

## **IBSL's comments on Consultation Paper on Definition of Adjusted Gross Revenue (AGR) in Licence Agreements for provision of Internet Services and minimum presumptive AGR**

At the outset we would like to submit that the broadband penetration rate as a percentage of India's population is at ~1%. Our 1% penetration happens to be the one of the lowest in the world as compared to other economies like Russia (11%), Brazil (7.5%) and China (9.5%). Broadband penetration requires very high level of investment. As per some industry sources, "An investment of \$1,200 to 1,500 per home is required as against an ARPU of merely \$10. This is a typical case of a business being unviable." Apart from this, the complicated Right Of Way (ROW) procedures and high ROW charges to lay a telecom network are dissuading service providers from venturing into the creation of new infrastructure for telecom services. Obtaining right of way clearances is proving to be major hurdle in creating new telecom infrastructure that includes the laying of optical fiber cables, towers & other related activities.

Of late, operators have been vary of investing & creating new cable plant or in rolling out wireless networks to build capacity for broadband. Combined with this the high cost of data plans, high handset or PC costs, and lack of local and segmented content are also threatening the cause of broadband in India. If on top of it additional charges are charged from end consumer in the name of license fee, the penetration of broadband will remain a distant dream.

During a recent CII-Media summit Mr R Chandrasekhar, Secretary Telecom & Chairman Telecom commission said: **"The government is taking proactive steps for enhancing the broadband penetration in the country from the present level of 20 million to 600 million by 2020 so as to cover the entire breadth and length of the country."**

While mentioning above at the CII-Media Entertainment Summit 2012 titled India-The Big Picture, Sh. R Chandrasekhar, Secretary, Information Technology and Chairman Telecom Commission said that the government was investing Rs 20,000 crore over the next few years for strengthening the broadband network in the country. In its wake, such massive investment would give a boost to the digitization, cloud based services and convergence to reach out to the common man in the far flung areas. The government's role, he stressed, would be that of a facilitator and the last mile movers would be cable and telecom service providers."

The announcement is very heartening since it shows government's resolve to provide common man with benefits of technology irrespective of the fact that he lives in a remote village or ultra-modern urban conglomerate. It is to be noted that;

1. With increase in broadband users government revenues will increase.
2. There will be more transparency in transactions thus reversing the trend in hoarding of black money.
3. There will be more awareness & empowerment in society through the medium of e-learning, e-commerce, tele-medicine, rural e-health programmes etc.

All the above & many more applications will be developed which will help the society & increase the GDP of country, improve skill level of workforce, increase in per capita income of population, help in improving distribution of government subsidies etc. in a big way. **So at this stage charging licence fee on pure internet services may prove to be counter-productive since all such charges will ultimately be paid by end subscriber who may not opt for services if they become costly.**

It is further to be noted that Government of India as sovereign has called for tenders for auction of BWA spectrum with a clear understanding that there will not be any license fee on pure internet services and only spectrum usage charges @ 1% will be recovered from the successful bidders. Changing the same at this stage will give a wrong signal to world & tarnish the image of India in world market. Therefore government should not try to make any changes in their own published and agreed policy on this issue, that too at a time when the stated goals of broadband penetration are not yet achieved.

Broadband services are more in the form of store & forward services rather than real-time services that are provided under UASL/NLD/ILD/CMSP/BSO licenses. These services are simply incomparable in their scope as has been brought out by TRAI in their present consultation paper also. There have been many tenders by USO administration wherein ISP's have been ineligible to partake simply because of scope of services that can be offered by ISP's. However if the object of this exercise is to ensure that arbitrage is taken care of then it is better to have a dialogue with Industry to look at the arbitrage possibilities & then devise ways wherein these issues are addressed while ensuring that still there are no License Fee charges on pure internet & broadband services.

Keeping above in view, our comments on the issues raised in this consultation paper are submitted herein below. It is humbly submitted that the Authority may kindly consider this submission favourably while formulating its recommendations to facilitate penetration of Broadband services for the benefit of masses across the country.

**Q. Stakeholders are requested to give their comments on definition of AGR for all three categories of ISP licences.**

At the outset, while evaluating the definition of AGR across the three categories of ISP licenses we would like to emphasise that it has been a concerted decision of the Government to keep the pure internet services out of the purview of the license fee in order to augment the proliferation of these services. It is a known fact that the broadband penetration in the country is very dismal and we have missed the targets of the National Broadband Plan once. The broadband penetration in the country has reached to just 14.81 million subscribers by Oct 2012 and it is the dire need of the country to have the internet access spread to its nooks and corners. *The National Telecom Policy 2012 has envisaged providing 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.* To achieve these targets it is required to continue with the present policy of exempting pure internet services from the AGR until we achieve these targets. This will encourage internet service providers to mushroom up at even smaller level and provide affordable internet access to the masses.

There are broadly two categories of ISP licenses:

- ISP license(s) granted under 1998 guidelines (ISP Category Licence)
- ISP license(s) granted under 2002 guidelines and subsequently under 2007 guidelines (ISP-IT Category Licence)

Keeping the above in view, the first category of ISP licenses which provide purely internet services should continue to avail the exemption. The second category of ISP licenses should continue with the deduction for pure internet services from the AGR while calculating the license fee.

The Internet Service Providers license issued on or after 2007 has defined, under condition 18, the definition of Adjusted Gross Revenue (AGR) as below:

*“18. Definition of ‘Adjusted Gross Revenue’:*

*18.1 Gross Revenue: The Gross Revenue shall be inclusive of revenue from Internet access service, revenue from internet contents, revenue from Internet Telephony service, revenue from activation charges, revenue from sale, lease or renting of bandwidth, links, R&G cases, Turnkey projects etc., revenue from IPTV service, late fees, sale proceeds of terminal equipments, revenue on account of interest, dividend, value added services, supplementary services, interconnection charges, roaming charges, revenue from permissible sharing of infrastructure and any other miscellaneous revenue, without any set-off for related item of expense etc.*

*18.2 For the purpose of arriving at the “Adjusted Gross Revenue (AGR)” the following shall be excluded from the Gross Revenue to arrive at the AGR:*

*(i) Charges from pure Internet service, activation charges from pure internet subscribers. Pure Internet Services shall mean any method / device / technology to provide access to Internet unless explicitly prohibited and all content available including web-hosting, web colocation which is available on internet without access restriction.*

*(ii) Service Tax on provision of service and Sales Tax actually paid to the Government if gross revenue had included as component of Sales Tax and Service Tax.*

*(iii) Roaming revenue actually passed on to other eligible/entitled telecom service provider.”*

This definition of AGR has been framed up after a due deliberation by the Government on the various issues related to ISP licenses and after considering the TRAI’s recommendations of 10<sup>th</sup> May 2007. This definition of AGR if applied uniformly to all ISPs under the second category will take care of the level playing field between the ISP operators as the levy of license fee has already been made uniform @6% of AGR and now @8% of AGR w.e.f. April 1, 2013. TRAI/DOT can also call for meetings of Industry to devise ways to stop arbitrage if that is one of issues with regulator/licensor. Even in present circumstances if DOT does due diligence it is possible to eliminate arbitrage.

So far as the definition of AGR appearing in the ISP license issued after 2007 vis-à-vis other telecom licenses is concerned, it is submitted that the various telecom licenses, issued by the Government till date, are for provisions of different telecom services and the terms and conditions are framed accordingly. The various telecom licenses differ in the scope of services that can be offered. The other terms and conditions are laid down in the licenses in accordance with the purpose of the respective license and the proliferation of those services. Comparing any specific license condition across different licenses will not be an apple to apple comparison. For instance, in the ILD license there is roll-out obligation imposed on the licensee whereas in the NLD there is none. Similarly, the ISP license has been restricted on the scope of services vis-à-vis a UAS license, even for internet telephony. There are many other restrictions imposed on the ISPs like they cannot share infrastructure, cannot interconnect with other telecom service providers, or cannot participate in the USO funded projects etc.

Even in the TDSAT Judgment dated 12 Oct 2012, it has been stated that ***Presumably the Central Government was required to consider all aspects of the matter including the question as to whether the petitioners with regard to the ‘pure internet service’ vis-à-vis the services rendered by the UAS licensees have a level playing field.***

Thus, it is humbly submitted that a wholesome approach may please be taken while evaluating such matters and prevailing licenses may not be amended partially taking a one-sided view in the name of arbitrage and level playing field. There is a need to explore other mechanisms for avoiding arbitrage by means of audits and penalties. Even TDSAT, in its Judgement dated 29th September 2010, has endorsed similar view and in line with this Judgement, there may be a need to consider stronger mechanisms to detect arbitrage rather than charging licence fee on pure internet services. The Authority could suggest enhanced mechanisms in consultation with Industry to address these

concerns. Shortcomings in the present framework cannot be justified for penalising Broadband services especially when the sector deserves right boost to facilitate spread of broadband services. It will dent the licensing environment and shatter the investor confidence.

Furthermore, BWA Spectrum bidding was based on a legitimate expectation that the nil licence fee rate on pure internet services at the time of BWA auction would continue. Any increase in the licence fee will adversely impact the business case considered while making the spectrum bids and at the same time will give a wrong signal to world & tarnish the image of India in world market.

Thus, we propose that the definition of AGR of the ISP license as amended in 2007 shall be applicable to all ISPs providing internet telephony for the purpose of computation of license fee and pure internet services shall continue to be exempted. Besides, the revenue from leasing of bandwidth/infrastructure and any other charges which are being double taxed by the Government by addition to the AGR of different licensees shall be allowed as a tax credit to the licensee as a pass through charge as is the standard practice in the Value Added Taxation or any indirect taxation regime of the Government.

In addition, for the purpose of determining spectrum usage charges, only the revenue from the wireless services shall be taken into account towards AGR calculations, as recommended by the Authority in its recommendations dated 16<sup>th</sup> April 2012 and also reiterated in its recent recommendations dated 2<sup>nd</sup> January 2013.

**Q. Should minimum presumptive AGR be applicable to BWA Spectrum holders under Internet Service/Access Service license(s) and other licenses with or without spectrum, including access service licenses? If yes, what should be the value of minimum presumptive AGR?**

It is submitted that minimum presumptive AGR should not be made applicable to BWA spectrum holders due to the following:

- 1. BWA Spectrum is procured at market determined price:** The BWA spectrum, obtained through auction held in 2010, was bid for by the participants on the basis of the Notice Inviting Application dated 25<sup>th</sup> Feb 2010 and the **market price for the spectrum** was determined by the bidders keeping in view the business viability for the full tenor of the spectrum allotment under those terms and conditions as laid down in the NIA. There was no mention in the NIA of any presumptive AGR to be imposed on the BWA spectrum holder. Any significant financial or non-financial change, directly or indirectly, to the conditions of NIA after the auction will significantly impact the business viability of the operators and is legally not tenable. This will result in costly services to end user & consequently will result in poor broadband penetration & indirectly impact GDP & other accruing benefits associated with higher penetration of Broadband services.
- 2. Stringent Roll-out Obligations on BWA spectrum holders:** The NIA has under Para 3.4.2 imposed stringent roll-out obligation for BWA spectrum holders wherein it requires 50% of the rural SDCAs to be covered within a span of five years. The operators have proceeded with planning and deployment of their networks with a view to achieve this mandatory coverage target in the due course of **five years**. Further, NIA provides for heavy penalties for non-compliance of these roll-out obligations in addition to the risk of revocation of the spectrum allotment. Therefore, introducing any additional charge on BWA spectrum in the form of presumptive AGR in the ISP/UAS license at this stage on the pretext of preventing the BWA spectrum from being idle is against the terms and conditions of the spectrum auction as laid in the NIA. It will be against business prudence to keep an asset idle after having paid for it upfront. There are finance & other such charges which need to be paid on such finances that prevent the asset owner from keeping it idle. However in line with scope

of the roll out it may take time for operators to roll out services in designated areas. Besides, any such additional levy will severely impact the business case of the BWA spectrum holders' *post-facto*.

- 3. BWA spectrum is de-linked from the license:** Since 2010, when the 3G and BWA spectrums were auctioned, it has been made amply clear that the service licenses are de-linked from these spectrums which are auctioned. A successful bidder of the BWA spectrum was to hold or obtain CMTS, UAS or ISP Cat-A service license separately. The terms and conditions governing the BWA spectrum allocation have been laid down in the Notice Inviting Application for this auction dated 25<sup>th</sup> Feb 2010 and is a legally binding document on both the winning entity and the Government. In such a case, introducing any condition relating to the BWA spectrum in the service licenses will result into linking of the license and spectrums again which is against the Government's stated policy. We would like to draw the attention of the Authority to its own Recommendation on the Terms and Conditions of Unified License (Access Service) submitted on Jan 2, 2013 to DOT where it has repetitively advised the Government (under clause 2.2 and thereafter with respect to various specific conditions) to keep the spectrum conditions separate from the license and also has reminded the Government that the NIA document is legally binding on both the DoT and the bidders (refer clause 2.4)
- 4. Concept of presumptive AGR:** As explained in detail in the Consultation Paper, the annual license fee or spectrum Usage Charges are computed as 'a percentage of Adjusted Gross Revenue'. The Licensor has the right to modify the percentage of levy; or exclude or include any kind of revenue being generated by the provision of services under the license in the definition of AGR or add or delete any expense/deduction thereof from the definition of AGR. It is essential to note that the basic nature of the AGR remains the **revenue** being generated from the services. The definition of AGR cannot be to imply something which is not a factor of the receipts from the specified services. The concept of 'presumptive AGR' proposed is simply an imposition of a minimum annual license fee not being a factor of revenue and thus, cannot be construed to mean an amendment of definition of AGR. Furthermore, any introduction of such minimum annual license fee shall mean an additional license condition being imposed *post facto*. This would hamper the business viability of the licensee and would also discourage the potential investors from investing under such instable policy environment.
- 5. Relevance of presumptive AGR for BWA spectrum holders:** It should be noted that the concept of presumptive AGR was introduced by the Authority in its recommendations on "Spectrum Management and Licensing Framework" dated 10th May, 2010 and the same was in the reference of erstwhile UASL regime wherein spectrum used to be bundled along with the licence as referred in the Para 2.131 of the recommendation "A new licensee having **received initial start-up spectrum** and not commencing its services results in the Government not receiving its due share of annual licence fee and spectrum charges as a percentage of the AGR. As such, inefficient usage of spectrum leads to loss of government revenues." For the same reason, the Authority had recommended minimum presumptive AGR only for licensees holding GSM and CDMA spectrum. In this context, it is submitted that in case of BWA spectrum, the spectrum is auctioned and allocated after the upfront payment of market determined price and thereafter is charged the spectrum usage charges. Besides this, various licenses allocation conditions have commencement time-lines and/or roll-out obligations which have penal provisions according to the vitality of the license/spectrum. If any licensee is unable to commence its operations, the upfront fee is already a sunk cost to him besides the penalty for not meeting the roll-out obligations.

These sunk costs and penalties are borne by the licensee without generating any revenue. On the other hand, the Government receives the upfront fee and the penalty for such inactions of the licensee and thus, there is no loss to the Government. Furthermore, the Licensor has the right to revoke the license for any non-compliance. Introduction of presumptive AGR would imply addition of new terms and conditions to the licenses in the midst of the currency of the contracts. This will amount to a breach of contract.

**Q. Please suggest the amendments required in the formats of statement of revenue and licence fee reported by various categories of Internet service licensees and UAS licensees.**

1. We are proposing Format of Statement of Revenue and Licence Fee as detailed in Annexure-A of our response.

**Revised Appendix II to Annexure-II of the ISP License Agreement**

Proposed Format of Statement of Revenue and Licence Fee (Sub-headings are not included only for simplicity purpose)

S.N.	PARTICULARS	ACTUALS FOR THE PREVIOUS QUARTER	ACTUALS FOR THE CURRENT QUARTER	CUMULATIVE UPTO THE CURRENT QUARTER.
<b>1.A</b>	<b>Revenue from services using wireline / Non-BWA spectrum</b>			
A	Revenue from Pure Internet Service ( Internet Access and Content Service):			
B	Revenue from Internet Telephony Service:			
C	Revenue from any other value added service			
D	Income from trading activity (all including of sales tax)			
E	Non-refundable deposits from subscribers			
F	Revenue from franchisees /resellers including all commissions and discounts etc. excluding the revenues already included in IA&IB			
G	Revenue from Roaming			
H	Revenue from IPTV Services			
I	Revenue from other Operators on account of provisioning of interconnection			
<b>1.B</b>	<b>Revenue from services using BWA Spectrum</b>			

A	Revenue from Pure Internet Service ( Internet Access and Content Service):			
B	Revenue from Internet Telephony Service:			
C	Revenue from any other value added service			
D	Income from trading activity (all including of sales tax)			
E	Non-refundable deposits from subscribers			
F	Revenue from franchisees /resellers including all commissions and discounts etc. excluding the revenues already included in IA&IB			
G	Revenue from Roaming			
H	Revenue from IPTV Services			
I	Revenue from other Operators on account of provisioning of interconnection			
<b>2</b>	<b>Income from investments</b>			
<b>3</b>	<b>Revenue from sharing/ leasing of infrastructure</b>			
<b>4</b>	<b>Revenue from sale/ lease renting of bandwidth, links, R&amp;G cases, turnkey projects etc.</b>			
<b>5</b>	<b>Miscellaneous Revenue</b>			
<b>AA</b>	<b>GROSS REVENUE OF THE LICENSEE COMPANY :(Add 1-5)</b>			
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<b>B</b>	<b>DEDUCT:</b>			
<b>B.1</b>	<b>Revenue from services using wireline / Non-BWA spectrum</b>			
1	Revenue from Pure Internet Service			
2	Service Tax paid to the Government			
3	Sales Tax paid to the Government			
4.	Roaming revenue actually passed on to other eligible/entitled telecom service provider.			
<b>B.2</b>	<b>Revenue from services using BWA Spectrum</b>			
1	Revenue from Pure Internet Service			
2	Service Tax paid to the Government			
3	Sales Tax paid to the Government			
4.	Roaming revenue actually passed on to other eligible/entitled telecom service provider.			
<b>BB</b>	<b>TOTAL DEDUCTIBLE REVENUE (B.1 + B.2)</b>			
<b>CC</b>	<b>ADJUSTED GROSS REVENUE (AA-BB)</b>			
	<b>REVENUE SHARE @ ----- OF ADJUSTED GROSS REVENUE i.e. CC</b>			
<b>DD</b>	<b>ADJUSTED GROSS REVENUE FOR SPECTRUM USAGE CHARGE (1B-B2)</b>			
	<b>SPECTRUM USAGE SHARE @ ----- OF ADJUSTED GROSS REVENUE FOR SPECTRUM USAGE CHARGE i.e. DD</b>			