Annexure 1A

Tower and Infrastructure Provider Association (TAIPA's) response to TRAI Consultation Paper No 09/2014 on 'Definition of Revenue Base (AGR) for the Reckoning of License Fee and Spectrum usage Charges'

Introduction

An IP-I, under the IP-I registration maintains assets like tower and related infrastructure, to be given on lease/ rent, to telecom service providers (TSPs) who are licensed under Section 4 of the Indian Telegraph Act, 1885 for providing cellular telephone services.

Telecom Infrastructure providers have played key role by bringing in an innovative concept of "Infrastructure Sharing" which has resulted in faster rollout for new entrants besides saving the capex. This has led to affordable services to end-users and improved accessibility to the hinterland. With managed services, the value of outsourcing is not just in sharing costs but also the ability to manage costs and quality.

The telecom infrastructure companies have made huge investments over Rs. 150,000 crores as an industry and are in existence over a span of 14 years. Growth of telecommunication services is potentially central to the success of several sectors such as banking, health, education and e-governance. The current Tower industry is essentially an inputs service for various multi-sectoral activities like e-banking, e-health, e-education, NeGPs, Surveillances, broadband penetration at the gram panchayat level, etc.

Brief Facts

The Indian Telecom sector has seen a dramatic growth phase from the late 1990s to 2010. Since operators were focused on acquiring customers and expanding services in the midst of hyper-competitive pricing pressures, they started outsourcing tower infrastructure deployment.

In the pre-2005 era when the Towers were being operated under integrated model (part of the Operators' domain); there was no sharing of towers taking place. Only a few Operators shared towers that too on a barter system - One tower shared for a similar number coming from the opposite side.

Between 2007 and 2010, the number of towers rose from about 100,000 to 310,000; fueling an increase in tenancy ratio to 1.6 per tower. From 2010 till 2012, there has been aggressive growth by new operators, allowing private players to boost their tenancy ratio.

Tower sharing created a strong incentive to the Indian telecom market, it allowed operators to reduce costs considerably and focus on core marketing activities while enabling new operators to rollout networks in record times, thus reducing the time to go to market for new operators.

India currently has more than 400,000 towers at a tenancy ratio of 1.9 and have begun to focus more on operational improvements.

Government of India has led various initiatives to promote Sharing of tower infrastructure which is opposite to licensing of IP-I. However, the present consultation paper if given effect to will put a spanner in the works and retard growth in the infrastructure sector which is contrary to NTP-2012.

(i) **USO funds for Sharing** - The USO Fund was launched in 2002 with the objective of providing universal telecom services. In 2001, the concept of village public telephones (VPTs) in rural regions was introduced. The next step for USO was to move towards introducing the concept of shared mobile infrastructure for faster rollout.

(ii) **Project Mobile Operator's Shared Towers (MOST)** - Project MOST was launched at the behest of the then Hon'ble Minister of Communications & IT and Urban Development Ministry to reap the rich benefits of Infrastructure sharing in India. It was aimed at promoting infrastructure sharing among all the service providers to primarily establish proof of concept of the possibility of multi-technology and multi-operators sharing a single tower with a view to bring down costs and enhance spread of affordable services continued to be carried out successfully by the industry.

(iii) **NTP 2012** – The primary objective of NTP-2012 is maximizing public good by making available affordable, reliable and secure telecommunication and broadband services across the entire country. More specifically, to increase rural teledensity from the current level of around 39% to 70% by the year 2017 and 100% by the year 2020.

Further, NTP-2012 has the vision ***Broadband on Demand*** and envisages leveraging telecom infrastructure to enable all citizens and businesses, both in rural and urban areas. The policy aims to *provide affordable and reliable* ***broadband-on-demand by the year 2015*** *and* ***to achieve 175 million broadband connections by the year 2017 and 600 million by the year 2020 at minimum 2 Mbps download speed and making available higher speeds of at least 100 Mbps on demand.***

Currently, around 30% of Indian population, mostly in far-flung rural & tribal areas are still deprived of the basic mobile services. Geographically, 15% area still needs to be covered by the telecom service providers. Further, nation-wide availability of broadband services needs to be planned now including the NTP 2012 targets which are 175 million broadband connections by the year 2017 and 600million by the year 2020.

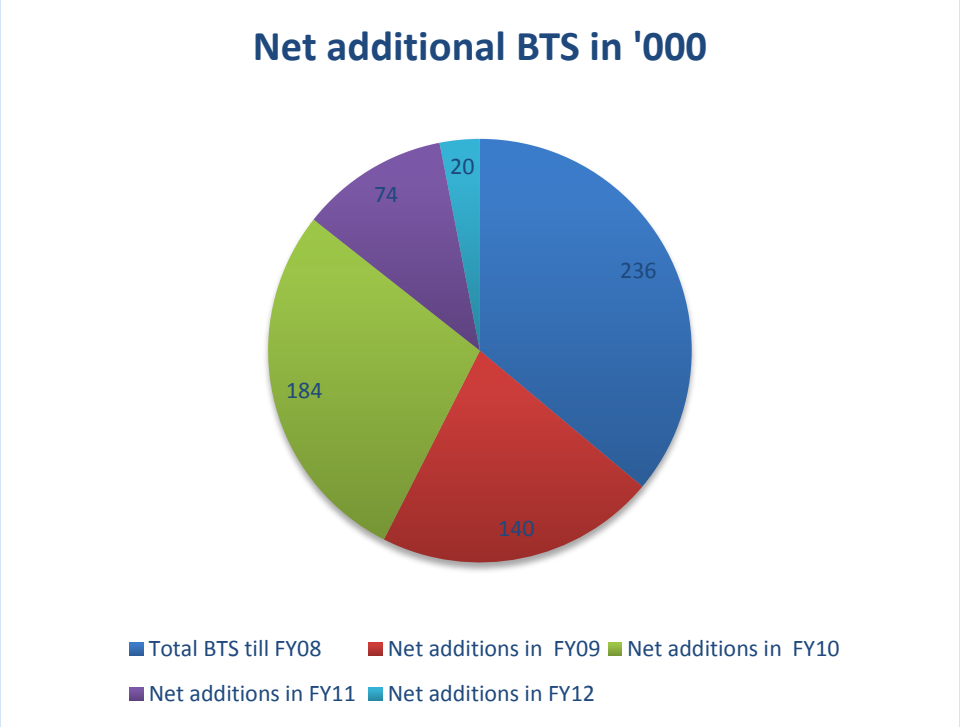
A recent estimates has indicated a requirement of more than 100,000 towers to support increased data service demands and another around 50,000 towers for expanding telecom reach to the hinterlands of the country.

There are approximately 403 IP-Is registered with DoT ranging from PSUs, Operations & Maintenance companies besides tower companies. Towers are setup by the IP-I companies to assist the TSPs in providing uninterrupted communication.

Growth trajectory of increase in number of BTS since 2008 :

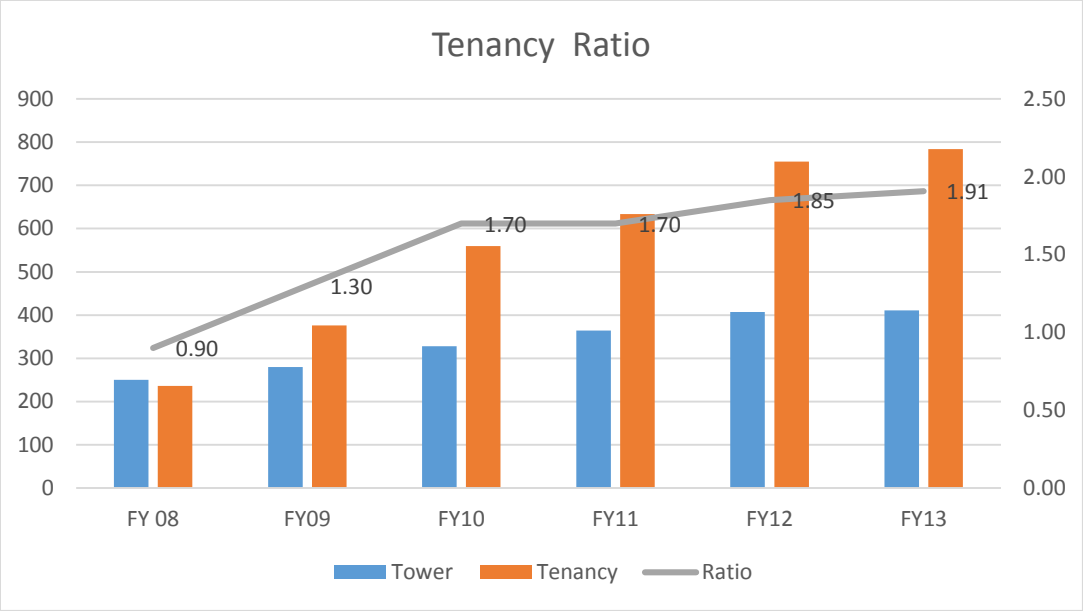
Year	Nos. in '000
Total BTS till FY08	254
Net additions in FY09	160

Net additions in FY10	210
Net additions in FY11	100
Net additions in FY12	32
Net additions in FY13	15



Growth in number of Towers and resultant tenancy ratio :

	Tower	Tenancy	Ratio
FY 08	250	236	0.90
FY09	280	376	1.30
FY10	328	560	1.70
FY11	364	634	1.70
FY12	407	755	1.85
FY13	411	784	1.91



Contribution to Government Exchequer

The telecom infrastructure sector is already paying huge levies/ taxes in the form of regulatory/ municipal costs including but not limited to - service tax, state level VAT, etc. While, other charges include municipal charges, right of way etc.

High Municipal Fees, Permission Fees, Renewal Fees and even Sharing Fees

Multiple fee under the guise of Renewal Fee, Sharing Fee, Compounding Fee, Development charges, lump sum deposits for demolition etc are being levied on Tower installation by the State/ Local bodies with the sole aim for revenue maximization for the Government exchequer.

Some State governments have divided the entire territories in to various categories like Corporations/Municipalities / Nagar Panchayats as High/Medium/low potential zones to levy the differential fees.

Currently, on an average industry pays around Rs. 50,000 - 200,000 per tower for Municipal Permission besides charges to various local bodies i.e. State Pollution Control Boards, etc. 'Property Tax' has become another big issue as the State Governments treat these towers as buildings.

The tower infrastructure industry already contributes heavily to the State and Central exchequers by way of above levies and fees.

Annexure – 1B

Statutory provisions for bringing IP-I under licensing – Para 1.18

At the very outset, we submit that the tower industry has an IP-I registration with the status of an infrastructure provider. Therefore IP-I providers should not be equated with telecom service providers, who are licensees under the Indian Telegraph Act, 1885.

The Consultation Paper proceeds on the premise that the Authority has the 'powerful backing' of the Indian Telegraph Act, 1885 and the TRAI Act, 1997. The common thread that runs through the Consultation Paper is to push IP-1s to migrate to a Unified License regime. This is against the TRAI Act 1997, the Indian Telegraph Act 1885 including the judgment of the TDSAT.

The class of 'infrastructure provider' is separate and a different regulatory regime is already in place and an IP-I does not require a license for the activities it carries out as per the Indian Telegraph Act, 1885.

There is a fundamental difference between a telecom operator/licensee who is granted a license under Section 4 of the Indian Telegraph Act and IP-1s who are granted registration certificates.

IP-Is provide only passive infrastructure and do not have any means of establishing and working of telegraphs under the present registration and do not fall under the ambit of the Section 4 of the Indian Telegraph Act 1885 (please refer Clause 2 of the IP registration).

The difference between the activities under a license granted under S.4 of the Telegraph Act and activities carried out by IP-1s under a registration certificate was recognized in **OIL India Ltd vs. Union of India, Petition No.272/2011** whereby the TDSAT has held that:

"Activities in terms of a registration certificate ex facie are not the Activities of a licensee; the same being distinct and separate ones. ***The Activities of a certificate holder of IP-I Registration being not the Activities carried out by a licensee, the same would not be subject to payment of any license fee while assessing an NLD licensee".***

DNA of IP-I different from Telecom Service Providers

The basic feature of the tower industry is the sharing of infrastructure – the tower industry is an input sector which provides readymade infrastructure to telecom service providers. Thus the DNA of an IP-1 provider is entirely different from a telecom service provider.

Further, IP-1 and IP-II Registrations are issued by the DoT keeping in view the difference between passive infrastructure and active infrastructure providers. The DoT had in the past consistently taken the position that IP-I providers (offering passive infrastructure) cannot be brought under the licensing regime [which was also incorporated in the Registration certificate granted by the DoT]. In fact, the Tower Industry in most of the countries is not treated as part of the telecommunication sector and is not licensed.

Keeping this distinction in mind, the Department of Economic Affairs, Ministry of Finance, Government of India issued the notification dated 27.03.2012 conferring the infrastructure status to the tower industry which is an input provider to telecom service providers.

In view of the fact that the regulatory architecture and framework of an IP-1 is different from that of a TSP the DoT did not bring IP-1's under the purview of licensing when an earlier recommendation was made by the Authority.

It is pertinent to note that IP-Is do not carry out any telegraph signals, etc and only undertake provision of passive infrastructure, hence IP-Is should not be brought under licensing regime.

Further, the IP-I registration certificate clearly mentions in Clause 2 "In no case the company shall work and operate or provide telegraph service including end to end bandwidth as defined in India Telegraph Act, 1885 either to any service provider or any other customer".

Therefore, the premises of TRAI' proposal to bring IP-I under licensing is completely unfounded and illogical.

Unequal's being treated equally – violative of Article 14

Further, IP-Is should not be brought within the licensing regime and status quo with regard to IP-1 must be maintained. The licensing regime has been specifically designed/ meant for Telecom Service Providers to the end consumers, whereas IP-Is since inception has only been providing passive infrastructure to the licensees under telegraph act. If the Consultation Paper is taken to its logical conclusion; it will result in unequals being treated equally which will be a violation of Article 14 of the Constitution of India. The Hon'ble Supreme Court in a catena of cases has held that equals have to be treated equally and unequals ought not to be treated equally.

If we go deeper into the purpose of having the Infrastructure Provider I and Infrastructure Provider II categories, created during 2000, both the categories fell under Registration; but there was a unique difference. IP II dealt with active infrastructure like lit fibre etc., and hence attracted a license fee of 10% ; whereas IP I being related to only Infrastructure provisioning, did not attract any fee right from its inception!!

Infrastructure provider category- I (IP- I)
"An IP-I can provide assets such as Dark Fibre, Right of Way, Duct space and Tower."

Infrastructure provider category- II (IP- II)
"An IP-II license can lease / rent out /sell end to end bandwidth i.e. digital transmission capacity capable to carry a message". (Issuance of IP-II Licence has been discontinued w.e.f. 14.12.05)

Annexure – 1C

IP-Is SHOULD BE GIVEN THE RIGHT TO CHOOSE

Choice lies at the heart of the matter; this should not be made 'mandatory' and forced upon existing IP-I registrants. The possible inclusion of IP-Is under the licensing framework in future is uncalled for. If IP-I's want to enhance their scope with active/ passive and other elements, they should be given an 'option' to migrate to the Unified Licence. This cannot be mandated/ pushed down the throats of IP-1s who have no interest in expanding the scope of activity.

Licensing is discriminatory to IP-Is

The tower industry has pointed out several times that singling out IP-I players for levy of license fees has no more justification for bringing IP-I players under a licensing regime than for imposing a similar license regime on IT giants who manage Operators' IT network, or global equipment vendors who provide managed services to the telecom operators. If the license fee on IP-I players (say Tower companies) is levied, then logically all equipment manufacturers must also pay license fee to DoT. Similarly, if the argument is that anything which is utilized by telecom industry or the telecom service provider can be subjected to imposition of license fee, the license fee as a corollary could become leviable on IT companies, Cement companies, Steel companies and even Consultants & Auditors who provide services to the telecom operators. This is entirely irrational and legally untenable.

Hence, levying of license fee on these companies would be an extreme step, and will act as an impediment in the growth of the overall telecom sector and infrastructure build up. If license fee is levied on providing tower and infrastructure, which are input services to a telecom operator, then the same license fee would also become applicable on various other input services such as:

- Manages service providers.
- Telecom equipment providers.
- IT service providers.
- Business Process Outsourcing units
- Manufacturer of DG sets, steel, cement, etc.

Licensing of IP-1 players is discriminatory since it does not apply to other service providers that the telecom operator's use (e.g. managed service providers; Telecom equipment providers; IT service providers; Business Process Outsourcing units; Manufacturer of DG sets etc.). Furthermore, IP-Is are not providing any services and are not under the category of service providers as defined in the unified licensing guidelines hence it is highly arbitrary and an autocratic step to even recommend that IP-I to be brought under licensing regime.

TRAI's INCONSISTENT POSITION

The Authority has taken inconsistent positions with many flip flops. In fact, in 2012, the Authority had recommended the set-off of the license fee paid by the TSPs, whereas in the current consultation

paper, the Authority seems to have once again changed its stand and has not mentioned anything regarding allowing any set-off to TSPs for the expenses paid to the IP-I service provider.

This creates needless uncertainty. The Supreme Court in ***Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613*** held that "*Certainty is integral to the rule of law*" and is necessary so that investors can arrange their affairs fruitfully and effectively.

In fact, TRAI has been adopting HoP On – HoP Off policy on an issue which is so critical to the survival of the IP-1 Industry. There was no such proposal till May, 2008 and it was the first time on 13-05-2008 the authority proposed to bring IP-1 registered companies under the licensing regime. DoT by its letter dated 25-08-2008 informed TRAI that the suggestions of TRAI have been examined and not accepted. This was followed by another letter by TRAI dated 21-10-2008, the TRAI proposed licensing of IP-I" on noble accounting methods". This was once again rejected by the DoT letter dated 29.10.2008 clarifying as follows:

"… (i) The matter has been examined and as per the statutory provision, such activity does not qualify for grant of license.
(ii) The revenues and profits from such activities attract necessary statutory charges as applicable e.g. income-tax, corporate tax etc.
(ii) Higher valuation cannot be a reason to bring IP-I under licensing regime.
(iii) There is no bar for a company providing telecom services diversifying its business to other activities such as real estate, licence of space by way of construction of buildings, towers, ducts etc.
(iv) USoF activities are reviewed from time to time and necessary action taken.
(v) Further, TRAI Act does not envisage reconsideration of a final decision' taken by the Government after due consideration, when time span after the decision is short and there is no change in the ground reality.
(vi) Hence there is no case for reviewing the Government decision"

The flip-flop of TRAI position is clearly highlighted in the following table :

Year	**TRAI**	**DOT**	**TAIPA comments**
2005	Unified Licence for all telecom **services - IP-I included under Licensing under the Authorization category;** No Bank Guarantees, No licence fees & No Registration charges.	UL-**Rejected**	
2007-April	Urgency for passive infrastructure sharing **- the Authority didn't recommend any legislation/ amendment in the license conditions. No Licence Fee for IP-I; & for the operators to avail exemption on LF for IP-I services, separation of services is a must.**	**Accepted**	_

Year	TRAI	DOT	TAIPA comments
2008-May	Urged DOT to bring IP-Is under licensing regime over **"Civic issues", "optimum utilisation of Infrastructure" - Proposed 1% Licence fees,**	**Rejected**	**Authority changed the position-** Authority wanted DOT to Licence IP-I **to ensure non-discriminatory & reasonable pricing for Operators.** W/o same; In 2007: Sharing was 25000 Towers & by 2011, it was 300,000+ (responsible for lowest tariff in world).
2008-October	**New reasonings for hive-off –** Reduction in Capex & avoiding attendant incidence of license fee on revenue earned from sharing of their telecom infrastructure and higher market valuation	**Rejected –** ***Quote*** *"The matter has been examined and as per the statutory provision such activity does not qualify for grant of licence"* *"TRAI Act does not envisage reconsideration of a final decision' taken by the Government after due consideration, when time span after the decision is short and there is no change in the ground reality."* *"Hence there is no case for reviewing the Government Decision."* ***Unquote***	**TRAI on multiple occasions have recommended to DOT for bringing IP-I under licensing regime, however DOT has clearly not accepted the same. Therefore, it implies that the matter be closed forever.**
2009	TRAI had sought comments from the stakeholders as follows: a. What are the advantages and disadvantages of a uniform licence fee? b. Whether there should be a uniform Licence Fee across all telecom licences and service areas including services covered under registration? c. If introduced, what should be the rate of uniform Licence Fee?		**Of the 56 points consulted under "Spectrum and Licence related issues", the reference to IP-I was casual and limited only to point 'b'.**
2010	TRAI proposed Licensing for IP-I on the main driving assumption of unsubstantiated allegation of Arbitrage besides existing issues		**TRAI never sought inputs on Arbitrage during the consultation process.** **Arbitrage was neither the case before divestment nor is it so thereafter.**

Year	TRAI	DOT	TAIPA comments
2010	TRAI proposed Licensing for IP-I on the main driving assumption of unsubstantiated allegation of Arbitrage besides existing issues		**TRAI never sought inputs on Arbitrage during the consultation process.** **Arbitrage was neither the case before divestment nor is it so thereafter.**
2011	TRAI recommended reforms related to Infrastructure issues		
Jan-2012		DOT had asked, "for a detailed examination of the issue of bringing IP-I players under licensing regime by DOT, and till such time had advised the matter be kept in abeyance", at the open house conducted by the then Telecom Minister, Licensor, Regulator and industry.	**The same has not seen the light of the day and the matter has NEVER been discussed with the industry so far.**
May-2012	TRAI recommended 'deduction available' to TSPs AGR *an amount equal to the License Fee paid by the IP-I on account of the revenue generated from the said access service provider who has rented the infrastructure from the IP-I licensee"*	Not accepted	**TRAI recommendation completely at odd with the ground realities. Therefore, all non-licensed activities should be deductible from the GR of the TSPs.** **IP-I have never accepted they can be brought under Licensing.**
July-2014	TRAI reiterates its views on bringing IP-I under licensing under the guise of its Consultation Paper on "Definition of Revenue Base (AGR) for reckoning of License Fee & Spectrum Usage Charges"		

Changing the Goal-post midway

Changing the rules of the game midway and 'shifting the goal-post' especially after large sums have been invested in the sector is completely arbitrary and unfair.

As IP-1s have made significant investments in the sector and the tower industry has planned its business affairs and entered into long term contracts at fixed prices. There should be no change in the 'goal post'. These contracts were based on the existing legal and regulatory regime. Any attempt to impose license fee on the tower industry will increase the economic burden midway which will be to the detriment of the tower industry. The IP-I industry will either fold-up or will have to pass on the increased cost to the telecom sector who will inturn pass on the cost to their consumers resulting in increased telecom tariffs.

The Hon'ble Supreme Court in ***NOIDA Entrepreneurs Association versus NOIDA and others, (2011) 6 SCC 508 2011*** has held as under:

"Public Authorities cannot play fast and loose with the powers vested in them. A decision taken in arbitrary manner contradicts the principle of legitimate expectation. An Authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred…"

The regulator through this consultation process has clearly overlooked or simply chosen to ignore the numerous and detailed representations, industry-wide documented views and explanations articulated at various forums. In January 2012, at the open house conducted by the then Telecom Minister, Licensor, Regulator and the industry, DOT had asked, "for a detailed examination of the issue of bringing IP-I players under licensing regime by DOT, and till such time had advised the matter be kept in abeyance". So far no detailed examination/ discussion has been held with the industry.

In this regard it is also important to draw your attention to TRAI's letter dated 21.10.2008 wherein Authority has admitted that IP-I registered companies created to facilitate infrastructure development in telecom sector. The relevant extract of the said letter is reproduced hereunder:

> ***"IP-I was created in the year 2000 to facilitate infrastructure development. IP-I companies are required to register with DoT without any financial burden such as entry fee and license fee to build telecom resources such as towers, ducts etc. It was expected that these concessions would help in creating infrastructure facilities"***

Tower sharing created a strong incentive to the Indian telecom market, it allowed operators to reduce costs considerably and focus on core marketing activities while enabling new operators to rollout networks in record times, thus reducing the time to go to market for new operators.

Annexure – 1D

Double License Fee

If the IP-Is are now levied any License Fee by putting them under the licensing structure it will tantamount to Double License Fee. This will force operators to reabsorb their own towers to avoid paying license fee twice, which will result in unjust enrichment of the Government which is contrary to law and will result in end of road for Infrastructure companies which is the backbone of the telecom sector.

For example, let us consider that what will happen if the towers were shared with in an integrated company. First of all, in the past, such sharing was prevalent only in terms of barter agreement, wherein same number of towers were exchanged as a barter deal by these companies which resulted in no revenue generation.

In case an integrated telecom operator, a telecom licensee charges other operator the Infrastructure fee, the fee paid by the other telecom licensee is only out of that revenue steam which is already license fee paid. For example, if On A's towers are shared by B and B would pay A the IP fee only out of the revenue on which it has already paid the license fee. Thus, in this scenario, if A has also to pay license fee on the revenues earned out of B's revenue stream, it would amount to payment of double license fee as B has already paid license fee on the revenue utilized to pay A the Infrastructure usage Fee.

In the current scenario, the sharing is happening on a neutral platform provided by an IP I service provider. However, even if we assume that there is no hiving-off and an integrated telecom operator, being a telecom licensee, charges other operator the Infrastructure fee, the fee paid by the other telecom licensee will only be out of that revenue stream which is already license fee paid.

In the extreme case, where the new policy regulates levying such a license fee on the telecom infrastructure companies, which only provide input services to the telecom operators, it would tantamount to a double-license fee, since the operators would be paying the license fee on their input services, as well as the output services.

Assumption with reference to "Arbitrage"

The view of the Authority to plug the arbitrage opportunity arising from the incentives available to TSPs to hive-off their assets solely to avoid levy of LF is notional and completely unfounded. The allegation that mobile operators divesting their tower business are engaged in arbitrage and seek to escape license fees payable to the government and that licensing IP-I players would prevent such "leakage" is totally unsubstantiated.

The argument that mobile operators' outsourced/hived-off/divested towers to reduce their license fee liability because tower related revenues would no longer be included in the calculation of license fees ignores DoT's own rules for fee computation. **On the contrary, a license fee on IP-I means a "double license" fee: i.e. first on the revenue of the telecom service provider and then on the revenue of the IP-I company earned from the telecom service provider.**

Any comparison regarding revenue arbitrage should be done in today's context and not the past - as the sharing model did not exist in the past. No "Infrastructure Provider" industry existed during that time. Moreover, under the current scenario, all expenses paid towards Infrastructure sharing are fully license fee paid, hence there is NO arbitrage. Resultantly the misplaced apprehension and allegation of arbitrage is without any substance.

Under the "barter arrangement" prevalent in the past, there was no revenue getting generated on account of tower infrastructure and the model was totally different. With the advent of infrastructure companies, both stand-alone as well as through a court process of consideration/ merger, the tower industry has grown.

The presumption and assumption in the Consultation Paper on alleged arbitrage is misconceived and devoid of any merit. IP-1 registered companies provides only passive infrastructure and therefore not covered under licensing, in view of which there is no evasion of any fee and resultantly there is no opportunity for arbitrage. On the other hand, telecom service providers in accordance with the mandate of law hived-off their tower assets as part of re-arrangement and re-organisation of business which has made the business more efficient and effective.

Infrastructure providers are the backbone of the telecom sector as they provide tower sharing services. This has reduced duplication of capital expenditure, on account of which long term investments are made to telecom assets which have resulted in expansion and growth of business and increase in reach and connectivity. The Authority must 'look at' and not look through these arrangements as this has benefitted IP-1s which resultantly benefits the telecom sector and ultimately the subscribers and consumers.

The misplaced presumption of arbitrage is a myth/is notional and is a distortion of historical facts as from the inception sharing of infrastructure has been on a barter basis and no license fee is required to be paid.

The Authority must act in the interests of the sector, whereas presumptions regarding arbitrage will cause needless and unnecessary harm to infrastructure providers.

Presumptive Loss

Loss of License Fee to the Government is a clear case of "presumptive loss". **The feeling of arbitrage is notional and completely unfounded.**

In the pre-2005 era when the Towers were being operated under integrated model (part of the Operators' domain); there was no sharing of towers taking place. Only a few Operators shared towers that too on a barter system - One tower shared for a similar number coming from the opposite side.

The above schemes/ projects promoted Sharing of Infrastructure and therefore, it will be out of place to discuss about the past since there was hardly any 'Sharing' happening. It was the Independent Tower Cos on whose initiative the 'Sharing' amongst telecom operators started. The independent players generated confidence in the TSPs due to their neutral nature and non-alignment of their business interests with a particular telecom service provider. **It will be far from**

reality to say that sharing would have continued for 'integrated operator' as well. Since, there cannot be trust factor with an integrated operator.

On DOT's request to promote "Sharing", TRAI undertook the consultation process in 2006 & promoted sharing vide its recommendation in 2007. However licensing and mandating was rejected by the DoT.

SUPREME COURT' ORDER

Further, even Hon'ble Supreme Court in its order dated 11th Oct 2011 decided that it was open for licensees not to undertake activities for which they do not require any license under clause 4 of the Telegraph act and can transfer these activities to any other person or firm or company.

a. It will not be correct to link the proposed Unified Licensing to hiving-off the infrastructure provision business by some of the Operators. In this regard, we would like to draw your attention to an order dated 11.10.2011 passed by Hon'ble Supreme Court of India in the matter of ***UOI &Anr. Vs. Association of Unified Telecom Service Providers of India &Ors.(2011) 10 SCC 543*** Wherein the Hon'ble court observed as under:-

Quote:

"If the wide definition of Adjusted Gross Revenue so as to include revenue beyond the license was in any way going to affect the licensee, it was open for the licensees not to undertake activities for which they do not require license under Section (4) of the Telegraph Act and transfer these activities to any other person or firm or company".

Unquote:

It clearly implies that the option of hiving-off / transfer certain of activities, for which no license under Sec-4 of Telegraph Act was required, was always available to the Licensees / Operators. Therefore, any reliance on transfer of such activities would be highly misplaced and not tenable.

The tower Industry, which is purely a passive Industry, could operate without a telecom license.

The activities like renting of ducts, dark fibre and towers etc. – are passive infrastructure related activities – which are more in the nature of infrastructure provisioning to facilitate further growth of telegraph services.

Annexure – 1E

With this background, we are pleased to provide our response/ comments to the specific issues as raised by TRAI relevant to the tower Industry.

Q7 Specifically, how should the income earned by TSPs from the following heads be treated:

(a) Income from dividend
(b) Income from Interest
(c) Gains on account of profit on assets and securities
(d) Income from property rent
(e) Income from sale of equipment including handsets
(f) Income from rent/ lease of passive Infrastructure (towers, dark fibre, etc.)
(g) **Other income on account of insurance claims, consultancy fees, foreign gains etc.**

TAIPA response :

We, as tower Industry, would be responding to 7(f) i.e. Income from rent/ lease of passive infrastructure (towers, dark fibre etc.)- which is the matter relevant to the tower Industry.

Income from rent/ lease of passive elements should not be subject to license fee because of following reasons :

(i) In case a telecom operator – a telecom licensee (TSP – A) charges other operator (TSP – B) any fee towards erection, maintenance and operation of tower sites, the fee paid by the other telecom licensee (TSP – B) is only out of the revenue stream which is already "license fee paid".

Thus, in this scenario, if TSP-A is also mandated to pay license fee on the revenues earned out of TSP-B's revenue stream, it would amount to payment of double license fee as TSP-B has already paid license fee on the revenue utilized to pay TSP-A charges/ fees towards erection, maintenance and operations of tower sites.

(ii) The purpose of having the Infrastructure Provider-I and Infrastructure Provider-II categories falling under Registration category, but with a very unique difference. IP-II were allowed to provide active infrastructure like lit fibre etc., and hence attracted a license fee of 10%; whereas IP-I being related only to passive infrastructure provisioning, did not attract any license fee since its inception.

(iii) **Supreme Court' *Order*-** It will not be correct to link the proposed Unified Licensing to hiving-off the infrastructure provision business by some of the Operators. In this regard, we would like to draw your attention to the order passed by Hon'ble Supreme Court of India in the matter of *UOI & Anr. Vs. Association of Unified Telecom Service Providers of India & Ors* (quoted above) wherein the option of hiving-off / transfer certain activities, for which no license under Sec-4 of Telegraph Act was required, was always available to the Licensees / Operators. Therefore, any reliance on transfer of such activities would be highly misplaced and not tenable.

Q 15 How should the permissible deductions be designed keeping in view future requirements? Specifically, what treatment should be given to charges paid to IP I providers in the context of bringing them under licensing regime in future.

TAIPA response :

IP-I was created in the year 2000 to facilitate infrastructure development. IP-I companies are required to register with DoT without any financial burden such as entry fee and license fee to build telecom resources such as towers, ducts etc. The tower industry has an IP-I registration with the status of an infrastructure provider. Therefore IP-I providers should not be equated with telecom service providers, who are licensees under the Indian Telegraph Act, 1885.

We would also like to highlight that the Department of Telecommunications, in its letter no. 10-51/2008-CS-III dated 29th October 2008, made it amply clear to the Authority, ***quote "The matter has been examined and as per the statutory provision such activity does not qualify for grant of licence" Unquote*** and cannot be a reason to bring IP-I under licensing regime.

The letter further states, ***quote "TRAI Act does not envisage reconsideration of a final decision' taken by the Government after due consideration, when time span after the decision is short and there is no change in the ground reality. Hence there is no case for reviewing the Government Decision." unquote***. Sir, there has been no change in the ground realities and the sharing has only increased by leaps and bounds due to the initiatives of Tower Infrastructure companies/ IP-Is. Copy of the above referred letter is attached below for your ready reference.

We would like to reiterate that as submitted above that IP-I services are non-licensed services and hence should not be considered for licensing or levy or license fee.

Our further comments regarding non-application of licensing for IP-Is has been covered in detail in the covering letter submitted alongwith this response and further elaborated in the accompanying Annexures.

Annexure – 1F

Additional grounds for not brining IP-I under licensing regime

Wrong notion that Licensing will benefit Tower Cos – completely at odds with the reality on grounds

The Authority's case that many benefits will follow if IP-Is are brought under license regime or that such a move will benefit IP-I, is a myth only from the fact that the existing licensed mobile Operators, many of whom own their towers, face all the problems that IP-I players currently face even though they hold a Licence. They enjoy no special advantage in obtaining approvals or in funding etc. This position is at odds with the ground realities.

Revenue Maximization

The Authority is contemplating to maximize revenue by bringing IP-I's under the Licensing Regime whereas the prime objective of NTP-2012 is *to strike a balance between the interests of users/ consumers, service providers and government revenue* ***not Revenue Maximization.*** NTP-2012 states:

Quote:

> **"---***Availability of affordable and effective communications for the citizens is at the core of the vision and goal of the National Telecom Policy – 2012. NTP-2012 also recognizes the predominant role of the private sector in this field and the consequent policy imperative of ensuring continued viability of service providers in a competitive environment. Pursuant to NTP-2012, these principles would guide decisions needed* ***to strike a balance between the interests of users/ consumers, service providers and government revenue.***"

Unquote:

Revenue maximization is not the objective of the policy and *is not the only way in which the common good can be subserved.*

It is therefore suggested IP-I being only the passive infrastructure providers/ registrants should NOT be brought under the licensing regime.

To conclude:

a. **The Authority while examining the definition of AGR for reckoning license fee cannot indirectly bring the tower industry and IP-Is within the licensing framework.**

b. **The Authority must not change the goalpost midway as this will create needless regulatory uncertainty.**

c. **The passive infrastructure providers should NOT be mandated for migration to Licensing regime and be allowed to continue with the current regime under Registration from DoT.**

d. The option/ choice must be given/left with the IP-I companies which want to enhance their scope by providing 'Active' infrastructure sharing in addition to passive sharing, for migration to a Unified licensing regime.

e. TRAI on multiple occasions have recommended to DOT for bringing IP-I under licensing regime, however DOT has clearly not accepted the same. Therefore, it implies that the matter be closed forever (refer DOT letter number 10-51/2008-CS-III dated 29th October 2008).