Ref : ISPAI/TRAI/1178 6th July 2007

Telecom Regulatory Authority Of India
Mahanagar Doorsanchar Bhavan,
Old Minto Road, Near Zakir Husain College
New Delhi-110002

Kind Attention Advisor (MN)

Registration No. N/DL/000003

Your Reference Consultation Paper No. 7/2007 – on "Review of License Terms and Conditions and capping of number of access providers dated 12 June 2007

Dear Sir,

Enclosed please find ISPAI response on the subject matter.

We sincerely believe that these inputs would be found useful.

Thanking you,
Yours truly,

For **Internet Service Providers Association of India**

Col (Retd) R S Perhar
Secretary

Encl : As above

ISSUES FOR CONSIDERATION

MERGER & ACQUISITION

Q1. How should the market in the access segment be defined?

The Access market may be defined in terms of wireline and wireless. The wireless segment should contain all types of wireless subscribers whether fully mobile, limited mobile of so called fixed wireless access subscriber and it should also include any wireless subscribers given access to the public switch through wireless in the last mile including but not limited to CDMA / TDMA / STDMA / CorDECT / WIFI / WIMAX technologies.

It is the context that wireline and wireless are two different segments with two different growth patterns. The tariffs for two streams are also regulated in a different manner. There is no point in classifying the market as fixed or mobile rather it should be classified as wireline or wireless as explained above and should be providing voice services pre-dominantly.

Q2. Whether subscriber base as the criteria for computing market share of a service provider in a service area be taken for determining the dominance adversely affecting competition, if yes, then should the subscriber base take into consideration home location register (HLR) or visited location register (VLR) data? Please provide the reasons in support of your answer?

For computing the market share of a service provider, anyone of the following criteria should be taken:

1. Subscriber base criteria
2. Segmented revenue earned from the subscriber, i.e., wireline subscribers or wireless subscribers.

The subscriber base should be taken as the subscriber database submitted by the licensed service providers to the security agencies at the end of each month. The subscriber database submitted to the security agencies is required for the national security and is not expected to be incorrect by the service providers.

Any discrepancy or misreporting the subscribers in such database should be treated as criminal offence. As regard to the revenue, revenue from both wireline subscribers and revenue from wireless subscribers for a service provider in a service area together should be taken into account for computing the market share. It is not only the subscriber base of a service provider, which affects the market share and the competitiveness, but the revenues earned and tariff charged by a service provider from its subscriber. Any dominating service provider with a large revenue share in a service area can dictate the tariff policies and scuttle the competition from smaller and new operators.

Q3. As per the existing guidelines, any merger/acquisition that leads to a market share of 67% of more, of the merged entity, is not permitted. Keeping in mind, our object and the present and expected market conditions, what should be the permissible level of market share of the merged entity? Please provide justifications for your reply?

Keeping in mind the objective and the present and expected market conditions, the permissible level of market share of the merged entity should be 25% or more. The monopoly market situation should be defined as market share of 25% or above of the subscriber base in a service area of 25% or more of the total adjusted gross revenue earned from wireline or wireless subscribers in that service area. This follows the limit of 25% is in line with the American practice where HHI of 1800 is permitted. If 1800 is taken as HHI it amounts to 25% of share of one operator and 15% of five other operators in a service area. This is also in line with the suggestion of the European Commission as indicated in the 2.39 of the consultation paper.

We, in India, has also seen the benefits of competition in the telecom market in terms of various varieties of services be offered by the service providers, coverage, reduction in tariffs and at least for now some care for subscriber complaints.

Q4. Should the maximum spectrum limit that could be held by a merged entity be specified?

a) If yes, what should be the limit? Should this limit be different for mergers amongst GSM/GSM, CDMA/CDMA & GSM/CDMA operators? If yes, please specify the respective limits?

b) **If no, give reasons in view of effective utilization of scarce spectrum resource?**

The maximum spectrum limit that could be held by the merged entity should be same as the maximum limit of spectrum permitted to an unmerged entity. With the merger of entities one particular license is terminated and therefore the merged license should be allowed time, not more than 6 months to refund the allocated spectrum to the government. This will ensure that more competition is infused into the sector which will definitely result in better consumer satisfaction and is in the interest of consumers as has been established by the past practices. Further this will discourage any undesirable takeovers for the same holding of spectrum and leading to inefficient utilization of spectrum or non-deployment of state-of-the-art technology in terms of smart antennas, in-building solutions, which in fact results in better quality of service to the consumers in terms of lesser call drops, better quality of speech, correct billing although at a slightly higher capital cost.

"Further it is surprising to note that although TRAI is responsible for ensuring terms & conditions of the license, but so far no action has been indicated by TRAI in the consultation paper for getting released back to the government the spectrum which was allocated more than the contracted spectrum in the license. Rather, the Tenor of the consultation paper suggests that inefficient utilization of spectrum is to be rewarded by limiting the number of operators in

a circle. ISPAI feels that if competition is limited, with the excuse of non-availability of spectrum, in the voice segment, data services like the internet will also get curtailed through limited number of players through the same policies. This is against the national policy and the Regulators responsibility to ensure that new and small entrants are encouraged more. TRAI cannot be the instrument to suggest limit on number of players in the market, which would be clearly unconstitutional."

Pages 145 – 149 of the consultation paper may be referred to in this respect.

The licenses are technology neutral and the operators are free to deploy GSM, CDMA and all PCS technologies. Once the license is technology neutral, the question of different limits for mergers amongst GSM / GSM, CDMA/CDMA & GSM/CDMA does not arise. This will ensure that mergers & acquisitions do not take place just for holding the spectrum or floating new companies to get the license and later on get merged for ensuring that a particular company gets more spectrum as the merged entity. This will also ensure that any merger & acquisition takes place in the interest of the share holders of the company apart from interest of the consumer being taking into account by proposing such activities.

Q5. Should there be a lower limit on the number of access service providers in a service area in the context of M&A activity? What should this be, and how should it be defined?

As already defined the number of access providers in a service area in the context of M&A activity should be three (3). This should be ensured in wireless and wireline segments also.

Q6. What are the qualitative or quantitative conditions, in terms of review of potential mergers or acquisitions and transfers of licenses, which should be in place to ensure healthy competition in the market?

The above stated conditions are sufficient to ensure healthy competition in the market in terms of review of potential mergers & acquisitions and transfers of licenses. Any merger or acquisition should not result in a combined market share of more than 25% and should also not result in holding of more spectrum that is allowed to an unmerged entity.

Q7. As a regulatory philosophy, should the DoT and TRAI focus more on ex post or ex ante competition regulation, or a mix of two? How can such a balance be created?

As a regulatory philosophy DOT and TRAI should focus more on ex post competition regulations and should ensure that market dominance in terms of subscriber base, revenue base and spectrum holdings are not breached to the detriment of other operators.

SUBSTANTIAL EQUITY

Q8. Should the substantial equity clause (1.4 of UASL) continue to be part of the terms and conditions of the UAS/CMTS license in addition to the M&A guidelines? Justify.

The substantial equity clause (1.4 of the UASL) should continue to be a part of the terms & conditions of the UAS / CMTS license in addition to the M&A guidelines. It is understood that such clauses were introduced at the time of issuing guidelines for new basic services in 2001 or for cellular licenses in 2001 with the intention to ensure proper competition in a sector in the consumer interest. The government and regulator have the basic responsibility towards the consumer of the country, while ensuring the proper growth of the sector. Any dilution of this clause will scuttle the competition as many big houses may be able to float various companies and grab the spectrum and scarce resources such as numbers and thereby harming the interest of the consumers.

Q9. If yes, what should be the appropriate limit of substantial equity? Give detailed justification.

Sometimes substantial equity and economic interest causes confusions. It is desirable to clarify that the substantial equity does not mean economic interest. Further once a company is formed the promoters cease to exist and shareholders interest takes over. In the present scenario it is very difficult to ensure that legal person does not have share of more than one licensed company for the same service in the same service area. Therefore it is desirable to hold the clause of substantial equity of 10% or more in the present form except for the deletion of the last sentence of clause 1.4(ii). It is further desirable to explain that the substantial equity shall be counted only upto a certain stage. This will ensure that by way of forming up a holding company no short-circuiting of the routes takes place.

Q10. If no, should such acquisition in the same service area be treated under the M&A Guidelines (in the form of appropriate terms and conditions of license)? Suggest the limit of such acquisition above which, M&A guidelines will be applied.

Does not arise in view of above.

Q11. Whether a promoter company/legal person should be permitted to have stakes directly or indirectly in more than one access License company in the same service area?

As explained in response to Q9, in the present equity scenario of the country where many licensed companies have floated their IPOs and will be floating their IPOs for raising funds for their expansion, it will be very difficult to ensure that a

legal person does not hold stakes in more than one licensed company in the same service area. Whenever a person exceeds the limit of 10% equity it has to be reported to the regulators in terms of statutory requirement and therefore the process of competition cannot get scuttled.

Q.12 Whether the persons falling in the category of the promoter should be defined and if so who should be considered as promoter of the company and if not the reasons therefore?

As already explained in response to Q9, a promoter cease to exist as and when the company is formed. So the question of defining the person falling in the category of promoter does not arise. In case licensor wants to define the promoter, the clarification given in tender document issued in 1994-95 can be relied upon wherein persons having equity of 10% or more in a company were treated as promoters.

Q13. Whether the legal person should be defined and if so the category of persons to be included therein and if not the reasons therefore.

There is no need to define a legal person which is well understood terms in the context of companies act and judicial parlance.

Q14. Whether the Central government, State governments and public undertakings be taken out of the definition for the purpose of calculating the substantial shareholding?

The government has to follow a transparent policy and all companies should be treated at par in this respect. Therefore the central government, state government and public limited undertakings may not be taken out of the definition for the purpose of calculating substantial share holders. It is not out of context to mention that cellular license in the service area of Rajasthan to Bharti / TCIL joint ventures was issued prior to introduction of substantial equity clause and therefore this exception can continue.

PERMITTING COMBINATION OF TECHNOLOGY UNDER SAME LICENSE

Q15. In view of the fact that in the present licensing regime, the initial spectrum allocation is based on the technology chosen by the licensee (CDMA or TDMA) and subsequently for both these technologies there is a separate growth path based on the subscriber numbers, please indicate whether a licensee using one technology should be assigned additional spectrum meant for the other technology under the same license?

The licenses are technology neutral and the subscribers of this country should not be denied the benefits of a technology over other. Today one technology may be better than other, but, tomorrow it is possible that with the advancement and development the other technology is able to give better services and satisfaction to the customer in terms of quality of service. There is no reason that the customer is denied such benefits for want of regulatory restrictions. It is a

fundamental duty of the regulator and the licensor to ensure that better services are being provided by the service provider by deploying the state-of-the-art technology

The mere fact that separate growth path has been prescribed on the subscriber number should not become a hindrance for deployment of mix of technologies. However, it should be ensured that the total spectrum envisaged should not be exceeded under any circumstances. In fact the regulator as well as licensor must initiate steps immediately to recover the spectrum allocated to various service providers in excess of stipulations in the license conditions.

Q16. In case the licensee is permitted, then how and at what price, the licensee can be allotted additional spectrum suitable for the chose alternate technology

The licensee should not be permitted to any additional spectrum beyond the stipulations in the license. Such allocations of spectrum leads to monopolistic conditions and against the interest of the consumers. It is pertinent to mention here that additional allocations beyond the original stipulations of the licenses have not led to any improvement of Quality of Services. Rather, we have seen constant deteoration in the Service Quality and has also led to oligopolic situations in the market which is against the interest of the consumers. Efforts have to be made by the regulator and the licensor to recover the excess allocated spectrum from the service provider, reframed and allocated to other eligible licensees and should be priced as per market conditions.

It will be worth-while to mention that from the revenue perspective the government has been subsidizing cellular services in large in terms of spectrum charges, for wireless access as compared to the wireline access. The cost of the copper which is the major resource in access network for wireline is also decided by the government and which is much higher as compared to the accessing a subscriber through wireless access and the spectrum charges are very low as compared other countries. In the larger context the issue is whether the government should continue to subsidize wireless services by way of no spectrum charges when the nation is facing scarcity of resources.

Q17. What should be the priority in allocation of spectrum among the three categories of licensees given in para 4.16 of the chapter?

The allocation of the spectrum should be in terms of 'first come first served based' on the eligibility criteria till the spectrum is auctioned for leasing out. There is no question of giving preference to existing licensees over new licensees or existing licensees wanting spectrum for deploying alternate technologies.

Q18. Whether there should be any additional roll out obligations specifically linked to the alternate technology, which the service provider has also decided to use?

There is no need of any additional roll out obligation linked to the alternate technology accept in the present form currently prescribed, such as for deployment of wireline.

Q19. Lastly, as such service provider would be using two different technologies for providing the mobile service, therefore what should be the methodology for allocation of future spectrum to him?

The spectrum should be allocated on common criteria irrespective of the technologies used. If a better spectrum efficient technology is used to serve large number of subscriber as compared to the other technology, then it should not be a disadvantage in terms of amount of the spectrum. In fact, there should be heavy penalties for using less efficient spectrum technologies and non-deployment of state-of-art-technologies and various other methods for providing access to the subscribers, such as in building solutions, smart antennae, etc.

ROLL OUT OBLIGATIONS

Q20. Should present roll out obligations be continued in the present form and scale for the Access service providers or should roll out obligations be removed completely and market forces be allowed to decide the extent of coverage? If yes, then in case it is not met, existing provision of license specifies LD charges upto certain period and then cancellation of license. Should it continue or after a period of LD is over, enhancement of LD charges till roll out obligations is met. Please specify, in case you may have any other suggestion.

The roll out obligation should be continued in the present form and the scale for the Access Service Providers. There is no doubt that the market forces play an important role in deciding the extent of coverage in the present scenario where one or two operators are geographically covered more area than others. But, it is a known fact that none of the operator is able to meet the roll out conditions for in building coverage as stipulated in the license agreement. And the TRAI has admitted in their consultation paper the liquidated damage has been imposed only on some of the operators and it is not clear when the liquidated damages will be imposed on rest of the operators. Further it is essential that the roll out should be as per the law of the land, i.e., by assuring that all statutory clearances from various authorities are taken before starting the service in the interest of the public safety. The cancellation of the license for non- fulfillment of roll out obligations does not seems to be a workable solution. At the same time, it has to be ensured that nobody should hold the scarce resources of spectrum and numbering. The liquidate charges should meet the end of justice in case service has commenced in the number of DHQs as stipulated in the roll out obligations in the license agreement at street level. It will not be out of context to mention that availability of spectrum is not a pre-requisite for fulfilling the rollout obligations. It is basically the commercial decision by the service provider to deploy what tech to service its subscribers while assuring the compliance to the terms & conditions of the license agreement. For e. g., roll out can be met by way of providing wireline services or a mix of wireline and WIFI or WIMAX solutions to meet the

rollout obligations. The basic principle of LD can be taken as damage is liquidated if the requisite amount is recovered therefore after recovery of the liquidated damage it may not be legally possible to enforce roll out obligations.

Q21. Is there a case for doing away with the performance bank guarantees as the telecom licensees are covered through the penalty provisions, which could be invoked in case of non-compliance of roll out obligations?

The performance bank guarantees can be done away with as the telecom licensees are covered through financial liability provisions, which can be enforced in case of non-compliance of terms and conditions of the license agreement.

Q22. Should roll out obligations be again imposed on the existing NLD licensees? If yes, then what should be the roll out obligations and the penalty provisions in case of failure to meet the same?

It is spelt that there is no case of imposing roll out obligations again on existing NLD licenses. With the Packet Switch technology taking over the Circuit Switch technology the concept of Switch in each SDCA/LDCA/State looses its relevance. The licensor and the regulator should not come in the way of deploying latest technologies which could be cost effective, while ensuring the required Quality of Service.

Q23. What additional roll out obligations be levied on ILD operators?

There is no need of any additional roll out obligations on ILD operators.

Q24. What should be the method of verification of compliance to roll out obligations?

Verifications to the compliance of the roll out obligations should be mandatory by third parties, which could be TEC or VTM units. This will ensure that no self-certificate is issued for completion of roll out obligation without any statutory clearances from the various authorities.

Q25. What indicators should be used to ensure quality of service?

The present indicators are sufficient to ensure Quality of Service (QOS). The only thing is to ensure that it is properly checked and tested in the field rather than relying upon the data provided by the service provider. For e.g., there are tremendous complaints for call dropping in respect of wireless services while the performance indicators released by the TRAI does not indicate such a poor quality of service. These call drops results in subscribers paying more telephone bills for communicating the same message. Stricter enforcement of spectrum allocation criteria will ensure that Service Providers forced to deploy better technologies for Quality of Service rather than them blaming the spectrum crunch for Quality problems.

Q26. As the licensees are contributing 5 per cent of AGR towards the USOF, is it advisable to fix a minimum rural roll out obligation? If yes, what should be that? If no, whether the Universality objectives may be met through only USOF or any other suggestions.

With the government funding for rural infrastructure through USOF, it is not advisable to fix minimum rural roll out obligations. However, the USOF beneficiaries need not be restricted to Access Providers alone, but extended to other operators such as ISP's who can be encouraged to roll out internet and broadband services in rural areas, through which voice services can also made available. It will better to do than wait for the Access providers to find the right time to get into rural deployment. The nation cannot afford to wait for them to fulfill their obligations.

Q27. In case of rural roll out obligation, whether number of BTS in a certain area a viable criterion for verification of rollout obligation?

Does not arise in view of answer to question 26.

Q28. What should be the incentives and the penalties w.r.t rural roll out obligations?

With a view to expand telecom facilities in rural areas, the concept of mobile virtual network operator can be introduced. Niche Operators should be encouraged to come forward and deploy services and applications in the areas that are not served by the current operators at this point of time. The concept of niche operators was suggested by TRAI in it's report for increasing Rural penetration in 2005, which is yet to be decided upon. TRAI can pursue this recommendation again.

PERMITTING A CAP ON NUMBER OF ACCESS PROVIDER IN EACH SERVICE AREA

Q29. Should there be a limit on number of access service providers in a service area? If yes, what should be the basis for deciding the number of operators and how many operators should be permitted to operate in a service area?

There should not be any limit on the number of access providers in a service area. The service providers are registered companies and are expected to have done due-diligence before entering into the business. Even the TRAI has permitted market forces to play under the name of 'forbearance' for the tariffs, the question of limit in the number of Access Providers should be left to the market forces.

ISPAI considers this question as a dangerous portent and a threat to the national policy of open competition. It understands that if TRAI recommends limiting the number of players in a service area it will be un-constitutional and against the philosophy and principals of regulation in a 'free market' society. It's job is to

ensure that new entrants and small operators are encouraged rather than seeking ways to promote the interests of a limited number of few large players – in the name of spectrum scarcity – by giving them the sole right to operate services in perpetuity. With this question, the intention seems to be allow a few large existing operators to gain control of the entire Indian market, give them a back door entry into all types of data services – which is the ISP's domain- and close the doors for new entrant and small operators forever. It is clearly against the interests of the nation and we fear that if this is recommended and even accepted under any pretext by the government, it will result in edging the other players out of the market. This certainly cannot be accepted under any circumstances.

Q30. Should the issue of deciding the number of operators in each service area be left to the market forces?

Yes. As explained above. TRAI must ensure that large operators and their operations do not threaten the existence or even entry of other new operators.

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