carriers. However, the clause 3(j) of the existing the Merger Guidelines dated 20th February 2014 relates to applicability of the spectrum usage charges (SUC) in respect of total access spectrum holding of the resultant entity. Further, it is noted that the existing Merger Guidelines, 2014 neither has any clause dealing with the spectrum charges for microwave carriers nor this issue was part of the consultation process carried out by the Authority. Therefore, this issue cannot be dealt as part of back reference. Having said that, TRAI has already given its Recommendations on "Allocation and Pricing of Microwave Access (MWA) and Microwave Backbone (MWB) RF Carriers" on 29th August 2014. DoT in its back reference dated 14th October 2021 has informed that these recommendations are under consideration. However, TRAI may

look into these issues, if a fresh detailed reference is made by DoT in this regard.

In view of the above, the Authority reiterates that the clause 3(j) of the Merger Guidelines, 2014, does not require any change to be made.

Annexure

Government of India
Ministry of Communications
Department of Telecommunications
Access Services Wing
Sanchar Bhawan, 20, Ashoka Road, New Delhi-110001

No.: 11-11/2020-Policy Date: 14/x/2021

To,
The Secretary,
Telecom Regulatory Authority of India,
Mahanagar Doorsanchar Bhawan,
Jawaharlal Nehru Marg (Old Minto Road),
New Delhi-110002

Subject: Reforming the Guidelines for Transfer/ Merger of Telecom Licenses - reg.

1. The Government has received TRAI's Recommendations on Reforming the Guidelines for Transfer/ Merger of Telecom Licenses dated 21.02.2020 (hereinafter referred to as "the TRAI's Recommendations dated 21.02.2020"), through which, TRAI has recommended to reform various clauses of 'Guidelines for Transfer/Merger of various categories of Telecommunication service licences/authorisation under Unified Licence (UL) on compromises, arrangements and amalgamation of the companies' dated 20.02.2014 (as amended) (hereinafter referred to as "the Merger Guidelines, 2014").

2. After considering the TRAI's Recommendations dated 21.02.2020, the Government has come to the following *prima facie* conclusions:
   (a) The Recommendation Nos. 3.4, 3.5 and 3.6, which are in respect of the clause 3(i) of the Merger Guidelines, 2014, need reconsideration. The Government is of the *prima facie* view that the clause 3(i) of the Merger Guidelines, 2014 may be amended by the suggested text given in **Annexure-I**.
   (b) The Recommendation No. 3.7, which is in respect of the sub-clauses (i), (ii) and (iii) of the clause 3(k) of the Merger Guidelines, 2014 needs

reconsideration. The Government is of the *prima facie* view that the sub-clauses (i), (ii) and (iii) of the clause 3(k) of the Merger Guidelines, 2014 may be amended by the suggested text given in **Annexure-II**.

(c) The recommendation made by TRAI through the para 2.51 of the TRAI's Recommendation dated 21.02.2020 (that the clause 3(j) of the Merger Guidelines, 2014 does not require any change to be made) needs reconsideration.

3. Under the terms of sub-section (1) of Section 11 of the Telecom Regulatory Authority of India Act, 1997 (as amended)-

(a) the Recommendation Nos. 3.4, 3.5 and 3.6 of the TRAI's Recommendations dated 21.02.2020 are being referred back to TRAI with a request to provide its considered view on the suggested text for revising the clause 3(i) of the Merger Guidelines, 2014, enclosed as **Annexure-I**,

(b) the Recommendation Nos. 3.7 of the TRAI's Recommendations dated 21.02.2020 is being referred back to TRAI with a request to provide its considered view on the suggested text for revising the sub-clauses (i), (ii) and (iii) of the clause 3(k) of the Merger Guidelines, 2014, enclosed as **Annexure-II**, and

(c) the recommendation made by TRAI through the para 2.51 of the TRAI's Recommendations dated 21.02.2020 is also being referred back to TRAI with a request to provide its considered view on the spectrum related charges to be levied upon the resultant entity (transferee company). For a ready reference, a brief summary of the regime for spectrum related charges in India is enclosed as **Annexure-III**.

4. This letter is being issued with the approval of the Secretary, Department of Telecommunications, Ministry of Communications, Government of India.

Enclosure: As above

14/5/2021

(S.B. Singh)
Deputy Director General (AS)
Tel: 011-23036918

Annexure-I

Suggested text for revising the clause 3(i) of the Merger Guidelines, 2014

'If a transferor company holds administratively allocated spectrum, assigned against the entry fee paid, the transferee company, shall pay to the Government, the differential between the market determined price of the entire administratively allocated spectrum held by the transferor company and the entry fee paid by the transferor company for such spectrum, from the date of written approval to the transfer/ merger of licences by the Department on a pro-rata basis for the remaining period of validity of the license(s). No separate charge shall be levied for spectrum acquired through auctions conducted from year 2010 onwards. Since auction determined price of the spectrum is valid for a period of one year, the last auction determined price shall be indexed by SBI MCLR upto the date of written approval to the transfer/ merger of licenses by DoT to arrive at market determined price after a period of one year. Upon receipt of the payment of differential amount, such spectrum shall be treated as liberalized i.e. technology neutral.

However, while raising the demand for payment of differential amount, the Department shall calculate tentative demand from the date of NCLT's approval to the merger scheme. Upon grant of written approval to the transfer of license by the Department, the actual demand of differential amount shall be recalculated based upon the date of grant of approval. Deficit, if any, in the differential amount paid by the transferee company shall be replenished by the transferee company. Excess amount, if any, paid by the transferee company shall be refunded back to the transferee company or set off against other dues.

In case the demands raised for one time spectrum charges in respect of the spectrum holding beyond 4.4 MHz in GSM band/2.5 MHz in CDMA band before merger in respect of transferor company have not yet been paid and are under judicial intervention, the Department shall revise such demands keeping the end date as the date of written approval to the transfer/ merger of licences by DoT. At the time of merger, the transferee company shall submit a bank guarantee for an amount equal to the revised demand for one time spectrum charge in respect of the transferor company pending final outcome of the court case.

However, while raising the demand for bank guarantee for one time spectrum charges in respect of the transferor company, the Department shall calculate a tentative demand keeping the end date as the date of NCLT's approval to the merger scheme. The Transferee

company shall submit a bank guarantee equivalent to the tentative demand for one time spectrum charges in respect of the transferor company to the Department.

Upon grant of written approval to the transfer of license by DoT, the actual demand for one time spectrum charges in respect of the transferor company shall be recalculated based upon the date of grant of approval. At this stage, the transferee company shall submit a fresh bank guarantee equivalent to the actual demand for one time spectrum charges in respect of the transferor company to the Department. Upon submission of the fresh bank guarantee, the bank guarantee (equivalent to the tentative demand for one time spectrum charges in respect of the transferor company) submitted earlier by the transferee company will be returned back.'

Annexure-II

Suggested text for revising the sub-clauses (i), (ii) and (iii) of the clause 3(k) of the Merger Guidelines, 2014

'Consequent upon the implementation of the scheme of compromises, arrangements or amalgamation and merger of licenses in a service area thereupon, the spectrum cap on the resultant entity will be governed by the relevant clause(s) of the license and the extant spectrum cap guidelines, if any, issued by DoT.'

Annexure-III

Brief summary of the regime for spectrum related charges in India

1. The clause 18.3 of the Unified License (UL) provides as below:

"18.3 Spectrum Related Charges:

In case the Licensee obtains spectrum, the licensee shall pay spectrum related charges, including payment for allotment and use of spectrum, as per provisions specified in the relevant NIA document of the auction of spectrum or conditions of spectrum allotment/LoI/directions/instructions of the Licensor/WPC Wing in this regard. The spectrum related charges shall be payable in addition to the License fee."

2. The spectrum related charges payable by the Access Service licensees include, *inter-alia*, spectrum usage charge (SUC) for access spectrum, and spectrum charge for microwave spectrum held by them. A brief description of the policy regime governing SUC for access spectrum, and spectrum charge for microwave spectrum is given below:

(1) SUC for access spectrum

3. Through the order No. P-14010/01/2021 dated 26.02.2021, the DoT has prescribed SUC for the telecom service providers (TSPs) having license/ authorization to provide "Access Services" in 700 MHz, 800 MHz, 900 MHz, 1800 MHz, 2100 MHz, 2300 MHz and 2500 MHz (collectively referred to as "Access Spectrum Bands"). Through the said order, it has been stated, *inter-alia*, that the weighted average of SUC rates across all spectrum assigned to a TSP (whether assigned administratively or through auction or through trading) in all Access Spectrum Bands shall be applied for charging SUC subject to a minimum of 3% of AGR excluding revenue earned from wireline services; the weighted average is to be derived by sum of product of spectrum holdings and applicable SUC rate divided by total spectrum holding.

(2) Spectrum charge for microwave spectrum

4. Through the order No. R-11014/4/87-LR (Pt) dated 20.07.1995 (hereinafter, referred to as "the DoT's order of 1995 on microwave spectrum"), the DoT conveyed, *inter-*

alia, royalty for microwave links for cellular mobile telephone service (CMTS) on the basis of the following formula:

Annual Royalty R = M . W . C

Where M =Constant Multiplier, W = Weighing Factor, C = Number of Radio Frequency (RF) channels used

5. In the year 2002, the DoT decided to migrate the system for charging of microwave spectrum to revenue sharing concept. Through the order No. L-14047/01/2002-NTG dated 18.04.2002 (hereinafter, referred to as "the DoT's Order of 2002 on Microwave Spectrum"), the DoT conveyed a package of microwave spectrum charging on percentage revenue share to all cellular operators on the premise that it is accepted in its entirety and simultaneously all legal proceedings with regard to spectrum charging instituted by them or COAI against the Government in Courts and Tribunals (TDSAT) etc. shall be withdrawn. The microwave spectrum charging package conveyed through the said order was as below:

Microwave spectrum type	**Metro**	**Circles other than Metro**	**Annual spectrum charges for microwave spectrum as percentage of AGR**
Microwave Access (MWA) Spectrum	Upto 224 MHz	Upto 112 MHz	0.25%
	For every additional 56 MHz	For every additional 28 MHz	Additional 0.05%
Microwave Backbone (MWB) spectrum	Upto 56 MHz		0.10%
	For every additional 28 MHz		Additional 0.05%

6. The acceptance of the above offer was to be communicated within seven days from the date of issue of the letter. All cellular operators of that time accepted the said offer.

7. In supersession of the DoT's Order of 2002 on Microwave Spectrum, and in partial modification of the DoT's Order of 1995 on Microwave Spectrum, the DoT prescribed the following spectrum charges for microwave spectrum in respect of both GSM and

CDMA based TSPs through the order No. J-14025/200(11)/06-NT dated 03.11.2006 (hereinafter, referred to as, "the DoT's Order of 2006 on Microwave Spectrum"):

Spectrum Bandwidth	Spectrum Charge as percentage of AGR	Cumulative spectrum charges as percentage of AGR
First carrier of 28 MHz (paired)	0.15%	0.15%
Second carrier of 28 MHz (paired)	0.20%	0.35%
Third carrier of 28 MHz (paired)	0.20%	0.55%
Fourth carrier of 28 MHz (paired)	0.25%	0.80%
Fifth carrier of 28 MHz (paired)	0.30%	1.10%
Sixth carrier of 28 MHz (paired)	0.35%	1.45%

8. The above spectrum charges (as percentage of AGR) were made applicable for both MWA carriers as well as MWB carriers.

9. In continuation of the DoT's Order of 2006 on Microwave Spectrum, orders dated 10.11.2008 and 19.02.2009 were also issued on the subject. Collectively, these orders will be referred to as "the DoT's order of 2006 on Microwave Spectrum (as amended)".

10. The GSM based TSPs and COAI challenged the DoT's order of 2006 on Microwave Spectrum before the Hon'ble TDSAT. Through the order dated 22.04.2010 passed in the Petition No. 122 of 2007 (COAI & Ors. Vs. UOI), the Hon'ble TDSAT set aside the DoT's Order of 2006 on Microwave Spectrum on the ground that the said order was issued without any statutory sanction. The Hon'ble TDSAT observed that *"The Parties having entered into a contract, the terms thereof could not be modified in absence of any express provision."*

11. The DoT has filed Civil Appeal No. 2018 of 2011 before the Hon'ble Supreme Court against the Hon'ble TDSAT's order dated 22.04.2010 passed in the Petition No. 122 of 2007. At present, the matter is pending for adjudication.

12. In a separate matter viz. WP(C) No. 423 of 2010, the Hon'ble Supreme Court, through its judgment dated 02.02.2012, observed that 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.

13. The DoT, through a reference dated 26.11.2012, sought the recommendations of TRAI on, *inter-alia*, (a) methodology for allocation of microwave spectrum, and (b) spectrum charges for microwave spectrum.

14. In response, TRAI provided 'Recommendations on Allocation and Pricing of Microwave Access (MWA) and Microwave Backbone (MWB) RF Carriers' dated 29.08.2014. These Recommendations are under consideration of the DoT.

15. Meanwhile, considering the immediate requirement of MWA and MWB spectrum of TSPs, the DoT decided to allot such spectrum for the interim period provisionally pending the final decision in the matter by the Government through the Guidelines No. L-14035/19/2010-BWA (Pt) dated 16.10.2015 (hereinafter, referred to as, "the DoT's Guidelines of 2015 on Microwave Spectrum"). These guidelines provide, *inter-alia*, as below:

"2. The interim/ provisional allotment of MWA/ MWB carriers will be subject to following terms, conditions and criteria:

(i) TSPs would be allotted, including the present holding, a maximum of 4 carriers for Metro & Category A Service Area and 3 carriers for Category B and Category C Service Areas for MWA, subject to availability.

(ii) Microwave Backbone carrier allotment will be considered on link-to-link basis subject to availability.

(iii) Each Microwave carrier refers to 28 MHz paired bandwidth in 13, 15, 18 and 21 GHz bands for MWA and in sub 10 GHZ band(s) for MWB.

(iv) For the interim period, the charging of MWA and MWB carriers will be done as per rates mentioned in Order no. J-14025/200(11)/06-NT Dated 3rd November' 2006 and its amendments of even no. Dated 10th November' 20008 and 19th February' 2009.

(v) The applicants (TSPs) are required to submit an undertaking and also enter into an Frequency Agreement (proforma enclosed herewith), duly filled in, before their request for the allotment of MWA/ MWB carriers is considered.

(vi) All MWA/ MWB carrier/ spectrum allotted, as an interim measure, will be purely on temporary and provisional basis and all such allotees will have to

participate in the allotment methodology as decided by the Government after considering the recommendations of TRAI on the subject.

(vii) *In the event of decision of the Government to allot MWA carrier/ spectrum by auction, the carriers allocated as an interim measure, will stand reverted back to the Government after a period of three months from date of finalization of results of aforesaid auction, in case such allotees fail to participate and/or win back the carriers/ spectrum provisionally allotted as an interim measure.*

(viii) *In the event of decision of the Government to allot MWA carrier/ spectrum by a methodology other than the auction, the carriers allocated as an interim measure, will stand reverted back to the Government after a period of three months, in case such allotees fail to participate in the said process and/or not being able to get back the provisionally allotted carriers/ spectrum, as per the methodology.*

(ix) *The licensees whose licenses have expired in November' 2014 or licenses expiring in future, will be allowed to hold the carriers allotted to them as per Clause 8.4 of UL guidelines on a purely provisional basis till the ongoing process of TRAI consultation is completed and a final decision thereon is taken by the Government; thereafter, MWA/ MWB carriers will be regulated in accordance with above Para (viii) and (viii) of this Guideline/ OM.*

(x) *Due notice will be given to such allotees who have been provisionally allotted the carriers/ spectrum as an interim measure and have not been able to get back the spectrum in full or in part.*

(xi) *During the said interim period, the present charging mechanism, as mentioned above, will continue subject to the condition that for the spectrum/ carriers allotted during interim period, the TSPs will have to pay the charges with retrospective effect (i.e. from the date of issue of letter for allotment of carriers as interim measure) as finally determined through the auction process/ market related process or any other methodology decided by the Government."*

16. At present, a draft 'Policy for Normative and Transparent Assignment/ Authorization of Spectrum' is under consideration of the DoT. The said policy, *inter-alia*, deals with the matter of microwave spectrum assignment methodology.

17. In the recent past, in case of a merger of two telecom licencees, the merging entities have submitted a joint undertaking to the DoT of the following effect:
'The merged entity (transferee company) would be paying 2006 rates in respect of MWA spectrum transferred from the transferor company and will abide by the final decision of the Government on the allocation of MWA/ MWB carriers including any cap on the number of maximum carriers as may be decided by Department of Telecommunications and applicable to all the TSPs.'

18. The foregoing description may be summed up as below:

(a) The licensees, which have obtained microwave spectrum under the DoT's Guidelines of 2015 on Microwave spectrum, hold only 3 or 4 MWA carriers in an LSA while the remaining licensees hold generally higher number of MWA carriers in an LSA.

(b) At present, access service licensees are paying spectrum charges in respect of microwave spectrum under two separate charging regimes. For this purpose, the access service licensees may be categorized as below:
Category-I: The licensees which are paying spectrum charges for microwave spectrum in accordance with the DoT's Order of 2006 on Microwave Spectrum (as amended).
Category-II: The licensees which are paying spectrum charges for microwave spectrum in accordance with the DoT's Order of 2002 on Microwave Spectrum under the Hon'ble TDSAT's order dated 22.04.2010 passed in Petition No. 122 of 2007. The matter is *sub-judice*; the applicability of spectrum charges may change upon the outcome of the Civil Appeal No. 2018 of 2011 (Union of India vs. COAI & Ors.).

19. A situation may arise in which, prior to the merger, the transferor company and transferee company may be paying spectrum charges for microwave spectrum under different charging regimes (viz. charging regime of 2002, and charging regime of 2006); besides, one of them may be having a restriction on the maximum number of MWA carrier holding while the other may not be having any such restriction. Under such a situation, the microwave spectrum holding and spectrum charges on microwave spectrum in respect of the resultant entity (transferee company) require to be regulated through a suitable provision.