Bharti Airtel Ltd.
India & South Asia
Airtel Center, Plot No. 16,
Udyog Vihar, Phase-IV,
Gurgaon - 122 015

www.airtel.in
Call: +91 124 4222222
Fax: +91 124 4248063

Ref No: RP/FY 19-20/062/767

Dated: 1st November, 2019

To,

Shri S T Abbas,
Advisor (Network, Spectrum and Licensing),
Telecom Regulatory Authority of India,
Mahanagar Doorsanchar Bhawan,
Jawahar Lal Nehru Marg,
New Delhi -110 002.

Subject: Response to Consultation Paper on "Reforming the Guidelines for Transfer/Merger of Telecom Licenses"

Dear Sir,

This is with reference to your above mentioned consultation paper. In this regard, please find enclosed our response for your kind consideration

Thanking you,
Yours Sincerely,
For Bharti Airtel Limited

Ravi P. Gandhi
Chief Regulatory Officer

Enclosed: As mentioned above

Bharti Airtel Limited's Response to TRAI's Consultation Paper on "Reforming the Guidelines for Transfer/Merger of Telecom Licenses"

At the outset, we would like to thank the Authority for providing the opportunity to submit responses to the Consultation paper on the issue of "Reforming the Guidelines for Transfer/Merger of Telecom Licences."

As the Authority is aware, over the last 3-4 years, due to intense competition and unviable tariffs, the telecom market has witnessed several merger & acquisitions. Additionally, frequent re-organizations, amalgamations and similar transactions have been undertaken by the operators to streamline their entities and structure. However, the current merger & acquisition policy does not deal with all types of transactions. Therefore, the merger & acquisition policy requires serious review to deal with all situations.

Further, the policy also requires to be relooked simply for the reason that in almost all cases, the merging entities have been compelled to seek relief before various Courts against many provisions of the merger guidelines, either before or after the merger. As a result, this has led to numerous litigations in the telecom sector.

Therefore, we sincerely believe that the merger & acquisition policy should be simplified to enable faster merger approvals and to allow the process to be more seamless. In this context, please find our detailed submissions on the issues raised in the Consultation Paper:

Q1. What reforms are required to be made in the existing guidelines on Transfer/Merger of Licenses to enable simplification and fast tracking of approvals? Kindly provide clause-wise response along with detailed justification.

Bharti Airtel's Response:

We welcome the intent of the Authority to move towards a simplified process involving faster approvals. Some of such suggestions are as under:

1. **As per the clause no. 3(a) of the merger guidelines**, the DoT is required to be notified for any merger/demerger proposal for its comments/observations. Further, under the Unified Licence, the merging entities are required to seek the prior approval of DoT before effecting the merger/demerger.

   As per Section 230 of the Companies Act, 2013, the applicant/petitioner companies require filing of the Scheme with the Central Government (Regional Director), the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India, if applicable, and such other sectoral regulators or authorities including DoT which are likely to be affected by the Scheme. All the said requirements and the approvals required thereunder under the Listing Regulations and the Companies Act, 2013 are prior to sanction of the Scheme by NCLT and don't require the applicant/petitioner companies involved in the Scheme, to re-visit any authority after the sanction by NCLT. Objections, if any, from all the other authorities are dealt with during the NCLT process itself.

While DoT is a part of the NCLT process and actively participates in the whole process; however, the applicant/petitioner companies are still required to approach DoT for approval of the demerger/merger of licences or telecom business on record. The NCLT proceedings itself takes at least 8-12 months, and the approval from DoT thereafter, also takes 2-4 months leading to a total time frame of 10-16 months for the demerger/merger to be completed. This results in significant loss of time and value to the merging entities.

Since DoT is already a part of the NCLT merger proceedings, the merging entities should not be required to approach DoT separately for its approval and the approval of DoT should be a part of the NCLT merger/demerger process.

2. **As per clause no. 3(m) of the merger guidelines,** all demands, if any, relating to the licences of the merging entities, are required to be cleared by either of the two licensees before issue of the permission of merger/demerger.

   Currently, DoT seeks the clearance of dues both at the time of in-principal and final merger approval. The whole process of clearance of dues is quite cumbersome and leads to significant delays in merger process.

   In any merger/demerger exercise, all the liabilities of the Transferor Company is generally transferred to the Transferee Company including the dues of all government bodies and the same is also recorded in the NCLT approval. Further, DoT additionally seeks an Undertaking from the Transferee Company to clear all dues of the Transferor Company which may arise at a later date. In such circumstances, asking for clearance of dues by DoT is not required since such dues would automatically transfer to the Transferee Company. Further, the transferee company continues to run its business and continues to hold its telecom licence and therefore, there is no reason why they should be asked to clear their outstanding dues. Therefore, we propose the following:

   (i) The DoT should not insist for clearance of outstanding dues for both the Transferor Company and the Transferee Company given that all liabilities are being transferred to the Transferee company.
   (ii) If the dues are to be cleared as well, the same should be for a fixed date on which the dues are required to be cleared and that should be prior to the final approval of the merger by the NCLT;
   (iii) A consistent definition of sub-judice matters be stated so that the merging entities are not forced to approach the Court for matters that are sub-judice but interpreted differently;
   (iv) All objections of the DoT are raised once and not at multiple occasions.

3. **As per Clause No. 3(i) of the merger guidelines,** the applicant/petitioner companies are required to submit a bank guarantee towards the outstanding demand of one-time spectrum charge in respect of transferee company.

We believe that the said requirement is unreasonable on account of the fact that DoT asks the merging entities to provide bank guarantees in respect of amounts that have been stayed by a court of law. It is unfair that once a particular demand has been challenged by the TSPs in any court and they have obtained the stay against such demand, are being asked to secure the same by way of Bank Guarantee. As a result, the merging entities are forced to challenge such demand either before or after the merger approvals and it leads to numerous litigations. Therefore, this particular requirement should be removed in the merger guidelines.

4. **As per Clause No. 3(b) of the merger guidelines**, a time period of one year is allowed for transfer / merger of various licenses in different service areas, subsequent to the appropriate approval of such scheme by the Tribunal / Company Judge. This clause ought to be suitably amended to clarify that the time spent in pursuing any litigation on account of which the final approval of a merger is not being granted by the DoT or any other authority, stands excluded while calculating the aforesaid period of one year. This is necessary to protect the rights of a TSP to pursue its remedies in Court and also to ensure that the aforesaid period of one year does not become redundant for no fault of the TSP on account of pendency of an issue before a Court.

Q2. Whether mandatory access to MVNOs should be provisioned in the DoT M&A Guidelines to address the competition concerns? If yes, in which cases the access should be mandated and what should be the guiding principles for provision of wholesale access to MVNOs? If no, kindly provide justification.

Bharti Airtel's Response:

1. We do not suggest any mandatory access to MVNOs as a part of the DoT M&A guidelines. Currently, any merger is approved by the Competition Commission of India and thereafter there are clauses related to spectrum and market share (both subscriber and revenue) cap. The apprehensions being stated by the MVNOs are without any basis or concrete facts.

2. We believe that the MVNOs should be required to get access on the basis of commercial terms, and given the availability of more than one service provider, the market dynamics should allow for the terms to be equal. In fact, for the MVNOs to also thrive and various entities to co-exist, it is important that there is a level playing field and that no special or mandated access is granted.

Q3. In your view, what changes are required in the provisions of UL so as to make them unambiguous? Please provide justification.

Bharti Airtel's Response:

1. Presently, DoT only allows the merger/demerger of telecom licences/business, pursuant to a scheme of arrangement / demerger to be sanctioned by NCLT.

2. However, transfer pursuant to scheme of demerger/merger is not the only method available for the transfer of an undertaking by a company and various legislations, including the legislations set out below, recognize other methods of transferring an undertaking or a business from one entity to another:

a) Companies Act:

The board of directors of a Company may "*sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings*", and such action shall be subject to approval of the shareholders of the Company by way of a special resolution as provided under Section 180 of the Companies Act.

Therefore, the Companies Act recognizes that the board of directors of a company is empowered to dispose of / sell an undertaking, including by way of a slump sale / business transfer.

In fact, transfer of an undertaking by way of a slump sale / business transfer agreement (under Section 180 of the Companies Act) is common in the Industrial parlance.

b) Securities laws:

Regulation 30 of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("**SEBI LODR Regulations**"), requires listed companies to make certain disclosures to the Stock Exchanges of certain events or information, within prescribed timelines. As per Regulation 30, read with Schedule III, of the SEBI LODR Regulations, one of the events that is required to be disclosed by a listed company to the Stock Exchanges is '*Acquisition(s) (including agreement to acquire), Scheme of Arrangement (amalgamation/ merger/ demerger/restructuring), or sale or disposal of any unit(s), division(s) or subsidiary of the listed entity or any other restructuring*."

Therefore, the SEBI LODR Regulations recognizes that the sale or disposal of any unit or division of a company may be undertaken by way of a slump sale / business transfer.

c) Tax laws:

The Income-tax Act, 1961, specifically defines a 'slump sale' to mean *the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales.* Therefore, it is evident that the Income-tax Act, 1961 specifically contemplates a transfer of an undertaking by an entity by way of a slump sale.

3. As is evident from the above, various statutes contemplate transfer of a business undertaking pursuant to a slump sale / business transfer. Slump sale is an internationally recognized method of transfer as it is less complex and allows entities to complete the transaction in an expeditious manner. We submit that permitting slump sale will be consistent and bolster the objective with which the present consultation paper has been floated i.e. reducing the time in completing a merger process and ensuring ease in completing the same.

4. **Therefore, we suggest that TRAI should recommend DoT to permit other methods of transfer of business including the Slump Sale as well. This will enable the merging entities not to take only the NCLT merger process, which otherwise takes a longer period and go for other options as well.**

Q4. If there are any other issues / suggestions relevant to the subject, stakeholders may submit the same with proper explanation and justification.

Bharti Airtel's Response:

1. Currently, the merger guidelines is limited to the operators holding CMTS/UASL/Unified Licence (with access service authorization). We recommend that the merger guidelines for other service authorizations such as NLD, ILD, VSAT, ISP, etc. may also be issued. Further, the merger guidelines should also be specified for the merger/demerger of one MNO and MVNO, MVNO and MVNO while ensuring that it does not violate other provisions of the licence agreement such as cross-holding between MNO and MVNOs.

2. Over the past few years, most mergers and acquisitions have been marred by litigation between the merging entities and the DoT. It is inevitable that either the merging entities or the DoT will approach the appropriate forum to protect their legal rights. However, it is also imperative that such litigation is reduced and completed quickly so as to allow for the merger and acquisition to proceed swiftly. To that extent, it is submitted that timelines within which the DoT exercises its legal remedies are stipulated and followed.