

Sub: TRAI Recommendations on Auction of Spectrum contrary to Public Interest and will deal a Fatal Blow to Telecom Sector

Introduction

1. The TRAI recommendations are an outcome of the judgment of Hon'ble Supreme Court on February 2, 2012, wherein it had, inter alia, directed as follows:
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 - i. *The licenses granted to the private respondents on or after 10.1.2008 pursuant to two press releases issued on 10.1.2008 and subsequent allocation of spectrum to the licensees are declared illegal and are quashed.*
 - ii. *The above direction shall become operative after four months.*
 - iii. *Keeping in view the decision taken by the Central Government in 2011, TRAI shall make fresh recommendations for grant of licence and allocation of spectrum in 2G band in 22 Service Areas by auction, as was done for allocation of spectrum in 3G band.*
 - iv. *The Central Government shall consider the recommendations of TRAI and take appropriate decision within next one month and fresh licenses be granted by auction.*v to vii”
2. The Supreme Court had cited a specific reference – recommended an auction mechanism for allocation of spectrum in the 2G band, whereas TRAI has expanded the scope of its Recommendations to include issues like Re-farming of spectrum, auction of 700 MHz, etc., which besides having no nexus with the Supreme Court Order, are novel, radical, disruptive and in any case require more detailed consultations. We therefore request that the **other issues such as Re-farming of spectrum and auction of 700 MHz spectrum, etc., which have long term implications and require careful consideration, should be delinked from the current auction process and deferred for due deliberation at a more opportune time**, instead of rushing it through at the present time.
3. It is respectfully submitted that TRAI's recommendations if accepted, will result in:-
 - a. A negative impact on tariffs; the burden will get passed on to customers.
 - b. Inadequate spectrum resulting in poor Quality of Service.
 - c. An artificial increase in the price of spectrum due to a gap in the demand and supply (It will not be the true market discovered price)
 - d. Significant increase in CAPEX and OPEX as a result of “Refarming” of spectrum while ensuring Quality of Service to all its existing subscribers. This will impact the economic viability and further increase the financial burden for operators.
 - e. Has the potential of relegating the industry back by several years, thus compromising country's connectivity and broadband agenda.

- f. Wrongly legitimize the dual spectrum regime and provisioning of 3G-EVDO
 - g. Limit the number of operators who can benefit from the auction of only one block of spectrum.
4. These recommendations militate against objectives of policy and are in violation of settled legal principles, judgments of the TDSAT and the Supreme Court and will also be against Consumer/Public Interest. We would like to make the following detailed submissions for your consideration:

A. Recommendation leads to Regression of Telecom Sector:

- i. TRAI's recommendations, if accepted, would result in the astronomical price of spectrum, huge cost of "Refarming" (both CAPEX and OPEX) and most importantly the cost of idle spectrum with the Government to be borne by the end customers.
- ii. A preliminary estimate shows that the impact of spectrum fee to be paid at the time of extension of license for Delhi Circle alone would result in an increased cost of around **40%** for the customers of Delhi. If the spectrum entry fee of the operators whose license are to be extended during next 5 years is considered than there would be an estimated impact of at least 25-30% of increased cost to customers of those circles. Therefore, these operators would not be left with any other alternative than to increase the tariffs. The "Refarming" would also have its own impact on tariffs. Such an increase in per minute cost would be further aggravated due to reduction in MoUs, after the increased tariffs, and will result in further increase in the tariffs.
- iii. **The citizens of this country who are the real owners of the spectrum pay for the price of the wrong recommendations from TRAI.**

B. Astronomically High Reserve Price:

- i. The recommended Reserve Price for 1800 MHz spectrum (Rs. 3,622 crores per MHz on a Pan-India basis), is much higher than the price for 3G spectrum. Further, the known price for 2G spectrum, as allocated by the Government as late as in December 2007, was more than 10 times lower than the newly stated price. It is evident that the unreasonably high reserve prices are driven by certain unjustified irrational assumptions and do not support the viability of the telecom sector.
- ii. The TRAI has stated that "Liberalization" of spectrum justifies the higher reserve price. We are once again surprised that TRAI has chosen to ignore the fact that the present license is technology neutral and operators are free to use the assigned spectrum for whatever technology they wish to deploy.
- ii. Liberalization, as is being postulated by TRAI is totally inconsistent with the policy of technology neutrality and license conditions. TRAI has also not taken into consideration the fact that the supporting eco-system (network equipment, handsets, etc.), of futuristic technology is non-existent at present. The development of a mature eco-system is at least five years away. Therefore any higher spectrum fee just to change the tag of the spectrum to "Liberalized" while it continues to be used for 2G services is totally unjustified.
- iii. Any alternate use of spectrum in 1800MHz/900MHz band is not economically viable due to a fact that less than 5% of the present customers use 3G and the

handsets for 4G are hardly available. In fact for LTE-TDD, the voice standards are yet to be defined. We believe that the present license allows the liberalized use of spectrum.

- iv. It is also pertinent to note that the latest price derived in BWA auction during 2010, in 2300 MHz band for the 4G technology (which TRAI now proposes to allow in existing spectrum allocation, under the guise of liberalization) was only Rs 1284.77 crores per MHz (FDD equivalent) on Pan –India basis as against the TRAI’s proposed price of Rs 3, 622 per MHz for 1800 MHz for Pan-India. Thus it is even more puzzling that the purported benefit being now sought to be given in the name of liberalization, has itself been valued at much less price by the market forces in recent past. Therefore, the reserve prices proposed by TRAI are arbitrary and holds no rational basis.
- v. TRAI has wrongly applied the multiplication factor of 2 for 900 MHz and 4 for 700 MHz over the reserve price of 1800 MHz. In its earlier recommendations including the experts determined price, the multiplication factor of 1.5 was used to derive the price of 900 MHz w.r.t price of 1800 MHz. It is not understandable as how this factor has increased from 1.5 to 2 when there is no change in the relative propagation characteristics of 900MHz and 1800 MHz. In our view, given the increased cost of spectrum, the cost differential between 900 MHz and 1800 MHz network, due to infrastructure CAPEX/OPEX, will significantly reduce and hence instead of increasing the multiplication factor to 2, it should actually have been reduced.
- vi. TRAI’s partiality towards the dual spectrum/CDMA operators is also evident from the fact that while TRAI has applied the factor of 1.2 between 2100 MHz band and 1800 MHz band but it has not proposed any price differential between 800 MHz band and 900 MHz band. Instead, it has proposed the multiplication factor of 2 for both 800 MHz band and 900 MHz band w.r.t the price of 1800 MHz band and chosen to ignore the multiplication factor **2.78** ($0.4809/0.1727=2.7$) between 800 MHz band and 1800 MHz band from the international data quoted in table 3.5 of its the recommendation. Further in para 3.92, it has proposed a multiplication factor of 4 for 700 MHz band without any logical reference. Therefore it is clearly established that the multiplication factors of 1.2, 2, or 4 suggested by TRAI are arbitrary and without any scientific or economic rationale and hence needs to be rejected outright.

C. Only a small fraction of available spectrum is being put up for Auction:

- i. TRAI in its recommendations has itself stated that 581 MHz of spectrum is available in the 1800 MHz band; however, it has suggested putting only 110 MHz for auction. This creates an “artificial scarcity” and deliberately extorts a higher resulting auction price. Therefore, we would like to submit that the entire spectrum available in 1800 MHz band should be put to auction.
- ii. Importantly, by limiting the auction to only one block of 5 MHz initially, the TRAI seems to be suggesting the end of operators whose licenses stand quashed – since only one of the quashed licensees would be able to continue services. This is against the spirit of the orders given by the Hon’ble Supreme Court. In its observation dated 24th April 2012, the Hon’ble Supreme Court has, inter alia, indicated that it wishes to provide continuity to operators who are successful in auction process, by extending the license period by few more months than the date for completion of auction. Hence also, the TRAI ought to have necessarily provided for more spectrum for auction.

- iii. TRAI's recommendations on holding almost 80% of the available spectrum in 1800 MHz for "Refarming", has ignored the fact that this recommendation will not only result in a loss to the tune of around Rs. 18000/- crore for holding the spectrum idle for 5 years in the form of revenue from the auction but also loss of the revenue share on account of license fee and spectrum usage charges. Delay in auction of 700MHz band which is the digital dividend band would result in further loss to the tune of Rs. 70,000/- crores for next 3 years as proposed by TRAI.
- iv. The TRAI while auctioning only one block of 5 MHz per circle, which is less than the 20% of the total available spectrum, has also ignored the real direct loss to the Government, by keeping the productive national asset idle. This will not only result in much lower revenue from the auction but would also result in reduced License Fees, Spectrum Usage Charges, etc. The teledensity and mobile broadband penetration has a certain positive impact on GDP (i.e. a 10% increase in teledensity leads to an increase of 1.4% increase in GDP) therefore any such withholding of spectrum will also cause an indirect losses of an even larger magnitude to the nation!
- v. "Refarming" was being considered by the TRAI even before the cancellation of 122 licenses. It is therefore evident that the TRAI had a plan to make spectrum available for the purposes of "Refarming" independent of the spectrum that would be available due to cancellations. Therefore also limiting the auction to only 5 MHz is illogical.

D. "Refarming" of Spectrum:

- i. Government's policy on spectrum assignment and pricing announced on 29th January, 2011, had no mention of any kind of "Refarming" of spectrum. TRAI in its communication dated 3rd Nov, 2011 to Department of Telecommunication had also explicitly mentioned that it would initiate a separate consultation process on issues involved in "Refarming". Hon' ble Supreme Court vide its judgment dated 2nd Feb 2012, ordered for cancellation of 122 licenses granted on or after 10-01-2008 and directed TRAI to make fresh recommendations for grant of license and allocation of 2G spectrum by auction, in view of the decision taken by the Government of India during 2011.
- ii. On 15th Feb, 2012, Government announced its decision on Spectrum management and licensing framework wherein it accepted the need for "Refarming" in-principle and conveyed that further steps will be taken post receipt of TRAI's recommendations in this regard. TRAI, instead of complying with Supreme Court judgment to provide the recommendation while considering the Central Government's decision of 2011, has unnecessarily clubbed the issue of "Refarming".
- iii. The clubbing of the vital issue of "Refarming" along with the auction of 1800MHz band spectrum has resulted in absurd recommendation which suggest auction of only 20% of the available spectrum and astronomical reserve price.
- iv. TRAI's recommendations on "Refarming" also ignores the following;

- a. The investments worth thousands of crores have been made in the 900 MHz network and a majority of such investments have been made as recent as 2008-09.
 - b. These investments have been made with the understanding that the Licenses including the spectrum will be extended without changing the basic structure/foundation of the license.
 - c. At present more than 53.9 % of mobile subscribers are being served on 900MHz network and 12.9 % of mobile subscribers are being served on 800MHz network. On the average, 66.8% of the total mobile customers in the country are being served using the network on 900/800 MHz network.
- v. TRAI's recommendations have clearly overlooked the universal rules of sustainability and growth and proceeded in a predetermined manner. This is evident from the fact that the Government in its letter dated 15.02.2012 has accepted "Refarming" in principle. The TRAI is following this, mainly executing a Government Decision whereas under the scheme of the TRAI Act it has come out with its independent recommendations which are to form the basis of a Government Decision. This was putting the cart before the horse.

E. Recommendations continue to favor Dual Spectrum license holders:

- i. TRAI's recommendation continues to favor dual technology operators and hence distorting the level playing field with GSM operators in particular and thus perpetuating discrimination in the industry.
- ii. The Supreme Court order dated 2nd Feb 2012 clearly observed all decisions taken pursuant to the Governments press release dated 10th Jan 2008 and during September 2007 – March 2008 to be arbitrary, rendering them illegal. In spite of this order, while declaring the available spectrum for auction, TRAI has not included the GSM spectrum (1800 MHz) wrongfully allocated to the dual spectrum operators including the one who was allocated spectrum on the basis on the said press release, without a public auction pursuant to a decision of 19th October 2007, which falls in the same period of September 2007 – March 2008. The very decision on part of the Regulator has resulted in further narrowing the spectrum available for auction and demonstrates discrimination and injustice towards the GSM players.
- iii. COAI had already pointed out that the allocation of dual spectrum during the September 2007 to March 2008 tantamount to allocation of second license to these companies in the same service area which otherwise is not allowed as per cross holding restrictions. The decision to allow the dual spectrum also falls in the same category for which the licenses have been struck down by the Supreme Court as it not only enabled the CDMA operators to obtain the startup GSM spectrum at Rs. 1658 crore but also ignores the fact that those operators were not allowed to obtain the GSM spectrum by the way of separate license.
- iv. Therefore, the latest TRAI recommendations, not only has the GSM spectrum (1800 MHz) granted to Dual spectrum operators not been included for cancellation, but their position is sought to be further legitimized by giving them a further 1.25MHz GSM spectrum.
- v. Further, while the new operators will now have to pay over Rs. 18,000 crores for the GSM spectrum, the Dual spectrum players will continue to hold the same GSM spectrum at a ten times lower price (of INR 1,650 crores) despite the fact

that both were granted the spectrum pursuant to the same decision making process of DoT between the period September 2007 to March 2008.

- vi. COAI notes that on the one hand TRAI concludes that spectrum is technology specific but on the other hand notes that CDMA operators are offering 3G EVDO services. As TRAI is mandated under the Act to enforce terms and conditions of license, it is surprising that TRAI continues to overlook this “illegality” being committed by the CDMA operators.
- vii. COAI has repeatedly pointed out the huge commercial advantage being enjoyed by the dual spectrum operators, which have been estimated at around INR 51,977 crores.
- viii. It is also a matter of deep concern that while TRAI is espousing the cause of “technology neutrality” in the use of spectrum, it continues to discriminate against the GSM operators by allowing Dual spectrum Operators to pay separate spectrum usage charges in 800MHz (for CDMA) and 1800MHz (for GSM) respectively. This is despite TRAI itself having recommended earlier that the spectrum should have been clubbed for the purpose of paying spectrum usage charges. COAI states that this discriminatory pricing can be expected to cost the Government at least around 25-30,000 crores over a potential 20 year license period.
- ix. We would like to strongly state that the licenses have been technology neutral since 1999 when the mobile operators were released from being mandated to use only GSM technology and could use any other technology in their allocated spectrum. This was amply clarified by DoT in 2001 when it stated that “The Cellular Services are to be operated by the existing licensees in designated Cellular Mobile Telephone Service band i.e., 890-915 MHz paired with 935-960 MHz. The operators have been permitted to operate the Cellular Mobile Telephone Service in any technology, however, the technology shall be digital and has to operate in the designated frequency band.”
- x. Thus the very basis and reasoning of TRAI to recommend “Refarming” to allow liberalized use is misplaced.
- xi. Therefore we believe that these recommendations by the TRAI would create serious problems of non-level playing field between GSM and Dual spectrum operators and seeks to legitimize the discriminatory regime now in practice.

F. TRAI Recommendations are not in conformity with the Supreme Court Judgment :

- i. The TRAI should have put to Auction the available /unallocated spectrum and the spectrum which was freed by cancellation of licenses.
- ii. The recommendations are also flawed as they did not include spectrum allocated to dual spectrum operators even though it was done without a public auction under a decision dated 19th October, 2007. This falls in the period September, 2007 to March, 2008, qua which the Supreme Court held that all decisions taken in the period September, 2007 to March, 2008 are arbitrary and capricious and were taken to favour certain operators.
- iii. This has a direct effect on both - total availability of the spectrum and on the price. And to that extent is against the letter and spirit of the judgment dated

02.02.2012 of the Supreme Court, which was to ensure adequate availability of spectrum.

- iv. Only 5 MHz of spectrum is being put to auction whereas all available spectrum should be put to auction. In India, there is a scarcity of spectrum and operators run networks with significantly lower amounts of spectrum compared to international counterparts. Though subscribers have increased, additional spectrum has not been allotted in recent years – having an adverse impact on quality of service.
- v. This will create an artificial scarcity leading to a higher and inflated value of spectrum; the burden of the higher/ additional cost would be ultimately passed onto subscribers and customers. This goes against the objectives of government policy.
- vi. Adequate availability of spectrum for the telecom sector would result in efficient use of spectrum, while realizing the true market value of the spectrum.
- vii. TRAI has relied on the Government communication dated 15.02.2012 which was issued after the judgment of the Supreme Court. The TRAI could not take this into account as it has to follow the directions given in the order dated 02.02.2012 which was to make recommendations keeping in view the January (29th January 2011) decision of the DoT.
- viii. The Recommendations exceed/go beyond the scope of the exercise by the Supreme Court. **License is in the nature of a Contract;**
 - (i) The telecom license issued to operators is in the nature of a contract – the terms and conditions of the license are contractual. The Supreme Court in its judgment dated 11.10.2011 (***Union of India vs. AUSPI***) has held that:

“29.once a license is issued under proviso to sub-section (1) of Section 4 of the Telegraph Act, the license becomes a contract between the licensor and the licensee.....”
 - (ii) It may be noted that:
 - a. The DoT has allocated spectrum [in the contracted band of 900 MHz] which is in accordance with its norms, policies and guidelines.
 - b. This was confirmed on affidavit before the TDSAT. On this basis the TDSAT passed the judgment dated 16.12.2010, which was confirmed by the Supreme Court by its order dated 19.8.2011.
 - c. The recommendation of the TRAI that spectrum in the 900 MH band should be refarmed and such a process should be done expeditiously [30 months before the expiry of the license [in para 2.83], is in the teeth of the contract with the DoT.
 - d. License for metro circles are valid up to 2014 and under Clause 4 [extension of licence] operators are entitled to apply for extension in the 19th year. [Refer Clause 4.1 of the license].
 - e. The intention of the contract was that the licenses would be extended at the end of the 20th year for a further period of ten years, keeping in view the fact that telecommunication operations required creating a network and infrastructure at significant cost and investment, which is serving over 600 million subscribers today.
 - f. This was the basis on which the parties acted.

- g. This clearly shows that the license is a binding contract with the DoT and it has to discharge its obligations under the license in a fair and just manner in conformity with the representations made under the license.
- h. The recommendations of the TRAI seek to re-write the existing contract which is legally impermissible. To this extent the recommendation cannot be acted upon or given effect to as this would amount to a violation of the contract with the DoT
- i. The principles of Good governance require the DoT to discharge its obligations under the contract and comply with the judgments of the court and the TDSAT.
- j. The industry has no doubt that any recommendation inconsistent and contrary to the same would not be given effect to.

(iii) The TDSAT in its judgment dated 13.1.2012, has also given a similar finding by following the judgment of the Supreme Court. [Ref. **Para 71** of the judgment in ***Unitech Wireless (Tamilnadu) Pvt. Ltd. & Ors. vs. Union of India & Anr***]. The DoT is a party to both decisions and is bound by them.

G. Rollout Obligations

- i. We believe that once the full market value for spectrum has been extracted by the Government through an open market (auction), there is no justification for any roll out obligations. Therefore no roll out obligations should be specified and the market forces should determine the rollouts.
- ii. We also believe that the roll out obligations prescribed in the Recommendations impose an unnecessary obligation on operators and distorts their revenue earning capacity by forcing them to focus on areas that may be economically unviable in the early stages.
- iii. The Government also continues to collect levy on account of Universal Service Obligations (USO), the prime objective of which is to fund for services in the rural areas. Therefore such rollout obligations tantamount to double whammy wherein the operator is being asked to contribute diligently towards the USO fund for provision of services in rural areas and is also being asked to provide services in those areas, that too after paying for spectrum at market determined price.