



Telecom Regulatory Authority of India



**Recommendations
on
Reforming the Guidelines for Transfer/Merger of Telecom Licenses**

21st February 2020

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CHAPTER I – INTRODUCTION

A. DoT Reference

- 1.1 The Department of Telecommunications (DoT) through its letter No. 20-281/2010-AS-I Vol.XII (pt) dated 8th May 2019 (**Annexure-1.1**), inter-alia, informed that the National Digital Communications Policy (NDCP), 2018 released by the Government of India under its 'Propel India' mission envisages Catalysing Investments for Digital Communications sector as one of the strategies, and simplifying and facilitating Compliance Obligations by reforming the Guidelines for Mergers & Acquisitions, 2014 to enable simplification and fast tracking of approvals is one of the action plan for fulfilling the afore-mentioned strategy. Through the said letter dated 8th May 2019, DoT has, inter-alia, requested TRAI to furnish recommendations on 'Reforming the Guidelines for Mergers & acquisitions, 2014', under the terms of the clause (a) of sub-section (1) of Section 11 of the Telecom Regulatory Authority of India Act, 1997 (as amended) by TRAI Amendment Act, 2000.
- 1.2 Through its subsequent letter dated 11th June 2019 (**Annexure-1.2**), DoT provided further inputs and requested that the same may be considered while providing recommendations on Reforming the Guidelines for Mergers & Acquisitions, 2014 to enable simplification and fast tracking of approvals. Vide letter dated 11th June 2019, DoT informed that it has examined several proposals for transfer/merger of licenses in the past five years. After examining the proposal for transfer/merger of licenses, DoT conveys its approval to take the transfer/merger on record subject to fulfilment of applicable conditions based on the existing guidelines. At many instances in the past, the entities have filed petitions before the Hon'ble TDSAT praying to quash and set aside certain conditions imposed upon them by DoT in terms of, inter-alia, the paragraphs 3(i) and 3(m) of the Guidelines for Transfer/Merger of licenses. The Hon'ble TDSAT, on several occasions

has granted stay to the operation of some of such conditions. This has resulted in uncalled-for delays in mergers being taken on record. Further, DoT forwarded a copy of the representation received from Virtual Network Operators Association of India (VNOAI) dated 16th November 2018, wherein it has been suggested to impose a commitment on the merged entity to set aside 20% of wholesale capacity for MVNOs on Mobile Bitstream Access (MBA) basis.

B. Consultation process

- 1.3 A Consultation Paper on “Reforming the Guidelines for Transfer/Merger of Telecom Licenses” was released on 19th September 2019 seeking comments of the stakeholders. The last date for submission of the comments and counter comments was 1st November 2019 and 15th November 2019, respectively. The Authority received comments from 9 stakeholders and counter comments were received from 2 stakeholders. These are available on TRAI’s website www.trai.gov.in. Open House Discussion was conducted on 23rd December 2019 in New Delhi.
- 1.4 Based on the inputs received from the stakeholders and its internal analysis, the Authority has finalized these recommendations. The recommendations comprise of three chapters. This Chapter gives an introduction of the subject. Chapter-II discusses the issues, comments received from various stakeholders and analysis based on which the recommendations have been framed. Chapter-III provides the summary of the recommendations.

CHAPTER-II: EXAMINATION OF EXISTING GUIDELINES ON TRANSFER/MERGER OF LICENSES

A. Background

- 2.1 Mergers and Acquisitions (M&A) are natural in any sector. M&A results in many benefits such as improving economies of scale, enhancing efficiency, attracting investments, promoting efficient utilization of resources and increasing affordability of services. However, increased market share as a result of M&A may lead to monopoly power and thereby lessening of effective competition and higher prices for consumers. Generally, in any sector, the level of competition is linked with the number of players i.e. the more the merrier. However, telecom is a capital incentive sector and provision of mobile services involves the utilization of limited natural resource, viz. spectrum, whose efficiency reduces with the increasing number of players as it leads to fragmentation, necessitating increased provisioning of guard bands. Therefore, there is a need to have a merger and acquisition policy framework that facilitates M&A activities and at the same time ensures that no compromise in competition occurs in the sector.
- 2.2 The existing Guidelines for Transfer/Merger of various categories of Telecommunication service Licenses/authorisation under Unified Licence (UL) on compromises, arrangements and amalgamation of the companies were issued by DoT on 20th February 2014, which has been amended on two occasions on 30th May 2018 and 24th September 2018 based on TRAI response on “Issues relating to Spectrum Cap” dated 21st November 2017 and recommendations on “Ease of doing Telecom Business” dated 30th November 2017, respectively. Various provisions are mentioned under Clause 3 (containing 14 provisions) of the guidelines on transfer/merger of licenses dated 20th February 2014 (as amended).

- 2.3 In the recent past, telecom access service market has undergone a phase of consolidation, several transfer/merger of licenses have taken place. Presently, there are 4 access service providers in each licensed service area as against 12-14 in 2010-2011, when the last recommendations on the merger of licenses were made by the Authority.
- 2.4 With the passage of time, some clauses may have become redundant, while some may have been noticed to be ambiguous and demand clarity. Moreover, the National Digital Communication Policy (NDCP), 2018, under 'Propel India' mission, *inter-alia*, envisages 'Reforming the Guidelines for Mergers & Acquisitions, 2014 to enable simplification and fast tracking of approvals' under the strategy on 'Catalysing Investment for Digital Communications sector'.
- 2.5 Further, through its letter dated 11th June 2019, DoT has informed that in many merger proposals, the entities have filed petitions before the Hon'ble TDSAT praying to quash and set aside certain conditions imposed upon them by DoT in terms of, *inter-alia*, the paragraphs 3(i) and 3(m) of the Guidelines for Transfer/Merger of licenses. The Hon'ble TDSAT, on several occasions has granted stay to the operation of some of such conditions. This has resulted in uncalled-for delays in mergers being taken on record.
- 2.6 In view of the above, the stakeholders were requested to provide their inputs on the reforms required to be made in the existing guidelines on Transfer/Merger of Licenses to enable simplification and fast tracking of approvals. The stakeholders were requested to provide clause-wise response along with detailed justification. Next section provides the clause-wise responses received from the stakeholders and their examination/analysis.

B. Examination of the provisions of the guidelines on transfer/merger of licenses

a. Clause 3(a) of the existing guidelines

2.7 Clause 3(a) of the existing guidelines is reproduced below:

“The licensor shall be notified for any proposal for compromise, arrangements and amalgamation of companies as filed before the Tribunal or the Company Judge. Further, representation/objection, if any, by the Licensor on such scheme on the merger/transfer of licenses/authorizations under Unified License, have to be made and informed to all concerned within 30 days of receipt of such notice. After the scheme is sanctioned by the Tribunal/ Company Judge, the Licensor will provide its written approval within 30 days of receipt of request for approval to the transfer/merger of licenses/authorizations under Unified License.”

Comments received from the stakeholders

2.8 Some of the stakeholders have opined that 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. To support their argument, the stakeholders have made the following submissions:

- As per the Section 230 of the Companies Act, 2013, the applicant / petitioner companies require filing of the Scheme with the Central Government, IT authorities, RBI, SEBI, Registrar, Respective Stock Exchanges, Official Liquidator, CCI, 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. DoT is a part of the NCLT

process and actively participates in the whole process. 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 take at least 8-12 months, and approval from DoT 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.

2.9 One stakeholder has submitted that the time period of 30 days provided to DoT to take on record a merger, should be made mandatory; if the same is not complied within the given timeframe, the merger should be deemed to have been taken on record.

Analysis

2.10 While framing the recommendations on “Ease of Doing Telecom Business” in 2017, the stakeholders had raised this issue and had requested that once the merger is approved by NCLT, there should be a defined timeline, within which, DoT should give its written approval to the merger of Licence. As per the clause 3(a) of M&A Guidelines 2014, the licensor is required to be notified for any proposal for compromise, arrangements and amalgamation of companies as filed before the Tribunal. Further, representation /objection, if any, by the Licensor on such scheme has to be made and informed to all concerned within 30 days of receipt of such notice. With a view that once the scheme of merger is accepted by the NCLT, wherein objections of DoT (if any) have already been considered, the Licensor should be in a position to grant its written approval to the merger/transfer of licences/authorisation within a short period of time, the Authority recommended the following:

“When the Licensor is notified about the merger proposal of companies as filed before the Tribunal, it should file objections, if any, for the merger of licences also during the stipulated window of 30 days. DoT should

spell out a definite timeline, not exceeding 30 days post NCLT approval, for providing written approval to transfer/merger of licences by the Licensor and it should be made a part of DoT's M&A Guidelines.”

2.11 Consequently, through an amendment issued by DoT on 24th September 2018, a time period of 30 days from the receipt of request for approval to the transfer/merger of licenses/ authorizations under Unified License, has been prescribed for DoT to provide its written approval.

2.12 Some of the stakeholders have opined that once the scheme has been approved by NCLT, there should be no requirement to go back to DoT again. In this regard, it may be useful to refer to the Section 4 of the Indian Telegraph Act, 1885, which provides that the Central Government may grant a license, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of India. Accordingly, a company is required to take a licence to provide telecom services. While transfer/merger of companies are approved by NCLT, transfer/merger of telecom license can take its effect only after the Licensor (DoT) provides its approval. Thus, it may not be appropriate to say that once NCLT has approved the transfer/merger of companies, there should be no need to go back to DoT for transfer/merger of license. Therefore, the Authority is of the view that no change is required in this clause.

b. Clause 3(b) and 3(c) of the existing guidelines

2.13 Clause 3(b) and 3(c) of the existing guidelines are reproduced below:

“b) A time period of one year will be allowed for transfer/merger of various licenses in different service areas in such cases subsequent to the appropriate approval of such scheme by the Tribunal/Company Judge.

c) If a licensee participates in an auction and is consequently subject to a lock-in condition, then if such a licensee propose to

merge/compromise/arrange/amalgamate into another licensee as per the provisions of applicable Companies Act, the lock-in period would apply in respect of new shares which would be issued in respect of the resultant company (transferee company). The substantial Equity/ Cross Holding clause shall not be applicable during this period of one year unless extended otherwise. This period can be extended by the Licensor by recording reasons in writing.”

Comments received from the stakeholders

- 2.14 One of the stakeholders has submitted that the clause 3(b) provides a time period of one year 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 should 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. The stakeholder has mentioned that 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.

Analysis

- 2.15 Clause 3(b) allows a time period of one year to the licensees for transfer/merger of various licenses in different service areas subsequent to the approval of merger of companies by NCLT. One stakeholder has opined that the time spent in pursuing any litigation, on account of which, the final approval of a merger is delayed, should be excluded while calculating the aforesaid period of one year. The Authority concurs with the view of the stakeholder.
- 2.16 Clause 3(c) provides for shifting of responsibility of lock-in condition (if any) w.r.t. spectrum acquired through Auction process, from the transferor company to the transferee company.

- 2.17 Before coming to the second part of the clause 3(c), it may be useful to refer to the clause 42.3 of the Unified License on Equity holding in other companies, which is reproduced below:

“In the event of holding/obtaining Access spectrum, no licensee or its promoter(s) directly or indirectly shall have any beneficial interest in another licensee company holding “Access Spectrum” in the same service area.”

- 2.18 In view of the above clause of the UL, to take care of a situation where the companies have merged but the licenses are yet to be merged, the Clause 3(c) provides exemption from substantial Equity/cross holding clause, during the period of one year provided in the clause 3(b) above or as extended by the Licensor in writing.

- 2.19 As per the present guidelines, it is possible that the merger of license may happen before the prescribed one year period or it may take more than one year as the guidelines has a provision for extension of the prescribed period of one year. However, the clause 3(c) provides an exemption of one year or more. In case merger of licences happens before one year, say in 6 months, the need for an exemption of substantial Equity/cross holding clause beyond merger of licences is not required. Therefore, the Authority is of the view that this clause should be modified such that the exemption from applicability of substantial Equity/ Cross Holding clause is granted till the period merger is taken on record by DoT.

- 2.20 Further, the last sentence of the clause 3(c) of the guidelines, provides that the period of one year can be extended by the Licensor by recording reasons in writing. It may be more meaningful if the sentence of clause 3(c) regarding extension of period allowed for transfer/merger of licenses by the licensor is appropriately brought under the clause 3(b) as it defines the timeline.

2.21 In view of the above, **the Authority recommends that:**

- a) **For calculation of one year i.e. time period allowed for transfer/merger of various licenses in different service areas subsequent to the approval of the Tribunal/Company Judge (Clause 3(b) of the M&A guidelines), the time spent in pursuing any litigation on account of which the final approval of a merger is delayed, should be excluded.**
- b) **The second part of the clause 3(c) of the M&A guidelines, which provides an exemption from substantial Equity/cross holding clause for a period of one year or more as extended by the Licensor, should be modified such that the exemption from substantial equity/Cross Holding clause is provided only for a period till transfer/merger of licence is taken on record by the Licensor.**
- c) **The last sentence of the clause 3(c) of the guidelines, which provides that the period of one year allowed for transfer/merger of various licenses in different service areas subsequent to approval of the Tribunal/Company Judge, can be extended by the Licensor by recording reasons in writing, should be appropriately brought under the clause 3(b) as it defines the timeline.**

c. Clause 3(d), 3(e) and 3(f) of the existing guidelines

2.22 Clause 3(d) of the existing guidelines is reproduced below:

“d) The merger of licenses/authorisation shall be for respective service category. As access service licence/authorisation allows provision of internet services, the merger of ISP licence/authorisation with access services licence/authorisation shall also be permitted.

e) Consequent to transfer of assets/ licences/authorisation held by transferor (acquired) company to the transferee (acquiring) company, the licences/authorisation of transferor (acquired) company will be subsumed in the resultant entity. Consequently, the date of validity of various

licences/authorisation shall be as per licenses/authorisation and will be equal to the higher of the two periods on the date of merger subject to prorata payments, if any, for the extended period of the licence/authorisation for that service. However, the validity period of the spectrum shall remain unchanged subsequent to such transfer of asset/licences/authorisation held by the transferor (acquired) company.

f) For any additional service or any licence area/service area, Unified Licence with respective authorisation is to be obtained.”

Analysis

- 2.23 As can be inferred from the clause 3(d), the merger of license/authorisation is allowed for respective service category. The rationale for this i.e. both the licensees having license/service-authorization for same service category is to ensure that scope of service of the resultant entity does not change due to merger of two licensees. However, clause 3(d) provides an exemption for an ISP merging with an access service licensee and the rationale given is that the access service licensee is allowed to provide internet services without obtaining a separate ISP authorisation/license.
- 2.24 Clause 3(e) provides that in case of merger of companies, the validity of the license will be equal to the higher of the two periods on the date of merger subject to pro-rata payments, if any, for the extended period of the license/authorisation for that service.
- 2.25 Clause 3(f) provides that for any additional services, requisite authorisation is to be obtained. All the TSPs are governed by the license issued by the Licensor. Further, any transfer/merger of license/authorisation does not change the scope of the license. Therefore, even if this clause was not explicitly mentioned in M&A guidelines, it is enforced by the licence agreement.
- 2.26 No change has been suggested by the stakeholders in the above clauses. The Authority also feels that no change is required to be made in these clauses.

d. Clause 3(g) of the existing guidelines

2.27 Clause 3(g) of the existing guidelines is reproduced below:

Transfer/merger of licences consequent to compromise, arrangements, amalgamation of companies shall be allowed where market share for access services in respective service area of the resultant entity is upto 50%. In case the merger or acquisition or amalgamation proposals results in market share in any service area(s) exceeding 50%, the resultant entity should reduce its market share to the limit of 50% within a period of one year from the date of approval of merger or acquisition or amalgamation by the competent authority. If the resultant entity fails to reduce its market share to the limit of 50% within the specified period of one year, then suitable action shall be initiated by the licensor.

Comments received from the Stakeholders

2.28 One of the stakeholders submitted that it should be clarified that the condition of ‘market share for access services in respective service area of the resultant entity is up to 50%’ is applicable only in class where the transferor (acquired) company and the transferee (acquiring) company individually have market share lower than 50% in the given service area. In case, either of the transferor or the transferee have a market share higher than 50% in the given service area before the transfer/merger of licenses, same should be allowed to be maintained as market share of the merged entity; and not mandated to be reduced to 50%.

Analysis

2.29 Last time TRAI had made its recommendations on M&A in the year 2011. In its recommendations on ‘Spectrum Management and Licensing Framework’ dated 3rd November 2011, TRAI had, inter-alia, recommended that -

“iii. Where the market share of the Resultant entity in the relevant market is not above 35% of the total subscriber base or the AGR in a licensed service area, the Government may grant permission at its level. However, where, in either of these criteria, it exceeds 35% but is below 60%, Government may decide the case after receipt of recommendations from the TRAI. Cases

where the market share is above 60% shall not be considered.” (Para 36, Chapter IV: Consolidation of Spectrum)

- 2.30 After considering TRAI’s recommendations, DoT issued its revised M&A guidelines in 2014. As per these guidelines, in case the merger proposal results in market share in any service area(s) exceeding 50%, either in terms of subscriber base or adjusted gross revenue, the resultant entity should reduce its market share to the limit of 50% within a period of one year from the date of approval of merger by the competent authority, failing which, suitable action is to be initiated by the licensor.
- 2.31 The existing guidelines put a cap of 50% market share as a result of M&A activity. One view could be that since there is no cap on acquiring market share by providing services, then why keep a cap while merging of two entities; moreover, there is a cap on spectrum holding, which can take care of the competition issues. The contrary view could be that an entity could grow by competing in the market and the regulations w.r.t. Significant Market Power (SMP) could be imposed on such player as soon as it qualifies the SMP criteria; however, in case of merger, one of the key roles of the licensor/regulator is to prohibit one player with greater market power and/or capital power to become more powerful through the M&A route, as it could lead to abuse of dominance. As regards spectrum cap, it alone may not be sufficient to prevent dominance as it also considers the spectrum that was put to auction but remained unsold; moreover, these guidelines are equally applicable to various licenses/authorisations under UL, which may not involve spectrum.
- 2.32 One stakeholder has submitted that in case, either of the transferor or the transferee have a market share higher than 50% in the given service area before the transfer/merger of licenses, same should be allowed to be maintained as market share of the merged entity; and not mandated to be reduced to 50%. As already mentioned, one of the key role of the Licensor/regulator is to ensure that there is effective

competition in the market. Healthy and effective competition is also in the interest of the consumers as it ensures quality services as well as competitive prices. Generally, M&A guidelines prescribe a cut off point in terms of market share, beyond which, a merger proposal is not accepted. However, the existing guidelines provide a flexibility such that if a TSP finds it beneficial, then only it would go for M&A. The rationale behind restricting the market share of the resultant entity upto 50% is to ensure that if a TSP is already holding 50% of the market share, which is considerable i.e. it is already an SMP, would be discouraged from undergoing M&A activities. In a way, restriction on market share of 50% works as a red-line.

- 2.33 Till Virtual Network Operators (VNO) were not permitted, the pertinent issue was how a TSP can ensure that it loses its market share. However, with VNO licensing in place, the resultant entity can tie-up with a VNO and shed its market share. Thus, in case two Licensees want to merge and in some of the LSAs, they are exceeding the permitted market share of 50%, they have one year period to shed the excess market share and if required, they can engage with a VNO to shed its excess market share. This would also help in ensuring sufficient number of players in the market. In this regard, it may be useful to refer to the following clause of UL(VNO):

“1.3 The Licensee shall also ensure that:

(i) Any changes in shareholding shall be subject to all applicable statutory permissions under the Laws of India.

(ii) There would not be any restriction on the number of VNO licensees per service area. VNOs are allowed to have agreements with more than one NSO for all services other than Access service and such services which need numbering and unique identity of the customer. For wire line access services through EPABX, the connectivity of different NSOs at different EPABX is allowed, however, the connectivity with more than one NSO at a particular EPABX shall not be permitted. In UL (VNO) the provision for restriction of equity cross holding will be applicable between (i) a VNO or its promoter(s) and another NSO (other than VNO's parent NSO) or its promoter(s) and (ii) between a VNO or its promoter(s) & another VNO or its promoter(s), authorised to provide access service using the access spectrum of NSO(s) in the same service area. This restriction will not be

applicable in case of VNOs parented to the same NSO. It would not be mandatory for an NSO to provide time bound access to its VNO, rather, it would be left to the mutual agreement between an NSO and a VNO. However, TRAI/DoT shall have right to intervene in the matter as and when required to protect the interest of consumers telecom sector.”

- 2.34 From the above clause, it can be inferred that the cross holding restriction is not applicable between a VNO and its parent NSO. Thus, there could be a situation where an NSO having substantial equity in a VNO passes on the surplus market share to its own arm as VNO. In order to handle such a situation, the Authority is of the view that the market share of VNO should be counted in the market share of parent NSO, if the NSO is a promoter of the VNO. Therefore, **the Authority recommends that for computing market share of an NSO in the relevant market, market share of the VNO(s) parented with it should be added to the market share of NSO, if the NSO is a promoter of VNO. Definition of a promoter shall be same as defined in the License/Guidelines to the License.**

e. Clause 3(h) of the existing guidelines

- 2.35 Clause 3(h) of the existing guidelines is reproduced below:

“For determining the aforesaid market share, market share of both subscriber base and Adjusted Gross Revenue (AGR) of licensee in the relevant market shall be considered. The entire access market will be the relevant market for determining the market share which will include wireline as well as wireless subscribers. Exchange Data Records (EDR) shall be used in the calculation of wireline subscribers and Visitor Location Register (VLR) data or equivalent, in the calculation of wireless subscribers for the purpose of computing market share based on subscriber base. The reference date for taking into account EDR/VLR data of equivalent shall be 31st December or 30th June of each year depending on the date of application. The duly audited AGR shall be the basis of computing revenue based market share for operators in the relevant market. The date for duly audited AGR would be 31st March of the preceding year.”

Comments received from the stakeholders

- 2.36 One of the stakeholders has commented that currently, the merger guidelines are limited to the operators holding CMTS/UASL/Unified

Licence (with access service authorization); therefore, it is recommended that the merger guidelines for other service authorizations such as NLD, ILD, VSAT, ISP, etc. may also be issued.

Analysis

2.37 While the existing guidelines are applicable for all the licenses/authorizations, the provisions created through clause 3(h) appear to have been made considering the access service licensees. In some of the services, it may not be appropriate to consider market share in terms of subscribers. For instance, an NLD service provider may be providing many services, such as (i) carrying voice traffic across LSAs, (ii) providing Domestic Leased Circuits, (iii) providing SLA based MPLS services; while all voice traffic of subscribers of access service providers terminating outside the home LSA are carried by NLD service provider, DLC and MPLS services are used by enterprise customers, where one enterprise may have taken multiple connections (DLCs and/or MPLS). One view could be to use capacity leased out by a TSP as a measure to compute market share; however, dedicated leased circuits are a factor of capacity as well as distance. Therefore, the Authority is of the view that while subscriber base and AGR, both will be relevant for access, Internet, VSAT, GMPCS, PMRTS, and INSAT MSS-R; for rest of the services, AGR is the only factor relevant for computation of market share.

2.38 Therefore, **the Authority recommends that the clause 3(h) of the guidelines may be amended such that:**

(a) for determining the market share for Access, Internet, VSAT, GMPCS, PMRTS, and INSAT MSS-R service licenses/authorizations, both number of subscribers as well as AGR should be considered.

(b) for determining the market share for rest of the service licenses/authorizations viz. NLD, ILD and Resale of IPLC, only AGR should be considered.

f. Clause 3(i) of the existing guidelines

2.39 Clause 3(i) of the existing guidelines is reproduced below:

“i) If a transferor (acquired) company holds a part of spectrum, which (4.4 MHz/2.5 MHz) has been assigned against the entry fee paid, the transferee (acquiring) company (i.e. resultant merged entity), at the time of merger, shall pay to the Government, the differential between the entry fee and the market determined price of spectrum from the date of approval of such arrangements by the National Company Law Tribunal/Company Judge on a pro-rata basis for the remaining period of validity of the license(s). No separate charge shall be levied for spectrum acquired through auctions conducted from year 2010 onwards. Since auction determined price of the spectrum is valid for a period of one year, thereafter, PLR at State Bank of India rates shall be added to the last auction determined price to arrive at market determined price after a period of one year. In the event of judicial intervention in respect of the demands raised for one time spectrum charges in respect of the spectrum holding beyond 4.4 MHz in GSM band/2.5 MHz in CDMA band before merger in respect of transferee (i.e. acquiring entity) company, a bank guarantee for an amount equal to the demand raised by the department for one time spectrum charge shall be submitted pending final outcome of the court case.”

Comments received from the stakeholders

2.40 Few stakeholders submitted that as per the clause 3(i), 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. 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 from the merger guidelines.

- 2.41 One stakeholder pointed out that clause 3(i) seeks bank guarantee for the spectrum holding of transferee company, which seems to be a mistake in the guidelines.

Analysis

- 2.42 First part of the Clause 3(i) provides that if a transferor (acquired) company holds a part of spectrum (4.4 MHz/2.5 MHz for GSM/CDMA), which has been assigned against the entry fee paid, the transferee (acquiring) company (i.e. resultant merged entity), at the time of merger, shall pay to the Government, the differential between the entry fee paid and the market determined price of spectrum from the date of approval of such arrangements by the National Company Law Tribunal/Company Judge on a pro-rata basis for the remaining period of validity of license(s), validity of spectrum being coterminous with license.
- 2.43 It will be useful to understand why the differential between the entry fee and the market determined price of spectrum is being asked for the spectrum holding of upto 4.4 MHz/2.5 MHz for GSM/CDMA. In the earlier era, when spectrum was bundled with the licence, the TSPs were assigned the initial spectrum (4.4 MHz/2.5 MHz for GSM/CDMA) along with the licence against the entry fee paid and the additional spectrum was assigned to them administratively, based on the subscriber-linked criteria; however, no price was charged from the TSPs for such additional spectrum. As a result of merger, the administratively assigned spectrum (initial spectrum + additional spectrum assigned administratively) held by the transferor company is changing hands (getting transferred to the transferee company); thus, it needs to be liberalized by paying the corresponding market determined price. Therefore, the guidelines prescribe to pay the differential between the entry fee and the market determined price for any initial spectrum (upto 4.4 MHz/2.5 MHz for GSM/CDMA) held by the transferor company from the date of approval of NCLT for the

remaining period of validity of spectrum on a pro-rata basis. For any initial spectrum held by the transferee company, rightfully, the guidelines do not seek the differential between entry fee paid and market determined price as the same is not changing hands. Once a service provider has paid the equivalent market determined price, such spectrum should be treated as liberalized i.e. technology neutral; however, since the guidelines on liberalization of spectrum were issued in the year 2015 (later than the guidelines for M&A), the M&A guidelines do not mention about it. Therefore, **the Authority recommends that it should be explicitly mentioned in the guidelines that consequent upon payment of market determined price for spectrum, such spectrum would be treated as liberalized i.e. technology neutral.**

- 2.44 Further, as mentioned earlier, a merger is effective only after the written approval of the Licensor, for which one year time has been provided in the guidelines itself, that too can be extended by the Licensor after recording the reasons. However, the resultant entity will be able to derive benefits of merger (including spectrum holding of the transferor company), only after the merger gets approved by DoT. Therefore, the merged entity should be liable to pay the differential amount for the spectrum assigned against the entry fee paid of the transferor company from the date of approval by DoT. This issue was discussed as part of consultation process on 'Ease of Doing Telecom Business' and it was recommended that the differential amount should be payable from the date of approval by DoT instead of date of approval by NCLT. In its back reference, DoT suggested the following alternate, which was agreed by TRAI; however, no amendment has been issued in this regard so far.

"When the licensee applies for transfer / merger of licenses to DoT, DoT will raise demand upon transferee of One Time Spectrum Charges (OTSC), from the date of NCLT approval, with a stipulation that such demand is subject to revision after the grant of approval of transfer of

licenses by DoT. The demand of OTSC will be recalculated based upon the date of grant of approval. Excess amount paid, if any, will be refunded back to the transferee / set off against other dues.”

- 2.45 In view of the above, **the Authority reiterates its earlier recommendation that if a transferor company holds a part of spectrum, which has been assigned against the entry fee paid, the transferee company/ resultant entity should be liable to pay the differential amount for the spectrum assigned against the entry fee paid by the transferor company from the date of written approval of transfer/merger of licences by DoT. However, while raising the demand for payment of differential amount, DoT shall calculate tentative demand from the date of NCLT approval, and upon grant of merger approval, the actual demand of differential amount shall be recalculated based upon the date of grant of approval. Excess amount paid by the transferee company/resultant entity, if any, shall be refunded back to the transferee company/resultant entity or set off against other dues.**
- 2.46 The second part of the Clause 3(i) provides that in case of judicial intervention in respect of the demands raised for one time spectrum charge (OTSC) in respect of spectrum holding beyond 4.4 MHz/2.5 MHz for GSM/CDMA before the merger in respect of transferee company, a bank guarantee of equivalent amount shall be submitted. Before discussing further, it may be useful to understand the OTSC. As already discussed, in the earlier era, when spectrum was bundled with the licence, the TSPs were assigned the initial spectrum (4.4 MHz/2.5 MHz for GSM/CDMA) along with the licence against the entry fee paid and the additional spectrum was assigned to them based on the subscriber-linked criteria; however, no price was charged from the TSPs for such additional spectrum. Therefore, through its order of 2012, DoT Ordered¹ the TSPs to pay up the price for additional

¹ In December 2012, DoT issued Order on ‘Levy of one time spectrum charges for GSM/CDMA spectrum held by the incumbent Telecom Service Providers’. DoT ordered the incumbent TSPs

spectrum assigned to them, retrospectively, and this price was termed as OTSC. The TSPs (separately) challenged this order of DoT in High Court(s) as TDSAT was not functional at that time. Some of these petitions were preferred to TDSAT by the High Court(s). In some of these petitions, TDSAT has given its Order and DoT has challenged the TDSAT Order in Supreme Court, which has granted interim stay on the TDSAT Order. The matter is sub-judice.

2.47 At the time of merger, ideally, market determined price should be sought for any administratively assigned spectrum held by the transferor company from the date of merger for the remaining validity, as it is getting transferred to the transferee company. However, since DoT has already raised the demand for OTSC (which includes the period before merger also) in respect of administratively assigned spectrum beyond 4.4 MHz/2.5 MHz for GSM/CDMA, the guidelines seek bank guarantee for the amount equivalent to the demand raised for OTSC, but in respect of transferee company and not for transferor company. It is the spectrum holding of transferor company which is changing hands and not of the transferee company. Evidently, there is some error. Therefore, the Authority is of the view that in the last sentence of clause 3(i) “transferee (i.e. acquiring company)” should be replaced with “transferor company (i.e. acquired company)”.

2.48 In view of the above, **the Authority recommends that in the last sentence of clause 3(i) “transferee (i.e. acquiring company)” should be replaced with “transferor company (i.e. acquired company)”.**

to pay One Time Spectrum Charge (OTSC) (based on the differential between the entry fee and the market determined price) for the spectrum holding above 6.2 MHz (GSM) for the period 01.07.2008 to 31.12.2012 as per the annexed scheduled rates and for spectrum holding above 4.4 MHz (GSM), the TSPs were given option to either pay OTSC w.e.f. 1.1.2013 or surrender the spectrum beyond 4.4 MHz. Similar Order was issued for CDMA services for spectrum holding beyond 2.5 MHz in 800 MHz band, separately.

g. Clause 3(j) of the existing guidelines

2.49 Clause 3(j) of the existing guidelines is reproduced below:

“The Spectrum Usage Charge (SUC) as prescribed by the Government from time to time, on the total spectrum holding of the resultant entity shall also be payable.”

- 2.50 The spectrum usage charges are prescribed separately by the Government from time to time. Different SUC rates are applicable for spectrum acquired through different auctions. SUC on the spectrum acquired in the last auctions held in 2016 is charged at the rate of 3% of AGR excluding revenues from wireline services. In case of combination of access spectrum assigned to an operator (whether assigned administratively or through auctions or through trading), weighted average of SUC rates across all access spectrum assigned to the TSP applies to the entire access spectrum held by the TSP. The clause 3(j) of the guidelines, prescribes that the SUC as prescribed, would be payable on total SUC held by the resultant entity.
- 2.51 No comments have been received from the stakeholders on this clause. The Authority is also of the view that this clause does not require any change to be made.

h. Clause 3(k) of the existing guidelines

2.52 Clause 3(k) of the existing guidelines is reproduced below:

“Consequent upon the implementation of scheme of compromises, arrangements or amalgamation and merger of licenses in a service area thereupon, the following conditions shall apply on the Resultant entity with respect to spectrum caps.

- (i) The total spectrum held by the Resultant entity shall not exceed 35% of the total spectrum assigned for access services, by way of auction or otherwise, in the concerned service area.*
- (ii) The combined spectrum holding in the sub-1 GHz bands (700 MHz, 800 MHz and 900 MHz bands) by the Resultant entity shall not exceed 50% of the total spectrum assigned in the sub-1 GHz bands, by way of auction or otherwise, in the concerned service area.*

(iii) *The principles applied in NIA of August 2016 for calculation of spectrum cap shall continue to be applied while calculating revised overall as well as sub-1 GHz spectrum cap.*

(iv) *In case transferor and transferee company had been allocated one block of 3G spectrum (2100 MHz) through the auction conducted for 3G/BWA spectrum in 2010, the resultant entity shall be allowed to retain two blocks of 3G spectrum (2100 MHz) acquired through the afore-mentioned auction in respective service areas as a result of compromises, arrangements and amalgamation of the companies and Transfer/Merger of various categories of Telecommunication service licences/authorisation under Unified Licence(UL)."*

Comments from the stakeholders

2.53 No comments have been received from the stakeholders on this Clause.

Analysis

2.54 The existing guidelines on transfer/merger of license hard-codes the existing spectrum caps. It may be noted that through its letter dated 29th September 2017, DoT had requested TRAI to provide its views on spectrum cap. In its response dated 21st November 2017 to DoT, the Authority expressed the following views:

(i) The overall spectrum cap should be revised from the current limit of 25% to 35%.

(ii) The current intra-band cap should be removed. Instead, there should be a cap of 50% on the combined spectrum holding in the sub-1 GHz bands (700 MHz, 800 MHz and 900 MHz bands).

2.55 Subsequently, on 19th March 2018, DoT issued an amendment to the Unified Licence and appended Clause 42.11 on 'Limit of Cap for spectrum holding' under spectrum allotment and use, Chapter VII of part I. The M&A guidelines were also amended by DoT on 30th May 2018 to incorporate the revised spectrum caps.

2.56 Through its recommendations on Auction of Spectrum in various spectrum bands dated 1st August 2018, the Authority has, inter-alia, recommended the following for spectrum band 3300-3600 MHz band:

“....To avoid monopolization of this band, there should be limit of 100 MHz per bidder. Since the TSPs are allowed to trade their partial or complete spectrum holding to another TSP, the limit of 100 MHz spectrum in 3300-3600 MHz band, shall also apply for spectrum trading.”

2.57 Now that spectrum cap has been included in the license itself, and any change would certainly be reflected in the license, it may be appropriate to link the applicable spectrum cap with the relevant clause of the UL, instead of hard coding the same in the guidelines on transfer/merge of licenses.

2.58 In view of the above, **the Authority recommends that the guidelines on transfer/merger of licenses should not hard-code the spectrum caps. Instead, it should be linked with the relevant clause of the license.**

i. Clause 3(l) of the existing guidelines

2.59 Clause 3(l) of the existing guidelines is reproduced below:

“If, as a result of merger, the total spectrum held by the resultant entity is beyond the limits prescribed, the excess spectrum must be surrendered or traded within one year of the permission being granted, The applicable Spectrum Usage Charges on the total spectrum holding of the resultant entity shall be levied for such period. If the spectrum beyond prescribed limit is not surrendered or traded within one year, then, separate action in such cases, under the respective licenses/statutory provisions, may be taken by the Government for non-surrender/non-trade of the excess spectrum. However, no refund or set off of money paid and/ or payable for excess spectrum will be made.”

Comments from the stakeholders

2.60 No comments have been received from the stakeholders on this Clause.

Analysis

2.61 Until 24th September, 2018, this clause had no provision of reducing spectrum holding via spectrum trading. This issue was examined by the Authority as part of its recommendations on “Ease of Doing Telecom Business”, wherein it was noticed that at the time of issuance of guidelines on transfer/merger of licenses dated 20th February 2014, spectrum trading was not permitted in the country. Therefore, only provision to get rid of excess spectrum holding was its surrender to the Licensor with no provision of refund or set-off of money paid and/or payable for excess spectrum. Therefore, the Authority, as part of its recommendations on “Ease of Doing Telecom Business”, inter-alia, recommended that

“If the merger results in excess spectrum holding beyond permissible spectrum cap, the resultant entity should be given an option to either surrender or trade its spectrum holding, within the stipulated period of one year. The Authority is of the view that Clause 3(L) of DoT’s M&A guidelines should be amended accordingly.”

2.62 Consequently, through an amendment issued by DoT on 24th September 2018, provision for trading of spectrum was prescribed in clause 3(l). Since this provision was examined recently and DoT has made the requisite amendment in the guidelines on Transfer/merger of licenses, there appears to be no more modification required.

j. Clause 3(m) of the existing guidelines

2.63 Clause 3(m) of the existing guidelines is reproduced below:

“m) All demands, if any, relating to the licences of merging entities, will have to be cleared by either of the two licensees before issue of the permission for merger/ transfer of licenses/authorisation. This shall be as per demand raised by the Government/ licensor based on the returns filed by the company notwithstanding any pending legal cases or disputes. An undertaking shall be submitted by the resultant entity to the effect that any demand raised for pre-merger period of transferor or transferee company shall be paid. However, the demands except for one time spectrum charges

of transferor and transferee company, stayed by the Court of Law shall be subject to outcome of decision of such litigation. The one time spectrum charge shall be payable as per provisions in para 3(i) above of these guidelines.”

Comments received from the stakeholders

- 2.64 One stakeholder has submitted that as per clause 3(m) 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. The following have been proposed by the stakeholder:
- (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.
- 2.65 Another stakeholder submitted that list of outstanding demands should be taken as of the date, DoT issues first in-principle approval, which is submitted to NCLT. List should not be kept open to enable smoother transaction.

Analysis

- 2.66 Two stakeholders have submitted that the list of dues should not be kept open, 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. One stakeholder has also submitted that DoT should raise all the objections and dues once and not at multiple occasions.
- 2.67 The clause 3(m) of the M&A guidelines provide that all demands, if any, relating to the licences of merging entities, will have to be cleared by either of the two licensees before issue of the permission for merger/ transfer of licenses/authorisation. It is understood that any demand raised by the licensor is anyways payable by the licensees as per the prescribed timelines, may it be a case of merger or not. Thus, Authority finds no merit in the comments of the stakeholders. Therefore, no change is required in the existing clause.

k. Clause 3(n) of the existing guidelines

- 2.68 Clause 3(n) of the existing guidelines is reproduced below:

“If consequent to transfer/ merger of licenses in a service area, the Resultant entity becomes a “Significant Market Power” (SMP), then the extant rules & regulations applicable to SMPs would also apply to the Resultant entity. SMP in respect of access services is as defined in TRAI’s “The Telecommunications Interconnect (Reference Interconnect Offer) Regulations, 2002 (2 of 2002)” as amended from time to time.”

Comments received from the stakeholders

- 2.69 No comments have been received in respect of this clause.

Analysis

- 2.70 Clause 3(n) prescribes that if a resultant entity becomes a SMP, the rules and regulation, as applicable, would apply to the resultant entity.

- 2.71 The stakeholders have not suggested any change to be made in this clause. The Authority is also of the view that this clause does not require any change to be made.

C. Representation of VNOAI

- 2.72 DoT through its letter dated 11th June 2019 had also forwarded a copy of the representation received from Virtual Network Operators Association of India (VNOAI) dated 16.11.2018, requesting that the same may be considered while providing recommendations on Reforming the guidelines for Mergers and Acquisitions, 2014. In its letter, VNOAI had, inter-alia, provided a description of the international practices to avoid cartelization and to sustain the competition by mandating MVNOs/VNOs to the merged entity. In order to sustain competition in the market, VNOAI has suggested to impose a commitment on the merged entity to set aside 20% of wholesale capacity for MVNOs on Mobile Bitstream Access (MBA) basis. In this regard, VNOAI has cited international precedent from European Commission wherein the authorities have mandated setting aside wholesale capacity for MVNOs in order to maintain competition in the market.
- 2.73 In relation to mandatory access to MVNOs, it was noted that in all the three international cases cited by VNOAI, the commitment, which, inter-alia, included granting access to MVNOs was proposed by the MNO and the Competition Authority of European Commission (CAEC) i.e. Director General Competition concluded that the proposed merger would no longer raise competition concerns, subject to full compliance of the commitments. Further, mandatory access to MVNOs was not a standalone remedy but a part of a broader remedy package which also included divestment of spectrum, etc. European remedy also defines key commercial principles & charges for the provision of wholesale access to MVNOs to avoid any dispute between the MVNO and the mobile network operator (or the merging entity granting access) along

with a detailed supervisory process through an independent monitoring agency. Thus, it may not be incorrect to say that access to MVNOs was not mandated by the CAEC, but was agreed during examination of the proposals for mergers on case to case basis.

- 2.74 In this regard, the stakeholders were asked to submit their views on whether mandatory access to MVNOs should be provisioned in the DoT M&A Guidelines to address the competition concerns.

Comments received from the stakeholders

- 2.75 Many stakeholders have submitted that M&A guidelines should not provide for mandatory access to MVNOs. The stakeholders also mentioned that 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 case the Authority is of the view that mandatory access to MVNOs should be provided, it may be dealt with through separate consultation. One of these stakeholders has further submitted that any merger is approved by CCI and thereafter there are clauses related to spectrum and market share (both subscriber and revenue) cap; thus, competition concerns are taken care of by the existing guidelines.
- 2.76 One stakeholder submitted that the telecom sector in India is heading towards a duopolistic market, this could be the biggest risk for the subscribers as well as the government. TRAI and DoT may consider to review the existing M&A Guidelines and mandate to MNOs to provide access to VNOs in the interest of competition and overall health of the Telecom industry in India.

Analysis

- 2.77 The UL (VNO) provides that it would not be mandatory for an NSO to provide time bound access to its VNO, rather, it would be left to the mutual agreement between an NSO and a VNO.

- 2.78 The TSPs always have the option of engaging with a VNO, including the cases where a proposed merger might be exceeding the market share of 50%. In India, commercial arrangement between Network Service Operator (NSO) and VNO are not regulated and the customers of a MVNO is likely to have similar quality of service as that of the concerned Mobile Network Operator (MNO). However, access to MVNO could be one way, using which, the MNO can shed its market share. Moreover, mere mandating access to VNOs may not work as the wholesale prices between NSO and VNO are not regulated.
- 2.79 The Authority is of the view that as part of M&A guidelines, it may not be appropriate to mandate the TSPs to give access to VNO.

D. Other comments received from the stakeholders

- 2.80 Some stakeholders submitted that in case any VNO was already parented to the transferor company, post-merger, the transferee company should honour such agreement.
- 2.81 One of the stakeholders has submitted that the transfer/merger guidelines should also be specified for the merger/demerger of one UL(VNO) while ensuring that it does not violate other provisions of the licence agreement.

Analysis

- 2.82 It is understood that once a company/licensee is getting merged with or transferred to another, all the assets and liabilities are also shifted to the acquiring company, which would include honouring of agreements entered into by the transferor company. Therefore, there seems to be no need for provision of specific guidelines for this.
- 2.83 Further, one of the stakeholders requested that the guidelines for UL(VNO) should also be specified. The Authority is of the view that this issue can be separately examined, if required.

E. Other issues

2.84 While the guidelines on Transfer/Merger of Licences are being reviewed, it may be appropriate that the relevant clause in the License may also be examined. Relevant Clauses in the Unified Licence under “Restriction on Transfer of License” in Chapter-I on General Conditions are reproduced below:

“6.3 Intra service area mergers and acquisitions as well as transfer of licenses shall be subject to the guidelines issued on the subject from time to time by the Licensor.

6.4 Further, the Licensee may transfer or assign the License Agreement with prior written approval of the Licensor, in the following circumstances, and if otherwise, no compromise in competition occurs in the provisions of Telecom Services:-

(i)(a) When transfer or assignment is requested in accordance with the terms and conditions on fulfillment of procedures of Tripartite Agreement if already executed amongst the Licensor, Licensee and Lenders; or

(i)(b) Whenever amalgamation or restructuring i.e. merger or demerger is sanctioned and approved by the High Court or Tribunal as per the law in force; in accordance with the provisions; more particularly Sections 391 to 394 of Companies Act, 1956; provided that scheme of amalgamation or restructuring is formulated in such a manner that it shall be effective only after the written approval of the Licensor for transfer/merger of Licenses, and

(ii) Prior written consent/No Objection of the Licensor has been obtained for transfer or merger of Licenses as per applicable guidelines issued from time to time. Further, the transferee/assignee is fully eligible in accordance with eligibility criteria as applicable for grant of fresh License in that area and show its willingness in writing to comply with the terms and conditions of the License agreement including past and future roll out obligations as well as to comply with guidelines for transfer/merger of Licenses including for charges as applicable; and

(iii) All the past dues are fully paid till the date of transfer/assignment by the Transferor Company and Transferee Company; and thereafter the transferee company undertakes to pay all future dues inclusive of anything remained unpaid of the past period by the outgoing company.”

2.85 The stakeholders were requested to provide their comments as to what changes are required to be made in the relevant provisions of UL.

Comments received from the stakeholders

2.86 No comments have been received from the stakeholders.

Analysis

2.87 The stakeholders have not suggested any change to be made in the above clauses. The Authority also feels that no change is required to be made in these clauses.

CHAPTER-III: SUMMARY OF RECOMMENDATIONS

3.1 The Authority recommends that:

- a) For calculation of one year i.e. time period allowed for transfer/merger of various licenses in different service areas subsequent to the approval of the Tribunal/Company Judge (Clause 3(b) of the M&A guidelines), the time spent in pursuing any litigation on account of which the final approval of a merger is delayed, should be excluded.
- b) The second part of the clause 3(c) of the M&A guidelines, which provides an exemption from substantial Equity/cross holding clause for a period of one year or more as extended by the Licensor, should be modified such that the exemption from substantial equity/Cross Holding clause is provided only for a period till transfer/merger of licence is taken on record by the Licensor.
- c) The last sentence of the clause 3(c) of the guidelines, which provides that the period of one year allowed for transfer/merger of various licenses in different service areas subsequent to approval of the Tribunal/Company Judge, can be extended by the Licensor by recording reasons in writing, should be appropriately brought under the clause 3(b) as it defines the timeline.

[para 2.21]

3.2 The Authority recommends that for computing market share of an NSO in the relevant market, market share of the VNO(s) parented with it should be added to the market share of NSO, if the NSO is a promoter of VNO. Definition of a promoter shall be same as defined in the License/Guidelines to the License.

[para 2.34]

3.3 The Authority recommends that the clause 3(h) of the guidelines may be amended such that:

- (a) for determining the market share for Access, Internet, VSAT, GMPCS, PMRTS, and INSAT MSS-R service licenses/authorizations, both number of subscribers as well as AGR should be considered.**
- (b) for determining the market share for rest of the service licenses/authorizations viz. NLD, ILD and Resale of IPLC, only AGR should be considered.**

[Para 2.38]

3.4 The Authority recommends that it should be explicitly mentioned in the guidelines that consequent upon payment of market determined price for spectrum, such spectrum would be treated as liberalized i.e. technology neutral.

[Para 2.43]

3.5 The Authority reiterates its earlier recommendation that if a transferor company holds a part of spectrum, which has been assigned against the entry fee paid, the transferee company/resultant entity should be liable to pay the differential amount for the spectrum assigned against the entry fee paid by the transferor company from the date of written approval of transfer/merger of licences by DoT. However, while raising the demand for payment of differential amount, DoT shall calculate tentative demand from the date of NCLT approval, and upon grant of merger approval, the actual demand of differential amount shall be recalculated based upon the date of grant of approval. Excess amount paid by the transferee company/resultant entity, if any, shall be refunded back to the transferee company/resultant entity or set off against other dues.

[Para 2.45]

- 3.6 The Authority recommends that in the last sentence of clause 3(i) “transferee (i.e. acquiring company)” should be replaced with “transferor company (i.e. acquired company)”**

[Para 2.48]

- 3.7 The Authority recommends that the guidelines on transfer/merger of licenses should not hard-code the spectrum caps. Instead, it should be linked with the relevant clause of the license.**

[Para 2.58]

Government of India
Ministry of Communications
Department of Telecommunications
Access Services Wing
Sanchar Bhavan, 20, Ashoka Road, New Delhi-110001

No: 20-281/2010-AS-I Vol. XII (pt.)

Date:08.05.2019

To,
The Secretary,
Telecom Regulatory Authority of India,
Mahanagar Doorsanchar Bhawan,
Jawaharlal Nehru Marg, Old Minto Road,
New Delhi-110002

Subject: Seeking recommendations of TRAI on strategies of National Digital Communications Policy, 2018 - reg.

The National Digital Communications Policy, 2018 (hereinafter, referred to as, the NDCP, 2018) of the Government of India envisages, *inter-alia*, the following strategies under its 'Connect India' and 'Propel India' missions:

"

1. Connect India: Creating a Robust Digital Communications Infrastructure

...

Strategies:

1.1 Establishing a 'National Broadband Mission – Rashtriya Broadband Abhiyan' to secure universal broadband access

...

- (j) *By Encouraging innovative approaches to infrastructure creation and access including through resale and Virtual Network Operators (VNO)*

2. Propel India: Enabling Next Generation Technologies and Services through Investments, Innovation, Indigenous Manufacturing and IPR Generation

...

Strategies:

...

2.1 Catalysing Investments for Digital Communications sector:

...

- (b) *Reforming the licensing and regulatory regime to catalyse Investments and Innovation, and promote Ease of Doing Business by:*

...

- v. *Enabling unbundling of different layers (e.g. infrastructure, network, services and application layer) through differential licensing*

...

- (c) *Simplifying and facilitating Compliance Obligations by:*

...

- v. *Reforming the Guidelines for Mergers & Acquisitions, 2014 to enable simplification and fast tracking of approvals*

...

- viii. *Creating a regime for fixed number portability to facilitate one nation – one number including portability of toll free number, Universal Access Numbers and DID numbers*

...

2.2 Ensuring a holistic and harmonized approach for harnessing Emerging Technologies

...

- (e) *Ensuring adequate numbering resources, by:*

...

- ii. *Developing a unified numbering plan for fixed line and mobile services*


... "

2. Telecom Regulatory Authority of India is, hereby, requested to furnish recommendations, under the terms of the clause (a) of sub-section (1) of Section 11 of the Telecom Regulatory Authority of India Act, 1997 (as amended), in respect of the afore-mentioned items of the NDCP, 2018.

3. For sake of convenience, the strategies/ items under strategies of the NDCP, 2018, on which recommendation of TRAI are being sought, are summarized below:

- (a) Strategy 1.1 (j) of 'Connect India' mission,
- (b) Item (v) under Strategy 2.1 (b) of 'Propel India' mission,
- (c) Items (v) & (viii) under Strategy 2.1 (c) of 'Propel India' mission, and,
- (d) Item (ii) under Strategy 2.2 (e) of 'Propel India' mission.

4. This issues with the approval of the Secretary, Department of Telecommunications, Government of India.


(S.B. Singh) 8/5/18

Deputy Director General (AS)

Tel: 011-23036918

Annexure 1.2

Government of India
Ministry of Communications
Department of Telecommunications
Access Services Wing
Sanchar Bhawan, 20, Ashoka Road, New Delhi-110001

No: 20-281/2010-AS-I Vol. XII (pt.)

Date: 06.06.2019

To,
The Secretary,
Telecom Regulatory Authority of India,
Mahanagar Doorsanchar Bhawan,
Jawaharlal Nehru Marg, Old Minto Road,
New Delhi-110002

Subject: Inputs with respect to the DoT's letter dated 08.05.2019 seeking recommendations of TRAI on strategies of National Digital Communications Policy, 2018- reg.

This is with reference to the letter of even No. dated 08.05.2019, through which, the Department of Telecommunications (DoT) had requested TRAI to furnish recommendations, under the terms of the clause (a) of sub-section (1) of Section 11 of the Telecom Regulatory Authority of India Act, 1997, on certain strategies of the NDCP, 2018. A copy of the DoT's letter dated 08.05.2019 is enclosed as **Annexure-I**.

2. In this regard, your kind attention is invited towards the item (v) under Strategy 2.1 (c) of 'Propel India' mission (viz. 'Reforming the Guidelines for Mergers & Acquisitions, 2014 to enable simplification and fast tracking of approvals'), which is one of the items, on which, DoT has sought recommendations of TRAI through the letter dated 08.05.2019.

3. With reference to the afore-mentioned item, it is stated that, earlier, DoT issued Guidelines for Transfer/Merger of various categories of Telecommunication service licences/ authorisation under Unified Licence (UL) on compromises, arrangements and amalgamation of the companies (hereinafter, referred to as, 'the Guidelines for Mergers & Acquisitions, 2014') through letter No. 20-281/2010-AS-I (Volume-VII) dated 20.02.2014. A copy of the Guidelines for Mergers & Acquisitions, 2014 is placed as **Annexure-II**. These guidelines were amended through letter No. 20-281/2010-AS-I

(Volume-VII) dated 30.05.2018 (**Annexure-III**) and 20-281/2010-AS-I (Volume-VII) dated 24.09.2018 (**Annexure-IV**). DoT has examined several proposals for transfer/ merger of licenses in light of the provisions of the Guidelines for Mergers & Acquisitions, 2014 in the past five years.

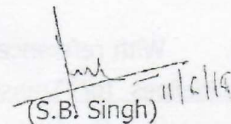
4. After examining any proposal for transfer/ merger of licenses, DoT conveys the approval of the competent authority to take the transfer/ merger on record subject to fulfillment of applicable conditions based on the provisions of the Guidelines for Mergers & Acquisitions, 2014. At many instances in the past, the merging entities have filed petitions before Hon'ble TDSAT praying to quash and set aside certain conditions imposed upon them by DoT in terms of, *inter-alia*, the paragraphs 3(i) and 3(m) of the Guidelines for Mergers & Acquisitions, 2014. The Hon'ble TDSAT, on several occasions, has granted stay to the operation of some of such conditions.

5. Your kind attention is also invited towards a copy of the representation received from Virtual Network Operators Association of India (VNOAI) through the letter No. VNOAI/11/2018 dated 16.11.2018 (**Annexure-V**). In its letter, VNOAI has, *inter-alia*, provided a description of the international practices to avoid cartelization and to sustain the competition by mandating MVNOs/ VNOs to the merged entities.

6. The above inputs may be considered while providing recommendations on 'Reforming the Guidelines for Mergers & Acquisitions, 2014 to enable simplification and fast tracking of approvals'.

7. This issues with the approval of the Secretary, Department of Telecommunications, Government of India.

Enclosures: As above


(S.B. Singh) 11/11/18

DDG (AS)

Tel: 011-2303 6918

Annexure - II

Government of India
Ministry of Communications and Information Technology
Department of Telecommunications
Sanchar Bhawan, 20, Ashok Road, New Delhi
(AS-I Division)

No.20-281/2010-AS-I (Volume-VII)

Dated: 20th February, 2014

Subject: Guidelines for Transfer/Merger of various categories of Telecommunication service licences/authorisation under Unified Licence (UL) on compromises, arrangements and amalgamation of the companies.

1. National Telecom Policy -2012 envisages one of the strategy for the telecom sector to put in place simplified Merger & Acquisition regime in telecom service sector while ensuring adequate competition. This sector has been further liberalised by allowing 100% FDI. Further, it has been decided in-principle to allow trading of spectrum. The Companies Act of 1956 has also been amended by Companies Act of 2013 and the amendments have been made in reference to compromises/arrangements and amalgamations of companies. SEBI has also prescribed procedure for IPO.
2. The scheme of compromises, arrangements and amalgamation of companies is governed by the various provisions of the Companies Act, 2013 as amended from time to time. Such schemes is to be approved by National Company Law Tribunal to be constituted under the provisions of Companies Act, 2013. Consequently, the various licences granted under section 4 of Indian Telegraph Act, 1885 to such companies need to be transferred to the resultant entity (ies). It is also noted that such schemes may comprise of merger by formation or merger by absorption or arrangement or amalgamation etc. of company (ies) and thereafter merging/transferring such licences/authorisation subject to the condition that the resultant entity being eligible to acquire such licence/authorisation in terms of extant guidelines issued from time to time.
3. Earlier department has issued Guidelines for intra service area Merger of Cellular Mobile Telephone Service (CMTS)/ Unified Access Services (UAS)

Licences vide Office Memo No.20-232/2004-BS-III dated 22nd April 2008. Taking into consideration the above and taking into consideration the TRAI's Recommendations dated 11.05.2010 and 03.11.2011 and National Telecom Policy 2012, in supersession of these guidelines, it has been further decided that Transfer/ Merger of various categories of Telecom services licences/ authorisation under UL shall be permitted as per the guidelines mentioned below for proper conduct of Telegraphs and Telecommunication services, thereby serving the public interest in general and consumer interest in particular: -

- a) The Licensors shall be notified for any proposal for compromise, arrangements and amalgamation of companies as filed before the Tribunal or the Company Judge. Further, representation/objection, if any, by the Licensors on such scheme has to be made and informed to all concerned within 30 days of receipt of such notice.
- b) A time period of one year will be allowed for transfer/merger of various licences in different service areas in such cases subsequent to the appropriate approval of such scheme by the Tribunal/Company Judge.
- c) If a licensee participates in an auction and is consequently subject to a lock-in condition, then if such a licensee propose to merge/compromise/arrange/amalgamate into another licensee as per the provisions of applicable Companies Act, the lock-in period would apply in respect of new shares which would be issued in respect of the resultant company (transferee company). The substantial Equity/ Cross Holding clause shall not be applicable during this period of one year unless extended otherwise. This period can be extended by the Licensors by recording reasons in writing.
- d) The merger of licenses/authorisation shall be for respective service category. As access service licence/authorisation allows provision of

internet services, the merger of ISP licence/authorisation with access services licence/authorisation shall also be permitted.

- e) Consequent to transfer of assets/ licences/authorisation held by transferor (acquired) company to the transferee (acquiring) company, the licences/authorisation of transferor (acquired) company will be subsumed in the resultant entity. Consequently, the date of validity of various licences/authorisation shall be as per licenses/authorisation and will be equal to the higher of the two periods on the date of merger subject to pro-rata payments, if any, for the extended period of the licence/authorisation for that service. However, the validity period of the spectrum shall remain unchanged subsequent to such transfer of asset/licences/authorisation held by the transferor (acquired) company.
- f) For any additional service or any licence area/service area, Unified Licence with respective authorisation is to be obtained.
- g) Taking into consideration the spectrum cap of 50% in a band for access services, transfer/merger of licences consequent to compromise, arrangements or amalgamation of companies shall be allowed where market share for access services in respective service area of the resultant entity is upto 50%. In case the merger or acquisition or amalgamation proposals results in market share in any service area(s) exceeding 50%, the resultant entity should reduce its market share to the limit of 50% within a period of one year from the date of approval of merger or acquisition or amalgamation by the competent authority. If the resultant entity fails to reduce its market share to the limit of 50% within the specified period of one year, then suitable action shall be initiated by the licensor.
- h) For determining the aforesaid market share, market share of both subscriber base and Adjusted Gross Revenue (AGR) of licensee in the relevant market shall be considered. The entire access market will be the relevant market for determining the market share which will include wireline as well as wireless subscribers. Exchange Data Records (EDR) shall be

used in the calculation of wireline subscribers and Visitor Location Register (VLR) data or equivalent, in the calculation of wireless subscribers for the purpose of computing market share based on subscriber base. The reference date for taking into account EDR/VLR data of equivalent shall be 31st December or 30th June of each year depending on the date of application. The duly audited AGR shall be the basis of computing revenue based market share for operators in the relevant market. The date for duly audited AGR would be 31st March of the preceding year.


- i) If a transferor (acquired) company holds a part of spectrum, which (4.4 MHz/2.5 MHz) has been assigned against the entry fee paid, the transferee (acquiring) company (i.e. resultant merged entity), at the time of merger, shall pay to the Government, the differential between the entry fee and the market determined price of spectrum from the date of approval of such arrangements by the National Company Law Tribunal/Company Judge on a pro-rata basis for the remaining period of validity of the license(s). No separate charge shall be levied for spectrum acquired through auctions conducted from year 2010 onwards. Since auction determined price of the spectrum is valid for a period of one year, thereafter, PLR at State Bank of India rates shall be added to the last auction determined price to arrive at market determined price after a period of one year. In the event of judicial intervention in respect of the demands raised for one time spectrum charges in respect of the spectrum holding beyond 4.4 MHz in GSM band/2.5 MHz in CDMA band before merger in respect of transferee (i.e. acquiring entity) company, a bank guarantee for an amount equal to the demand raised by the department for one time spectrum charge shall be submitted pending final outcome of the court case.
- j) The Spectrum Usage Charge (SUC) as prescribed by the Government from time to time, on the total spectrum holding of the resultant entity shall also be payable.

- k) Consequent upon the implementation of scheme of compromises, arrangements or amalgamation and merger of licenses in a service area thereupon, the total spectrum held by the Resultant entity shall not exceed 25% of the total spectrum assigned for access services and 50% of the spectrum assigned in a given band, by way of auction or otherwise, in the concerned service area. The bands will be as counted for such cap in respective NIAs for auction of spectrum. In respect of 800 MHz band, the ceiling will be 10 MHz. Moreover, the relevant conditions pertaining to auction of that spectrum shall apply. In case of future auctions, the relevant conditions prescribed for such auction shall be applicable. However, in case transferor and transferee company had been allocated one block of 3G spectrum through the auction conducted for 3G/BWA spectrum in 2010, the resultant entity shall also be allowed to retain two blocks of 3G spectrum in respective service areas as a result of compromises, arrangements and amalgamation of the companies and Transfer/Merger of various categories of Telecommunication service licences/authorisation under Unified Licence (UL), being within 50% of spectrum band cap.
- l) If, as a result of merger, the total spectrum held by the relevant entity is beyond the limits prescribed, the excess spectrum must be surrendered within one year of the permission being granted. The applicable Spectrum Usage Charges on the total spectrum holding of the resultant entity shall be levied for such period. If the spectrum beyond prescribed limit is not surrendered by the merged entity within one year, then, separate action in such cases, under the respective licenses / statutory provisions, may be taken by the Government for non surrender of the excess spectrum. However no refund or set off of money paid and/or payable for excess spectrum will be made.
- m) All demands, if any, relating to the licences of merging entities, will have to be cleared by either of the two licensees before issue of the permission for merger/ transfer of licenses/authorisation. This shall be as per demand

raised by the Government/ licensor based on the returns filed by the company notwithstanding any pending legal cases or disputes. An undertaking shall be submitted by the resultant entity to the effect that any demand raised for pre-merger period of transferor or transferee company shall be paid. However, the demands except for one time spectrum charges of transferor and transferee company, stayed by the Court of Law shall be subject to outcome of decision of such litigation. The one time spectrum charge shall be payable as per provisions in para 3(i) above of these guidelines.

- n) If consequent to transfer/merger of licenses in a service area, the Resultant entity becomes a "Significant Market Power" (SMP), then the extant rules & regulations applicable to SMPs would also apply to the Resultant entity. *SMP in respect of access services is as defined in TRAI's "The Telecommunications Interconnect (Reference Interconnect Offer) Regulations, 2002 (2 of 2002)" as amended from time to time.*

4. The dispute resolution shall lie with Telecom Dispute Settlement and Appellate Tribunal as per TRAI Act 1997 as amended from time to time.
5. LICENSOR reserves the right to modify these guidelines or incorporate new guidelines considered necessary in the interest of national security, public interest and for proper conduct of telegraphs.


(R. K. Soni)
Director (AS-I)
For and on behalf of the President of India
Ph. 23036284

Hhvescure-1H

No.: 20-281/2010-AS-I (Vol. VII)
Ministry of Communications
Department of Telecommunications
(Access Services Wing)
Sanchar Bhawan, 20, Ashoka Road, New Delhi -110001

Dated at New Delhi, 30.05.2018

Subject: Amendment in the Guidelines for Transfer/ Merger of various categories of Telecommunication service licenses/ authorisation under Unified License (UL) on compromises, arrangements and amalgamation of the companies dated 20.02.2014

In pursuance to the clause (5) of 'Guidelines for Transfer/ Merger of various categories of Telecommunication service licenses/ authorisation under Unified License (UL) on compromises, arrangements and amalgamation of the companies' (hereinafter, referred to as, the Merger and Acquisition Guidelines, 2014) issued by the Department of Telecommunications (DoT) on 20.02.2014, and revision of the limits of cap for spectrum holding therefor, DoT hereby amends the sub-clause (g) and sub-clause (k) of the clause (3) of the Merger and Acquisition Guidelines, 2014 as detailed below:

Present Clause	Amended Clause
g) Taking into consideration the spectrum cap of 50% in a band for access services, transfer/merger of licences consequent to compromise, arrangements or amalgamation of companies shall be allowed where market share for access services in respective service area of the resultant entity is upto 50%. In case the merger or acquisition or amalgamation proposals results in market share in any service area(s) exceeding 50%, the resultant	g) Transfer/merger of licences consequent to compromise, arrangements or amalgamation of companies shall be allowed where market share for access services in respective service area of the resultant entity is upto 50%. In case the merger or acquisition or amalgamation proposals results in market share in any service area(s) exceeding 50%, the resultant entity should reduce its market share to the limit of 50% within a period

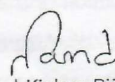
Admd
30/05/18

<p>entity should reduce its market share to the limit of 50% within a period of one year from the date of approval of merger or acquisition or amalgamation by the competent authority. If the resultant entity fails to reduce its market share to the limit of 50% within the specified period of one year, then suitable action shall be initiated by the licensor.</p>	<p>of one year from the date of approval of merger or acquisition or amalgamation by the competent authority. If the resultant entity fails to reduce its market share to the limit of 50% within the specified period of one year, then suitable action shall be initiated by the licensor.</p>
<p>k) Consequent upon the implementation of scheme of compromises, arrangements or amalgamation and merger of licenses in a service area thereupon, the total spectrum held by the Resultant entity shall not exceed 25% of the total spectrum assigned for access services and 50% of the spectrum assigned in a given band, by way of auction or otherwise, in the concerned service area. The bands will be as counted for such cap in respective NIAs for auction of spectrum. In respect of 800 MHz band, the ceiling will be 10 MHz. Moreover, the relevant conditions pertaining to auction of that spectrum shall apply. In case of future auctions, the relevant conditions prescribed for such auction shall be applicable. However, in case transferor and transferee company had been allocated one block of 3G spectrum through the auction conducted for 3GIBWA spectrum in 2010, the resultant entity shall also be allowed to</p>	<p>k) Consequent upon the implementation of scheme of compromises, arrangements or amalgamation and merger of licenses in a service area thereupon, the following conditions shall apply on the Resultant entity with respect to spectrum caps.</p> <p>(i) The total spectrum held by the Resultant entity shall not exceed 35% of the total spectrum assigned for access services, by way of auction or otherwise, in the concerned service area.</p> <p>(ii) The combined spectrum holding in the sub-1 GHz bands (700 MHz, 800 MHz and 900 MHz bands) by the Resultant entity shall not exceed 50% of the total spectrum assigned in the sub-1 GHz bands, by way of auction or otherwise, in the concerned service area.</p> <p>(iii) The principles applied in NIA of August 2016 for calculation of spectrum cap shall continue to be</p>

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<p>retain two blocks of 3G spectrum in respective service areas as a result of compromises, arrangements and amalgamation of the companies and Transfer/Merger of various categories of Telecommunication service licences/ authorisation under Unified Licence (UL), being within 50% of spectrum band cap.</p>	<p>applied while calculating revised overall as well as sub-1 GHz spectrum cap.</p> <p>(iv) In case transferor and transferee company had been allocated one block of 3G spectrum (2100 MHz) through the auction conducted for 3G/BWA spectrum in 2010, the resultant entity shall be allowed to retain two blocks of 3G spectrum (2100 MHz) acquired through the afore-mentioned auction in respective service areas as a result of compromises, arrangements and amalgamation of the companies and Transfer/ Merger of various categories of Telecommunication service licences/ authorisation under Unified Licence (UL).</p>
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2. The afore-mentioned amendments in the Merger and Acquisition Guidelines, 2014 shall come into effect immediately.


(Nand Kishor Bijaraniyan)

ADG (AS-V)

For and on behalf of the President of India

Tel: 011-23036416

To,

Director (IT) for publishing on the web-site of Department of Telecommunications

Annexure - IV

No.: 20-281/2010-AS-I (Vol. VII)
Ministry of Communications
Department of Telecommunications
(Access Services Wing)
Sanchar Bhawan, 20, Ashoka Road, New Delhi- 110001

Date: 24.09.2018

Subject: Amendment in the 'Guidelines for Transfer/Merger of various categories of Telecommunication service licenses/authorisation under Unified License (UL) on compromises, arrangements and amalgamation of the companies' dated 20.02.2014

In pursuance to the clause (5) of the 'Guidelines for Transfer/ Merger of various categories of Telecommunication service licenses/authorisation under Unified License (UL) on compromises, arrangements and amalgamation of the companies' dated 20.02.2014 (hereinafter, referred to as "the Merger and Acquisition Guidelines, 2014"), the Department of Telecommunications, hereby, amends the sub-clause (a) and sub-clause (l) of the clause (3) of the Merger and Acquisition Guidelines, 2014 as detailed below:

Present Clause	Amended Clause
a) The licensor shall be notified for any proposal for compromise, arrangements and amalgamation of companies as filed before the Tribunal or the Company Judge. Further, representation/ objection, if any, by the Licensor on such scheme has to be made and informed to all concerned within 30 days of receipt of such notice.	a) The Licensor shall be notified for any proposal for compromise, arrangements and amalgamation of companies as filed before the Tribunal or the Company Judge. Further, representation/ objection, if any, by the Licensor on such scheme and on the merger/ transfer of licenses/ authorizations under Unified License, have to be made and informed to all concerned within 30 days of receipt of such notice. After the scheme is sanctioned by the Tribunal/ Company Judge, the Licensor will provide its written approval within 30 days of receipt of request for approval to the transfer/ merger of licenses/ authorizations under Unified License.

Signature

<p>1) If, as a result of merger, the total spectrum held by the relevant entity is beyond the limits prescribed, the excess spectrum must be surrendered within one year of the permission being granted. The applicable Spectrum Usage Charges on the total spectrum holding of the resultant entity shall be levied for such period. If the spectrum beyond prescribed limit is not surrendered within one year, then, separate action in such cases, under the respective licenses/statutory provisions, may be taken by the Government for non surrender of the excess spectrum. However, no refund or set off of money paid and/ or payable for excess spectrum will be made.</p>	<p>1) If, as a result of merger, the total spectrum held by the resultant entity is beyond the limits prescribed, the excess spectrum must be surrendered or traded within one year of the permission being granted. The applicable Spectrum Usage Charges on the total spectrum holding of the resultant entity shall be levied for such period. If the spectrum beyond prescribed limit is not surrendered or traded within one year, then, separate action in such cases, under the respective licenses/statutory provisions, may be taken by the Government for non-surrender/ non-trade of the excess spectrum. However, no refund or set off of money paid and/ or payable for excess spectrum will be made.</p>
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2. The afore-mentioned amendments in the Merger and Acquisition Guidelines, 2014 shall come into effect immediately.

Sujit Kumar
29/01/15

(Sujit Kumar)

ADG (AS-V)

For and on behalf of the President of India

Tel: 011-23036416

To,
The Director (IT), DoT-Hq, New Delhi for publishing on the web-site of the Department of Telecommunications

11-01-2018 M(T)

Ref: VNOAI/11/2018

DDG (AS)
DDG (DS)

The Chairman
Telecom Regulatory Authority of India
Mahanagar Doorsanchar Bhawan, Jawahar Lal Nehru Marg,
New Delhi- 110 002.

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Ministry of Telecom
Dept. of Telecom
Central Registry

16 NOV 2018

Date: 16.11.2018

VNOAI

Sub: International Practices to avoid cartelization and to sustain the competition by mandating MVNOs/VNOs to the merged entities refer recent Merger of Two top Operators (Idea-Vodafone) and creation of 3+1 market in India.

Sir/Madam

This in reference to the issue of competition being reduced due to recent Merger and Acquisition of two large operators (IDEA-VODAFONE) forming a new entity with the revenue of about Rupees.80,000/- crores and a market share of (RMS of 43%) leaving behind market leader Bharti Airtel. However, the proposed merger of Vodafone and IDEA has some challenges on the M&A policy front. The RMS of the new entity should not be over 50% of the overall revenue of the market.

In order to sustain the competition in the Indian mobile market we need a balance between the efficient utilization of spectrum on the one hand and ensuring adequate competition on the other. The basic objective of maintaining competition in the market remains relevant. In view of such situations therefore internationally countries have used market share in terms of subscriber base as one of the criteria to classify any operators dominance. Internationally the regulators and licensing authority clear the mergers only on the commitment that the host merged entity will be setting aside 20% of whole-sale capacity for MVNOs with upfront commitment on MBA basis.

We hereby provide you some of the used cases in the European Union where in recent some M&A activity has taken place between prominent operators. The Licensing authorities/ Regulators

mandated for earmarking of 20% of whole-sale capacity for the MVNOs in order to maintain the competition in the market and availability of good competitive products to the end consumers.

Globally – to avoid the above described scenario and to ensure that: –

- Customers continue to enjoy choice and the benefits of a competitive market, despite the consolidation (through mergers and acquisitions) among the TSPs.

While at the same time ensuring that: -

- spectrum is allocated to a few responsible players and not fragmented among several TSPs
- Capex expenditure for the industry as a WHOLE is kept at sustainable levels (ensuring that too many TSP's don't invest and build duplicate infrastructure across the country, far in excess to requirements.

Globally the regulatory authorities mandate in case of M&A that: -

- TSPs which are opting for mergers with other TSPs, or acquiring other TSPs must allocate a fixed proportion of their spectrum capacity (typically 20-40% depending on the 'dominance' of the operator) for the exclusive use of MVNOs.
- Such TSPs are also mandated to compulsorily host MVNOs (maybe 1-5 MVNOs)
- TSPs are mandated to provide 'non-discriminatory access to MVNOs i.e. the TSP must extend all facilities (like coverage, access to 4G networks etc.) to the customers of its hosted MVNOs, that it provides to its own customers.
- In some cases, TSPs purchasing spectrum in auctions are also subject to mandate allowing MVNO access to the TSP's network.

We submit that similar conditions may be introduced in India also. Mandating the large incumbent TSPs in India to support VNOs – will ensure that several VNOs will emerge in India in a short period of time.

With a large number of VNOs, co-existing with the 4 large TSPs which will emerge post the current wave of consolidation – customers will continue to enjoy the benefits of a competitive market viz – lower, more affordable costs, innovative services and choice of multiple brands.

The dominance of the large TSPs –expressed as pricing power in the market, will be curtailed by the availability of a large number of VNOs, who will be 'alternate service providers' for the end consumers.

We submit that such mandates be applied by DoT and TRAI, to TSPs opting for mergers and acquisitions so that the end customers continue to be benefited.

Global Scenario and Case Study

There have been several instances where regulators in other countries have mandated wholesale network access to MVNOs, as a precondition for allowing mergers and acquisitions among the TSPs in that country. Following are some case studies in Europe :-

1. Austria – Acquisition of Orange Austria by Hutchison.

Hutchison was mandated to

- Ensure that up to 30% of its capacity was dedicated to its Wholesale business.
- Allow wholesale access (i.e. make its spectrum available) to up to 16 MVNOs for the next ten years;
- Sign wholesale access agreement with at least one MVNO approved by the European Commission BEFORE completing the acquisition.
- http://europa.eu/rapid/press-release_IP-12-1361_en.htm

2. Ireland – Merger between Hutchison and Telefonica.

Hutchison was mandated to

- Ensure the short-term entry of two mobile virtual network operators (MVNOs), with an option for one of them to become a full mobile network operator later. Hutchison committed to divest five blocks of spectrum in the 900 MHz, 1800 MHz and 2100 MHz bands to either MVNO at a later date.
- Ensure to sell 30% of the merged company's network capacity to two MVNOs in Ireland at fixed payments. (Instead of the usual "pay-as-you-go" wholesale pricing model, typically used between TSPs and MVNOs, where payments are made as per the usage of the MVNO's subscribers.)
- http://europa.eu/rapid/press-release_IP-14-607_en.htm



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3. Germany – Acquisition of E-Plus by Telefonica.

Telefónica submitted commitments to the regulator as below-

- To sell, before the acquisition is completed, up to 30% of the merged company's network capacity to one to three MVNOs in Germany at fixed payments.
- Extend existing wholesale agreements with Telefonica's and E-Plus' partners (i.e. MVNOs and Service Providers) and to offer wholesale 4G services to all interested players in the future.
- Improve its wholesale partners' ability to switch their customers from one MNO to another (i.e. make it easier for its MVNOs to switch to the network of another TSP if they want)
- <http://europa.eu/rapid/press-release MEMO-14-460 en.doc>

It is therefore, submitted that the above case studies in Europe may be considered for the mandate of allocation of capacity by the merged entity in the case of current merged entities like IDEA-VODAFONE merger for the VNOs in India be mandated in order to maintain the efficient usage of spectrum and ensuring the adequate competition in the Indian Telecom Market for the benefit of consumers at large.

As per Global case studies described above the Merged entity will be able to use excess network capacity optimally. The VNOs will no longer face any hurdle or challenge to access the 'merged entities' networks. Customers will benefit from having larger choice of brands, to choose their telecom operator, and also benefit from continued affordable prices and innovative service offerings. The government will benefit from increased revenues through regulatory fees and taxes since the telecom resources of the country will be monetized more efficiently by the merged entity.

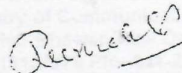
In the absence of any mandate to the current scenario in India wherein there are 3-Private Players and one Govt. entity (BSNL). It is a fact that inspite the issue of UL-VNO policy in 2016 but no UL-VNO was able to start the services as no TSP is ready to provide the capacity to the VNOs. Therefore the chances of cartelization in the industry are more and moreover if the regulators and licensors want that in pursuant to NTP2012 the VNO policy to succeed then mandate to TSP for compulsory allocation to the VNOs be made on priority in order to provide benefits to the end consumers. We can judge this from the international practices where inspite of

such a mature market there is substantial competition due to mandating of the MVNOs to the TSPs and customers are largely reaping its benefits.

We therefore urge the authorities to consider our submissions in the right prospective and suo moto amend the regulations inorder to protect the competition in the market and availability of innovative products to the end consumers.

Best Regards

For Virtual Network Operators Association of India



(Rakesh Kumar Mehta)

Secretary General

Mobile: 9899006599

E-mail: secretary-general@vnoai.com/rk.mehta2051@gmail.com

CC-

✓ 1. Secretary Telecomm
Dept of Telecommunications
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