JOINT PARLIAMENTARY COMMITTEETO EXAMINE MATTERS RELATING TO ALLOCATION AND PRICING OF TELECOM LICENSES AND SPECTRUM FROM 1998-2009

WRITTEN STATEMENT OF SH. A. RAJA, (MINISTER OF COMMUNICATION & INFORMATION TECHNOLOGY 16.05.2007 – 14.11.2010)

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LIST OF ABBREVIATIONS

ADG	Additional Director General
AGR	Adjusted Gross Revenue
ARPU	Average Revenue Per User
AS	Access Services
BSO	Basic Service Operator
BTS	Basic Telephone Service
CAG	Comptroller and Auditor General of India
CBI	Central Bureau of Investigation
CDMA	Code Division Multiple Access
CMTS	Cellular Mobile Telephone Services
COAI	Cellular Operators Association of India
DDG	Deputy Director General
Dir.	Director
DoT	Department of Telecom
EGOM	Empowered Group of Ministers
FCFS	First Come, First Served
FDI	Foreign Direct Investment

FIR	First Information Report
GOM	Group of Ministers
GSM	Global System for Mobile Communications (originally *GroupeSpécial Mobile*)
JPC	Joint Parliamentary Committee
LA (T)	Legal Advisor (Telecom)
LF	Licensing Finance
LOI	Letter of Intent
M(F)	Member (Finance)
M(T)	Member (Technology)
MoC&IT	Minister of Communication and Information Technology
MoF	Ministry of Finance
MoLJ	Ministry of Law and Justice
NTP-94	National Telecom Policy, 1994
NTP-99	New Telecom Policy, 1999
PMO	Prime Minister's Office
S(T)	Secretary (Telecom)
SG	Solicitor General of India
TC	Telecom Commission
TDSAT	Telecom Disputes Settlement and Appellate Tribunal

TEC	Telecom Engineering Commission
TRAI	Telecom Regulatory Authority of India
TTML	Tata Teleservices (Maharashtra) Ltd
TTSL	Tata Tele Services Ltd
UAS	Unified Access Service
UASL	Unified Access Service License
USO	Universal Service Obligation
WLL	Wireless in Local Loop
WPC	Wireless Planning and Coordination

WRITTEN STATEMENT OF SH. A. RAJA TO THE JOINT PARLIAMENTARY COMMITTEE

1. INTRODUCTION

1.1 I was the Minister for Communication and Information Technology during the period 16.05.2007 to 14.11.2010, when I had to resign because of the controversy created by the grant of UAS Licenses and allocation of 2G spectrum by the DoT in the years 2008-09.

1.2 This JPC has been constituted to examine all matters relating to allocation and pricing of Telecom Licenses and Spectrum from 1998-2009. Despite my repeated requests,[1] the Chairman of the JPC has declined to permit me to depose before the Committee and set out the entire sequence of events and roles of various individuals in relation to the grant of UAS Licenses and allocation of 2G spectrum. I am therefore submitting this Written Statement to the JPC.

1.3 Since I do not have access to the records with the JPC, I have mostly referred to the records as available in the Special Court dealing with the matter. In case the JPC requires any particular document, I will be happy to provide the same.

[1] Vide letters dated 22.02.2013, 13.03.2013, 18.03.2013 and 09.04.2013.

1.4 The controversy in relation to the grant of UAS Licenses and allocation of 2G spectrum became sensational in the year 2010 essentially because of allegations that I, in conspiracy with other DoT officials and some private companies, granted UAS Licenses and 2G spectrum at a throwaway price thereby causing huge losses to the exchequer and windfall gains to the licensee companies. It was further alleged that I altered the procedure for grant of licenses and allocation of spectrum to benefit the companies I was conspiring with.

1.5 The controversy was looked into by the Supreme Court, the CAG and by this JPC. *None of these three bodies have bothered to give me a hearing*. This is truly unfortunate because an examination of the facts, that I could have presented, would demonstrate that I had throughout acted in public interest. Neither the policy nor the procedure was altered to benefit any applicant – rather, it was made more stringent and transparent than the past. Under my tenure, teledensity targets were reached ahead of time and tariffs fell to perhaps the lowest in the world. At the same time, Government revenue from telecom increased to become the largest non-tax revenue of the Government. It was a win-win situation for the Government, the consumer and the telecom industry.

1.6 Today, the telecom growth story is over. Misguided judicial intervention forced the government to take unsustainable policy decisions. Competition in the sector has been destroyed. Investor

confidence in the sector is at an all-time low. The failed spectrum auction has made a joke of the 'loss to the exchequer' theory. It is in these circumstances that the Government must introspect on its actions of the last two years in relation to policy formulation, defending its policy before various fora, and launching prosecutions against various persons including myself.

1.7 Speaking of prosecutions, I must note with a sense of happiness and pride in my honesty that the combined investigation by the CBI, ED and Income Tax Department could not identify a single rupee of any bribe or gratification received by me or even my extended family for the so called benefits given by me to the private companies.I am confident that I will establish my innocence before the competent court and that this JPC will also hold my actions to be fully justified.

1.8 In this Written Statement, I first present the situation that prevailed in the DoT in May 2007, when I was appointed as the MoC&IT and the context in which the recommendations of the TRAI were received and considered by the DoT. I then discuss the various actions of the DoT in relation to the grant of licenses in 2008 and allocation of spectrum over a period of time in 2008-09, under the following heads: (i) fixation of entry fee; (ii) FCFS policy; (iii) fixation of cut-off date; (iv) dual technology; and (v) eligibility of applicants. Much of the controversy has centred around these five issues.

2. SITUATION IN MAY 2007

2.9 I took charge as MoC&IT on 16.05.2007. The state of affairs prevailing at that time was as under:

(i) The DoTwas implementing the UASL regime based on the NTP-99, Cabinet decision of 2003 and UASL Guidelines 2003 and 2005.

(ii) Based on the above, 51 UAS licenses had been issued by the DoT under my predecessors in the period 2003 to 2007. (Note: the last such license was given on 20.03.2007, less than two months before I took charge.)

(iii) Several of those licensees, particularly those who had been issued licenses in December 2006 and thereafter, were awaiting allotment of start-up spectrum. Other licensees were pressing for allotment of additional spectrum.

(iv) The UASL Guidelines were not being followed in spirit. To take one example: there is no power in the Guidelines to relax any eligibility condition or extend the time to comply with eligibility conditions. But this had routinely been done on a discretionary basis and not a single application had been rejected for failure to comply with eligibility conditions on the date of application. This is contrary to the settled principle of

law that a person must be eligible on the date on which he applies.

(v) The DoT was apparently following the FCFS system, but this was not provided in the UASL Guidelines. It had no statutory basis either. It was also not defined anywhere.

(vi) There was no transparency about spectrum availability. Spectrum hoarding was taking place, particularly in the GSM technology. The sector was dominated by the COAI, whose objective was to grab as much spectrum as possible and prevent competition. In fact, after I took change, there was immense pressure on me to continue the same policy. This was also disclosed to the Hon'ble PM by me in November 2007.

(vii) Teledensity was still quite low: in March 2007, rural teledensity was about 6% and total teledensity was about 18%. Call charges were hovering at an average of about Re. 1 per minute for local calls. ARPU for GSM service was Rs. 298 per month.

(viii) In short, the fundamental objective of NTP-99 – widespread and affordable telecommunication service – was not being achieved.

2.10 On 13.04.2007, prior to my taking charge, a statutory reference had been sent by the DoT to the TRAI under s. 11 of the TRAI Act

seeking its recommendations inter alia on whether there should be a cap on the number of service providers in a service area and on the terms and conditions of UAS licenses.[2]

2.11 In view of the above reference, processing of existing UASL applications/ new UASL applications had been stopped awaiting receipt of TRAI recommendations and decisions taken thereon by the Government.[3]

2.12 After I took charge, the recommendations of TRAI were received on 29.08.2007.[4] In brief, the recommendations of TRAI were that:

(i) no cap should be imposed on the number of licensees/ service providers in a service area;

(ii) there should be no auction of 2G spectrum (800, 900 and 1800 MHz bands) but spectrum in other bands should be auctioned;

(iii) there should be no change in the entry fee payable by new licensees and the existing fee regime should be continued; and

(iv) a licensee using one technology may be permitted, on request, usage of alternative technology and thus allocation of dual spectrum

[2]D-5 at 2/C.
[3]Note dated 26.04.2007 found in D-43 at 10/N.
[4]D-596.

2.13 The above recommendations were accepted by the DoT. The subsequent actions of the DoT in granting Licenses and allocating spectrum were fully consistent with NTP-99, UASL Guidelines and TRAI Recommendations.

3. FIXATION OF ENTRY FEE

3.14 The singular factor responsible for the sensationalisation of this case was the magnitude of the so-called loss caused to the national exchequer by the grant of UAS Licenses and allocation of 2G spectrum. Fantastic figures have been thrown around, ranging from 1.76 lakh crore (claimed by the CAG); 22,000 crore (claimed by the CBI in its FIR); and 30,984.55 crore (claimed by the CBI in its chargesheet). All these figures have been claimed to have been arrived at on the basis of entirely different theories such as 3G auction, foreign investment attracted by the licensees and growth in AGR, which are inconsistent with each other and have no legal basis.

3.15 All these claims are utterly misconceived. They are completely contrary to the stated policy of the Government of India and TRAI and also to the factual position, which is that far from there being any loss, there has actually been a situation where all stakeholders – government, consumers and operators – have benefited.

3.16 This issue needs to be considered in light of the policy prescriptions of NTP-99, the objectives of the telecom sector identified by the Five

Year Plans and the recommendations of TRAI made from time to time, and actual experience of operations in the sector.

A. Introduction of private participation in telecom sector

3.17 The telecommunications service sector historically operated in a monopolistic environment with the sovereign Government having exclusive privilege to work, maintain and operate telegraphs. Consequently, all resources were also maintained and operated by the departments of the government. This practice had been the tradition across the world. With the growth of the world economy, this sector was liberalised over a period of time in various parts of the world. Each country, depending upon its economic conditions, opted for the expansion of telecommunications service by way of participation of private sector so as to provide affordable service to its people.

3.18 NTP-94 for the first time opened up the telecom service sector for private sector participation. After the liberalisation of the telecom sector for access services, with the coming of private operators, the field was broadly divided into fixed line providers (basic services) and mobile operators. While basic service operators did not require any earmarking of major chunks of spectrum (except for WLL services in CDMAtechnology in 800 MHz band), CMTS service providers did require specific earmarking of spectrum in 900 and 1800 MHz bands, also called GSM spectrum. This spectrum for CDMA and GSM technology is collectively known as “2G spectrum”.

3.19 The licensing of cellular services was done in phases. In the first phase, in November 1994, two CMTS licences were awarded in each of the four Metro cities of Delhi, Mumbai, Kolkata and Chennai. Licenses were awarded to operators based on their satisfying a predetermined set of criteria. The licence fee payable by each operator was also predetermined – that is, there was no bidding process. Spectrum charges and royalty for use of spectrum were payable separately.

3.20 In the second phase, in December 1995, two CMTS Licences were awarded in 18 telecom circles based on a bidding process. The bids were for the licence fee amount, which was spread over a 10-year licence period. The spectrum allocation was assured and there were no separate upfront charges for spectrum. However, a separate wireless operating licence was to be obtained and annual spectrum usages charges were payable separately at applicable rates. The successful operators had a duopoly – the understanding was that for the duration of their license, there would be no other operators in their circles. However, the right of the Government was reserved to operate the services as third operator.

3.21 Tenders were also invited in January 1995 for award of BSO licenses again based on bidding for license fee payable over a period of 15 years. Basic Service licenses were granted to five companies with an

effective date as September 1997 and to one more company with effective date March 1998.

3.22 Within a few years, it was realised by all concerned that the service providers had made very high bids and huge investments and consequently the cost of their operations, being passed on to the consumers was very high. The high call charges during the initial era of privatisation are well known. As a result, the business did not develop to the expected levels. Commitments for high license fee could not be honoured because of inadequate revenue generation.

3.23 Thus the licensing framework of NTP 1994 failed to achieve its objectives because it concentrated on maximising revenue stream and not on increased teledensity, growth of the telecom sector and the advantage of technological advances being passed on to the consumers. Large capital resources had been invested by the private licensees in the telecom sector and their non-viability was affecting the domestic and foreign financial institutions funding the projects. This in turn was affecting the viability of the telecom service industry itself. It was evident that some policy-level changes were required.

B. Creation of TRAI

3.24 In 1997, the Telecom Regulatory Authority of India Act was enacted, which created the Telecom Regulatory Authority of India ("TRAI").

The functions of TRAI, as specified by Section 11 of the Act (as amended in 2000) are as follows:

> *(1) Notwithstanding anything contained in the Indian Telegraph Act,1885, the functions of the Authority shall be to*
>
> *(a) make recommendations, either suo motu or on a request from the licensor, on the following matters, namely:-*
>
> *(i) need and timing for introduction of new service provider;*
>
> *(ii) terms and conditions of license to a service provider;*
>
> * * *
>
> *Provided further that the Central Government shall seek the recommendations of the Authority in respect of matters specified in sub-clauses (i) and (ii) of clause (a) of this sub-section in respect of new licence to be issued to a service provider and the Authority shall forward its recommendations within a period of sixty days from the date on which that Government sought the recommendations.*

3.25 At this stage, one must take note of another body called the Telecom Commission. The Telecom Commission is an executive body within the DoT set up by a Cabinet Resolution of 11.04.1989.[5] It is headed by the Secretary (T) and has various full-time and part-time members.

[5]D-5 Vol. 2 at 64.

The Telecom Commission was to be the policy formulation wing of the DoT. At this time, the telecom sector was a monopoly.

3.26 After opening up of the telecom sector, the entire structure of the DoT changed. It was no longer a service provider. Rather, its role changed to that of licensor. Tariff determination was supposed to be done by the telecom companies themselves, as per market conditions. The regulator of the sector was TRAI, with TDSAT being the appellate forum. Thus TRAI would make recommendations on policy issues, which would then be considered by the DoT and appropriate decision would be taken.

C. Introduction of NTP-99

3.27 As stated above, the licensing framework of NTP 1994 failed to achieve its objectives. Therefore on 20.11.1998, a High Level 'Group on Telecom' was constituted by the Government to make recommendations on following:

(i) Proposed new telecom policy;

(ii) Issues relating to existing licensees of basic and cellular services and suggest appropriate remedial measures within the frame work of the new telecom policy;

(iii) Issues relating to the TRAI.

3.28 The recommendations of the Group on Telecom on changes in the telecom policy and to resolve the problems of the existing operators were considered by the Union Cabinet who approved NTP-99 which is effective from 01.04.1999.[6]

3.29 The objective of NTP-99 is to facilitate investments and competition in the telecom sector. Its thrust is to create a modern and efficient telecommunications infrastructure taking into account the convergence of IT, media, telecom and consumer electronics and thereby propel India into becoming an IT superpower. Resolving the problems of existing licensees was also envisaged under the policy; it was also in the larger public interest. NTP-99 is the bedrock regarding issuance of licence and allocation of spectrum for achieving the objective of availability of affordable and effective communications for the citizens which is at the core of the vision and goal of the telecom policy.

3.30 NTP-99 introduced the concept of revenue sharing in the telecom sector. Three kinds of fees/charges were contemplated by NTP-99:

(i) Entry Fee: this is a one-time fee paid at the stage of obtaining the license.

(ii) License Fee: this is a fee calculated as a percentage of the AGR of the licensee, payable quarterly.

[6]D-586.

(iii) Spectrum Usage Charge: this is also a fee calculated as a percentage of the AGR of the licensee, payable quarterly.

3.31 NTP 1999 at paragraph 3.1.1 provided as follows:

> *The entry of more operators in a service area shall be based on the recommendations of the TRAI who will review this as required, and no later than every two years.*
>
> *CMSP operators would be required to pay a one-time entry fee. The basis for determining the entry fee and the basis for selection of additional operators would be recommended by the TRAI. Apart from the one time entry fee, CMSP operators would also be required to pay licence fee based on a revenue share. It is proposed that the appropriate level of entry fee and percentage of revenue share arrangement for different service areas would be recommended by TRAI in a time-bound manner, keeping in view the objectives of the New Telecom Policy.*

3.32 Every telecom operator would be interested in maximising its revenue. The way it would do this is by adding more subscribers. This would lead to increase in teledensity, which was the fundamental objective of NTP-99. As teledensity increases, the AGR of the operators increases. Consequently, the revenue of the Government in the form of License Fee and Spectrum Fee also increases. At the same time, keeping the initial Entry Fee low ensures greater participation in the market, thereby lowering tariffs, and achieving the other objective of NTP-99. Thus, it was planned to have effective and affordable telecommunication in India.

D. Telecom Policy Objectives

3.33 In 2002, the 10th Five Year Plan for the period 2002-07 was announced. It may be noted that the Five Year Plans are prepared by the Planning Commission and approved by the National Development Council headed by the Hon'ble Prime Minister. It contained several initiatives/ action points for the telecom sector. The important ones among these are as follows:

(i) The telecom sector needs to be treated as an infrastructure sector for the next decade.

(ii) Government's broad policy of taxes and regulation for the telecom sector has to be promotional in nature.

(iii) Revenue generation should not be a major determinant of the macro policy governing the sector.

(iv) The Guiding Principles of Spectrum Policy under 10th plan are that "Spectrum policy needs to be promotional in nature; revenue considerations playing a secondary role."

(v) Keeping in line with the policy adopted by most of the progressive administrations in the world, the licence fee needs to be aligned to the cost of regulation and administration of USO.

(vi) Specific planning would be required to prepare the grounds for a multi-operator system to develop and the subscriber base to expand without impediments.

(vii) The incidence of licence fees in the form revenue share and spectrum charges has to be guided by this principle. As part of the promotional policy, there is need for the TRAI to work out afresh the revenue share and USO regime.

3.34 In the 11th Five Year Plan (released on 25th June 2008) also the Government continues to treat Telecom as infrastructure sector. Some of the promotional policies of the Government in the Telecom Sector over a period of time as acknowledged in the Eleventh Plan document for giving a boost to the sector, include the following:

(i) National Frequency Allocation Policy 2002 was evolved.

(ii) Guidelines for Unified Access Service licence regime were issued on 11th November 2003.

(iii) FDI ceiling has been raised to 74% for various telecom services.

(iv) Access service provider can provide Internet telephony, Internet services, and broadband services. They can use the network of NLD/ILD service.

(v) Prior experience in telecom sector is no more a prerequisite for grant of telecom service licenses.

(vi) Annual license fee for NLD, ILD licences has been reduced from 15% to 6% of Adjusted Gross Revenue (AGR) with effect from 1 January 2006.

(vii) Delicensing of 2.40–2.4835 GHz frequency band for indoor and outdoor use and 5.15–5.13 GHZ frequency band for indoor use.

3.35 In July 1999, the Central Government also decided in favour of migration of existing licensees to the revenue share regime of NTP 1999. Accordingly, a migration package for migration from fixed license fee to revenue share regime was offered to existing licensees, effective from 01.08.1999. Under the migration package existing licensees had to forego their duopoly rights and additional operators were inducted in a multi-player regime. All the existing basic and cellular operators migrated to the revenue sharing regime.The Central Government PSUs viz. MTNL and BSNL were also given CMTS Licences in 1999-2000 as the third CMTS operator.

3.36 In September/ October 2001, based on TRAI's recommendations and approval of the Government, 17 new Licenses were issued to private companies as the fourth cellular operators (one each in 4 Metro Cities and rest in 13 Telecom Circles). These licences were awarded based on bidding for upfront entry fee. The allotment of spectrum was

assured under the licence and no upfront fee was charged for the spectrum. Annual licence fee and spectrum charges were payable separately at prescribed percentage of AGR.

E. TRAI Recommendation of 2003

3.37 It may be noted that initially, two kinds of licenses were being awarded – basic (including CDMA) and cellular licenses (with GSM spectrum). This led to several disputes inter se between licensees and also disputes between the licensees and the licensor on various issues as to whether a particular act was within the terms of the license or not.

3.38 TRAI in its recommendation dated 27.10.2003 on 'Unified Licensing Regime'[7] recommended that considering the vision of Government of India through various policies (e.g., NTP 1994, NTP1999, Convergence Bill), technological development, market trends, international trends, the need to accelerate growth of telephone density, public interest and for the proper conduct of the Service/telegraphs, "Unified Licensing" regime should be initiated for all services covering all geographical areas using any technology within six months. As a preparatory step, Unified Access Service License ("UASL") will be implemented for access services in each circle.

[7]D-595

3.39 With regards to entry fee for UASL regime, TRAI deliberated on various options in the recommendations dated 27.10.2003. These various options including the option of 'Auctioning' for entry fee of UAS licence were discussed in its report. TRAI recommended that for fixing the entry fee for migrating to UASL Regime, the entry fee for fourth cellular operators shall be the entry fee for migration to UASL Regime.

3.40 Paragraphs 7.15 to 7.19 of the TRAI recommendation dated 27.10.2003 are extremely relevant and are reproduced below:

> *7.15 To decide the benchmark for the entry fee for Unified Access Licensing Regime three alternatives could be considered which are discussed in the subsequent paragraphs.*
>
> *7.16 The first alternative could be inviting bids from existing operators as well as from the new prospective Unified Access Licensing Operators. This is possible since additional spectrum is now being made available by Ministry of Defence and the existing contractualcommitments to existing cellular and WLL players can easily be met, leaving out a balance for more players. The benchmarks fixed through this process will be upto-date based upon the current market situation andwill be done through a transparent process. The problems associated with the bidding process are as follows:*
>
> > *i) The fixing of the benchmarks through a bidding process could be more time consuming and hence delay the implementation of Unified Licensing.*
> >
> > *ii) While inviting bids the question will be whether it should be done with spectrum or without any spectrum,*

i.e. only for migration to Unified Licensing Regime. If the bids are invited without spectrum, the new prospective Unified Licensing operators will not be able to roll out their wireless services in the absence of spectrum. If the separate bids are invited for Unified Licensing and spectrum, the bidding process will become even more time consuming and complicated. In case additional spectrum is given for Unified Licensing operators, the existing operators, while migrating to Unified Access Licensing Regime, may also demand additional spectrum which may not be available immediately. This will stall migration to the Unified Access Licensing Regime.

iii) Unless the revised spectrum pricing and allocations guidelines are finalised, there is no guarantee that the spectrum would be made available to existing operators willing to migrate to the Unified Licensing Regime.

Considering all these problems, the Authority is ofthe opinion that the bidding process for fixing up of the benchmarks for migration to Unified Licensing Regime may not be preferable.

7.17 The second alternative could be that basic service operators willing to migrate to Unified Access Licensing Regime should pay the difference in entryfee of average of 1st and 2nd cellular operators and entry fee paid by Basic Service Operators. This argument is not sustainable due to the following reasons:

i) CMSPs in pre NTP'99 era before migration did not pay any license fee (revenue share).

ii) 1st and 2nd CMSPs got the advantage of early entry to the market in a duopoly regime.

Some of the operators have said that they are incurring losses. In this business losses are incurred initially, e.g., Orange, one of the largest mobile operators in U.K., took almost seven years to break even. Even in India some of the Service providers have started making profits. A number of studies have shown that even at present tariff levels the addition of new subscribers is profitable.

7.18 The 3rd alternative is that the existing entry fee of the fourth Cellular Operator would be the entry feein the new Unified Access Licensing Regime. BSOs would pay the difference of the fourth CMSP's existing entry fee and the entry fee paid by them. It may be recalled that, even in the past, entry to cellular and basic services has been on fixed fee basis, e.g., for metros in the case of cellular and for the second BSO.

7.19 It is recommended that the 3rd alternative asmentioned in para-7.18 above may be accepted for fixing the entry fee for migration to Unified Access Licensing regime for Basic and Cellular services atthe circle level.

3.41 Thus, TRAI considered and recommended against the auctioning of spectrum. One paragraph of these Recommendations has constantly been read out of context. In para 7.39, TRAI said "*[Government] may introduce additional players through a multi-stage bidding process as was followed for 4th cellular operator*". This has been erroneously construed by various agencies including the CAG to argue that TRAI had recommended auction process. However, a proper reading of the

recommendations reveals that this was in the context of the then existing licensing regime, i.e. pre-UASL regime. TRAI never recommended auction in the UASL regime. This has been clarified by TRAI itself in its letter dated 20.08.2011:

> *[T]hroughout its recommendations from October 2003 till August 2007, TRAI never recommended auction methodology. (TRAI's recommendation in Para 7.39 of the October 2003 recommendations regarding multi-stage bidding process was in the context of the then existing licensing regime.) UAS Licensing regime was introduced in November 2003. Its recommendations always kept in view the need for growth of the Telecom sector including in the semi urban and the rural areas, the need for maintaining the level playing field against the backdrop of entry of new players from time to time and the need to ensure that the prices of telecom services were affordable by the consumers. TRAI repeatedly held the view that Telecom services and spectrum should not be treated as a source of revenue for the government.*
>
> *(Emphasis in the original)*

3.42 In 2003, a GOM on telecom matters was constituted under the chairmanship of the Finance Minister with the approval of the Hon'ble Prime Minister vide Cabinet Secretariat Memo dated 10.09.2003. The Terms of Reference of GOM included the issue "to chart the course to a Universal License".The TRAI recommendations were placed before GOM on 30.10.2003. The recommendations of GOM were considered by the Cabinet on 31.10.2003.[8]

[8]D-591 at 75-I/C.

F. Cabinet Decision of 2003

3.43 As per the Cabinet decision dated 31.10.2003, the recommendations of GOM on Telecom matters chaired by the then Hon'ble Finance Minister, inter-alia, on issues as quoted below were approved:[9]

> *The Department of Telecom and Ministry of Finance would discuss and finalise spectrum pricing formula, which will include incentive for efficient use of spectrum as well as disincentive for sub-optimal usages. [para 2.1.2 (3)]*
>
> *The scope of NTP-99 may be enhanced to provide for licensing of Unified Access Services for basic and cellular licence services and unified Licensing comprising all telecom services. Department of Telecommunications may be authorised to issue necessary addendum to NTP-99 to this effect. [para 2.4.6 (i)]*
>
> *The recommendations of TRAI with regard to implementation of the Unified Access Licensing Regime for basic and cellular services may be accepted.*
>
> *DoT may be authorised to finalise the details of implementation with the approval of the Minister of Communications & IT in this regard including the calculation of the entry fee depending on the date of payment based on the principle given by TRAI in its recommendations. [para 2.4.6 (ii)]*

3.44 It is important to note that the Cabinet decision of 2003 made a distinction between entry fee and spectrum charges. Entry fee was to be decided by the DoT based on TRAI recommendations. Spectrum pricing (i.e. charges for usage of spectrum including incentives and

[9]D-591 at 77/C.

disincentives) was to be finalised by DoT in consultation with MoF. This distinction is extremely important.

3.45 It must be noted that in 2006, spectrum pricing was taken out of the Terms of Reference of the GOM at the request of the then MoC&IT dated 16.11.2006, and agreed to by the Hon'ble PM on 26.11.2006.[10] This appears to be impermissible in view of the earlier Cabinet decision. In fact, under my tenure, spectrum pricing was in fact discussed several times with MoF and an agreed position was communicated to the Hon'ble PM.

3.46 Based on the Cabinet decision of 2003, an addendum to NTP 1999 was notified on 11.11.2003 and the UASL Guidelines of 2003 were issued.[11] The guidelines, inter-alia, others stipulate that "With the issue of these Guidelines, all applications for new Access Services Licence shall be in the category ofUnified Access Services Licence."

G. TRAI Recommendations of 2005

3.47 Thereafter, two important sets of recommendations were made by TRAI on 13.01.2005 and 13.05.2005, which are explained below.

3.48 TRAI in its recommendations on 'Unified Licensing' dated 13.01.2005 envisaged convergence of licences for various Telecom services and Broadcasting services and progressively moving away

[10]D-363 at p. 174.
[11]D-586.

from licensing regime to a registration regime. The recommendations of TRAI on Spectrum Pricing & License fee were as follows:

9.0 Spectrum pricing:

9.1 In the existing policy, spectrum charges have two components - (i) one time spectrum charges which are paid as part of one time entry fee by the service providers and (ii) annual spectrum charges which are paid in the form of percentage of AGR. The spectrum related issues including spectrum pricing and its allocation are already under a consultation process and depending upon the comments received during consultation process and TRAI's own analysis the spectrum recommendations will be finalized. In the interim period till spectrum guidelines are issued by the Government of India based on TRAI's recommendations, the existing spectrum pricing and allocation procedures will continue.

10.0. License Fee: -

10.1 TRAI is of the view that the telecom services should not be treated as a source of revenue for the Government. Imposing lower license fee on the service providers would encourage higher growth, further tariff reduction and increased service provider revenues. With increased growth, it would be a win-win situation for the industry and the Government.

3.49 Again the TRAI in its recommendations dated 13.05.2005 on'Spectrum Related Issues' gave following recommendations on theissue of spectrum pricing:

(i) As in the existing framework the spectrum charges should continue to have two components: one time spectrum charge and annual spectrum charge. (Para 4.1)

(ii) In UASL, the one-time spectrum charges and entry fee for license have not been separated. In other words, the entry fee includes one-time spectrum charge also. (Para 4.3.3)

(iii) Existing method of annual spectrum charge in terms of percentage of revenue share should continue (Para 4.5.1).

(iv) Keeping in view the objectives of growth, affordability, penetration of mobile services in semi-urban and rural areas and also the aspect of spectrum charges, Authority further recommends that existing ceiling on annual spectrum chargesof 6% AGR should be brought down to 4% of AGR. (Para 4.5.2)

It is relevant to note that in neither of these recommendations of 2005, did the TRAI suggest auction of 2G spectrum. It maintained its position that telecom sector should not be seen as a source of revenue to the Government.

H. UASL Guidelines of 2005

3.50 After enhancement of FDI in telecom sector from 49% to 74%, DoT on 14.12.2005 issued revised UASL Guidelines.[12] These guidelines, inter-alia stipulate that:

(i) Licences shall be issued without any restriction on the number of entrants for provision of Unified Access Services in a Service Area.

(ii) The applicant will be required to pay one time non-refundable Entry, annual Licence fee @ 10/8/6% of Adjusted Gross Revenue (AGR) for category A/B/C service areas respectively and spectrum charges on revenue share basis as specified by WPC wing.

3.51 The three-pronged fee regime (entry fee, license fee and spectrum charge) is also exactly consistent with the terms of NTP-99 and the Cabinet decision of 2003. The guidelines issued for UAS Licences on 14.12.2005 are the extant guidelines for grant of new UAS licence. All UAS licences issued in year 2008 were also governed by these detailed guidelines.

[12]D-586.

I. TRAI Recommendations of 2007

3.52 Accordingly on 13.4.2007 a reference was made to TRAI stating that the policy on Unified Access Service Licensing was finalized in November 2003 based on its earlier recommendations. As on date, 159 licenses had been issued for providing Access Services (CMTS/UASL/Basic) in the country with 5-8 Access Service providers in each service area. The Access Service providers were mostly providing services using the wireless technology (CDMA/GSM). As per the present policy, any Indian company fulfilling the eligibility criteria can apply for UAS license. This was increasing the demand on spectrum in a substantial manner. Therefore, TRAI was requested to furnish their recommendations on the issue of limiting the number of access providers in each service area and review of certain terms and conditions in the access provider license.

3.53 Thereafter, on 28.08.2007, the TRAI issued its recommendations on "Review of license terms and conditions and capping of number of access providers" and recommended that there should not be any cap on the number of access providers in a service area.[13]

[13]D-596

3.54 In these recommendations, the TRAI again revisited the issue of pricing of 2G spectrum, and its recommendations in this regard are reproduced below:

> *2.71 Spectrum pricing aims to ensure that the value of the spectrum is reflected in the fees that licensees pay for its access. There are generally three ways in which this is done:*
>
> - *Administrative Incentive Pricing which attempts to calculate the value of the spectrum by assessing the cost associated either with the user employing an alternative solution, or its opportunity cost foregone by denying access to an alternative user.*
>
> - *Beauty Parades or Comparative Selection which fixes the price of the spectrum to ensure optimum utilization by awarding spectrum to the user(s) who score highest against a group of pre-set criteria (such as rural coverage or the fulfilment of roll-out obligation).*
>
> - *Spectrum Auction is fully market-based technique whereby spectrum is awarded to the highest bidder (or some combination of highest priced bids).*
>
> *2.72 In each case, the aim is to change spectrum users' behaviour towards the use of the spectrum, to ensure that the maximum (social, economic or technical) benefit is accrued. However, in the present context, none of these above techniques of spectrum pricing are being considered for reasons stated in the ensuing paragraphs.*
>
> *2.73 The allocation of spectrum is after the payment of entry fee and grant of license. The entry fee as it exists today is, in fact, a result of the price discovered through a markets based*

mechanism applicable for the grant of license to the 4th cellular operator. In today's dynamism and unprecedented growth of telecom sector, the entry fee determined then is also not the realistic price for obtaining a license. Perhaps, it needs to be reassessed through a market mechanism. On the other hand spectrum usage charge is in the form of a royalty which is linked to the revenue earned by the operators and to that extent it captures the economic value of the spectrum that is used. Some stakeholders have viewed the charges/fee as a hybrid model of extracting economic rent for the acquisition and also meet the criterion of efficiency in the utilization of this scarce resource. The Authority in the context of 800, 900 and 1800 MHz is conscious of the legacy i.e. prevailing practice and the overriding consideration of level playing field. Though the dual charge in present form does not reflect the present value of spectrum it needed to be continued for treating already specified bands for 2G services i.e. 800, 900 and 1800 MHz. It is in this background that the Authority is not recommending the standard options pricing of spectrum, however, it has elsewhere in the recommendation made a strong case for adopting auction procedure in the allocationof all other spectrum bands except 800, 900 and 1800 MHz.

2.78 As far as a new entrant is concerned, the question arises whether there is any need for change in the pricing methodology for allocation of spectrum in the 800, 900 and 1800 MHz bands. Keeping in view the objective of growth, affordability, penetration of wireless services in semi-urban and rural areas, the Authority is not in favour of changing the spectrum fee regime for a new entrant. Opportunity for equal competition has always been one of the prime principles of the Authority in suggesting a regulatory framework in telecom services. Any differential treatment to a new entrant vis-à-vis incumbents in the wireless sector will go against the principle of level playing field. This is specific and restricted to 2G bands

only i.e. 800, 900 and 1800 MHz. This approach assumes more significance particularly in the context where subscriber acquisition cost for a new entrant is likely to be much higher than for the incumbent wireless operators.

2.79 In the case of spectrum in bands other than 800, 900 and 1800 MHz i.e. bands that are yet to be allocated, the Authority examined various possible approaches for pricing and has come to the conclusion that it would be appropriate in future for a market based price discovery systems. In response to the consultation paper, a number of stakeholders have also strongly recommended that the allocation of spectrum should be immediately de-linked from the license and the future allocation should be based on auction. The Authority in its recommendation on "Allocation and pricing of spectrum for 3G and broadband wireless access services" has also favoured auction methodology for allocation of spectrum for 3G and BWA services. It is therefore recommended that in future all spectrum excluding the spectrum in 800, 900 and 1800 bands should be auctioned so as to ensure efficient utilization of this scarce resource. In the 2G bands (800 MHz/900 MHz/1800 MHz), the allocation through auction may not be possible as the service providers were allocated spectrum at different times of their license and the amount of spectrum with them varies from 2X4.4 MHz to 2X10 MHz for GSM technology and 2X2.5 MHz to 2X5 MHz in CDMA technology. Therefore, to decide the cut off after which the spectrum is auctioned will be difficult and might raise the issue of level playing field.

3.55 Both the CAG and subsequently the CBI have selectively relied only on a few lines of the TRAI recommendations, particularly the first portion of para 2.73 extracted above. But the TRAI itself has recommended in the same paragraph that it was not recommending auction of spectrum or revision of entry fee for new entrants. What

has not been appreciated is that entry fee is not the only source of revenue to the Government. It is only one component out of three, and the other two components – license fee and spectrum charge – have an inbuilt system of indexation in them, because they will increase as AGR increases.

3.56 It is evident from the above extracts that insofar as 2G spectrum is concerned, the TRAI's recommendation was to continue the existing practice of allotment of spectrum rather than auction. TRAI also specifically considered whether there should be auction of spectrum/ revision of entry fee for new entrants and recommended against it on the basis of the principle of level playing field.

3.57 The above recommendations of TRAI were received by DoT on 29.8.2007. On 10.10.2007, the Telecom Commission unanimously approved the said recommendations.[14]It is relevant to note that one of the Members of the Telecom Commission is Member (Finance). The M(F) participated in the TC meeting of 10.10.2007 and was part of the unanimous decisions taken in that meeting. No issue or dissent was raised on the point of entry fee or any other point.

J. Role of Ministry of Finance & Hon'ble PM

3.58 The records showing the interaction between the DoT, MoF and PMO also make it clear that there was unanimity on the point that start-up

[14]D-5 at 7-18/N.

spectrum would not be auctioned and there would be no revision of entry fee for new operators.

3.59 On 22.11.2007, the then Finance Secretary wrote to the DoT asking for the basis on which licenses were being issued on the basis of entry fee determined in 2001.[15] This issue was then discussed in the DoT in detail by the officers.

3.60 On 27.11.2007, a detailed note was prepared in the DoT.[16] It concluded by saying:

> *The Government has taken a conscious decision not to bring changes in the existing policy and not to invite bids for entry fee for grant of UAS licenses as all the pending applications are in terms of existing UASL guidelines. If such changes are made at this stage then there may be litigations. Moreover, the cost of offering the service, if increased, may consequently lead to increased tariff and low tele-density, thereby defeating the government objective of achieving 500 million telephone connections by 2010.*

3.61 The matter was then discussed by the Secretary (T) with the Member (F) and a reply was sent to the Finance Secretary on 29.11.2007 stating:

> *The entry fee was finalized for UAS regime in 2003 based on the decision of the Cabinet. It was decided to keep the entry fee for the UAS licence the same as the entry fee of the fourth cellular operator, which was based on a bidding process in 2001.*

[15] D-9 at 1/C
[16] D-9 at 1-3/N

> *The dual technology licences were issued based on TRAI recommendations of August, 2007. TRAI, in its recommendations dated 28th August, 2007, has not recommended any changes in entry fee/annual license fee and hence no changes were considered in the existing policy*[17]

3.62 It is important to note that this letter was sent by the S(T) after discussions with M(F).[18]

3.63 This letter was received in the Finance Ministry and examined by the then Finance Minister. As per his instructions, thereafter, the Finance Ministry on 12.12.2007 again wrote to the DoT asking for copies of the Cabinet decision of 2003 and some other documents, which were duly provided to them on 13.12.2007 itself.[19]This also was specifically brought to the attention of the M(F).[20]

3.64 Thereafter, on 29.11.2007, the M(F) suddenly wrote a note that in view of the letter of the Finance Secretary, the "issue should be examined in depth before any further steps are taken".[21]

3.65 The following factors need to be borne in mind while considering this note:

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[17]D-9 at 6/C.
[18]D-9 at 3/N.
[19]D-9 at 7/C
[20]D-9 at 4-5/N.
[21]D-7 at 18/N.

(i) The M(F) was a member of the Telecom Commission that unanimously approved the TRAI Recommendations that entry fee would not be revised and 2G spectrum would not be auctioned. She did not raise this issue.

(ii) The letter of the Finance Secretary was replied to by the S(T) after a comprehensive note had been prepared in the AS Wing, and the issue and even the draft reply was discussed with the M(F). She did not raise this issue.

(iii) The file had come to her for her comments on the draft LOI. It was totally out of place to mention the letter of the Finance Secretary, particularly when just one day before, the reply to that letter has been sent by the S(T).

3.66 That is why I recorded my note, stating inter alia that "The matter of entry fee has been deliberated in the Dept. several times in the light of various guidelines issued by the department and recommendations of TRAI. And, accordingly decision was taken that entry fee need not be revised. On the above lines Sec(T) has also replied to the Finance Sec's letter dated 22.11.2007. Member (F) should have checked the facts with Sec(T), before putting up the note on the file".

3.67 I would state that my note was fully justified in view of the three points mentioned above. It is relevant to note that M(F) also clearly accepted this position, because she had two further opportunities to

again bring up this issue and she chose not to: *first* while processing the file for furnishing the various policy documents to the MoF as desired by them, and *second* in the meeting of the Full Telecom Commission in December 2007.

3.68 I have dealt with this note in some detail because of the mistaken impression started by the CAG and spread by the media that I harshly overruled the M(F). In my note, however, I was simply pointing out the position as per the record. This was also accepted by the M(F).

3.69 Thereafter, I had numerous personal discussions with the Finance Minister and the Hon'ble PM in December 2007 and the first week of January 2008 in Cabinet meetings and otherwise, where they were in agreement with the proposed course of action of the DoT. That is why the Finance Ministry did not raise any further issues regarding entry fee or spectrum charges.

3.70 In my subsequent personal meetings with the Finance Minister, we agreed that the existing regime would be continued, insofar as start-up spectrum was concerned. On 15.01.2008, the Finance Minister also sent a note to the Hon'ble PM wherein he did not suggest any revision of entry fee and only spoke of auction of spectrum above start-up spectrum.[22] The actual process of spectrum allocation began only

[22]PMO File No. 3B.

after this issue was settled with the Finance Minister and the Hon'ble PM.

3.71 There were subsequent meetings between the Finance Minister and myself on 30.01.2008, 29.05.2008, 12.06.2008 and other informal discussions wherein it was agreed that start-up spectrum would not be charged and spectrum above the start-up spectrum would be charged.[23] This was also communicated to the Hon'ble PM by the two of us in a meeting on 04.07.2008.[24]

3.72 This same position had been conveyed by me to the Hon'ble PM vide my letters dated 02.11.2007. In fact, this letter merely encapsulates the discussions and decisions that took place in the DoT and contained in the DoT files. The internal notes made by officers in the PMO also make it clear that only spectrum above the initial threshold (i.e. above start-up spectrum) was to be charged. This is also the position conveyed to the Hon'ble PM by me in numerous meetings and discussions and agreed to by him. He has been kind enough to defend this position even in Parliament.

3.73 The current MoC&IT has also justified the non-revision of entry fee and non-auction of start-up spectrum in various interviews and press releases.

[23]D-363 at 530.
[24]PMO File No. 3H.

3.74 Thus, it is very clear that the Government had taken a conscious decision to keep the entry fee low and thereby increase competition in the sector. This was a decision taken by successive Governments and had the consent of all concerned, including the Hon'ble PM.

K. Telecom Commission

3.75 It has also been suggested that entire process was rushed through on 10.01.2008 and the Full Telecom Commission (which included the Finance Secretary) meeting scheduled for 09.01.2008 was deliberately postponed by a week to avoid debate.

3.76 This again is wholly incorrect. The agenda before the Telecom Commission had nothing to do with entry fee – rather, it concerned increasing the spectrum charges. *This meeting had been convened as per my directions*, as recorded in the TC Memo itself:

> *This proposal is for bringing the annual AGR-based spectrum charges to realistic levels to reflect the true value of this scarce, vital economic resource – radio spectrum, in respect of commercial telecom service providers using 2G spectrum.*
>
> *The Hon'ble MoC&IT had desired that a decision needs to be taken on the spectrum charges. He had directed that the issue of spectrum charges in terms of the AGR be placed before the Telecom Commission for in depth deliberations.*[25]

3.77 Thus, I had no motive or incentive to postpone the meeting. Moreover, a meeting of the Full Telecom Commission was in fact

[25] TC Memo dated 09.01.2008, DoT File 137B, p. 10.

held on 07.12.2007 (after the exchange of correspondence with the MoF) and then again on 15.01.2008, and the MoF representative did not raise the issue of entry fee or auction at all. This clearly shows that the two Ministries had reached agreement on the course of action.

3.78 In a further letter dated 26.05.2008, the TRAI again informed DoT that keeping in view the objective of growth, affordability, penetration of wireless services in semi-urban and rural areas and principle of level playing field and opportunity for equal competition between the incumbents and new entrants, the TRAI recommended the same entry fee as was taken from the fourth cellular operator for grant of CMSP/ UAS license in the year 2001.

3.79 It may be noted that certain service providers had increased the rates of certain calls and SMSs in year 2006-07. Aggrieved by the situation, a consumer group viz. Telecom Users Group of India has filed Petition no. 206 of 2006 before the Hon'ble TDSAT and the petition was finally disposed of on 15.07.2008 (after grant of new UAS licences in year 2008), where TDSAT had observed that "*The grievance of the petitioner in this petition was that certain service providers/ respondents had increased the rates of certain calls and SMSs. Today, the factual position is that such rates and rates of other telecom services have drastically come down. Thus, this petition has become infructuous and is accordingly disposed of.*"

L. Impact of the Policy

3.80 In light of the above, the following stands established:

(i) The decision to not auction 2G spectrum was taken on the basis of NTP 1999, 10th and 11th Five Year Plans and the recommendations of TRAI, under which a conscious policy decision was taken that the overriding objectives were to increase teledensity rather than maximising revenue.

(ii) TRAI specifically recommended that the entry fee for the subsequent operator should be kept the same as what the fourth operator paid in 2001, in order to maintain a level playing field.

(iii) As a result of allowing free competition and a level playing field, teledensity increased to a huge extent. By the end of September 2010, rural teledensity was 28.46% and total teledensity was 60.99%. The total number of telephones had exceeded 720 million (far in excess of the Plan target of 600 million).

(iv) Call charges came down drastically and India today has perhaps the lowest call charges in the whole world. As a result of increased competition, calling charges which hovered at an average of Re. 1 per minute (for local calls) have now come down to around Re. 0.30 per minute. The concept of "per-second tariff" has been introduced by all operators. Such low

rates would not have come into effect had the new competitors been made to pay spectrum charges far in excess of what the original players in the field had paid.

(v) ARPU in December 2010 had fallen to Rs. 107 per month, from Rs. 298 per month in March 2007. (It has fallen to Rs. 95 per month by September 2012.[26]) *The increase in teledensity and fall in ARPU translates into a real gain of over Rs. 1.5 lakh crore per annum*. This is the money that consumers all over India have saved. Unlike the so called 'notional' loss, this is a very real gain.

(vi) Government revenue also increased because of the revenue sharing regime. Insofar as revenue to the Government is concerned, with the increase in teledensity and overall increase in revenues in the telecom sector, the revenue share of the Government has been increasing year after year. Till March 2010, the Government has collected about Rs. 77,938 crore under the revenue share regime. It is the largest non-tax revenue of the Government.

M. Theories of 'notional loss'

3.81 It has been contended that there has been a huge revenueloss to the Government as a result of the non-auction of 2G spectrum. There are

[26]TRAI, *Indian Telecom Services Performance Indicators*, 11.01.2013 (available at www.trai.gov.in)

different theories on which this alleged revenue loss is being calculated:

(i) The amount allegedly received by some operators after "selling spectrum" which they obtained from the Government; and

(ii) The amount received by the Government in the auction for 3G spectrum.

(iii) The amount based on growth in AGR

3.82 Swan Telecom Pvt. Ltd. and Unitech Group were awarded Licenses for Unified Access Services for 13 and 22 service areas respectively in February-March 2008. The allegation is that the promoters of these companies then sold their stake to other foreign companies for huge amounts, which represents the real value of the spectrum, and consequently the amount that the Government could have garnered by an auction.

3.83 It is respectfully submitted that the said argument is entirely misconceived. After news reports of such sale began to circulate, the DoT sought clarifications from the said companies. They have in turn clarified that no sale of promoters' equity has taken place in any of the companies.

3.84 What has in fact happened is that the companies have inducted strategic partners as investors in the companies by issuing additional

equity shares to them as per the provisions of the Companies Act 1956 and other applicable laws. Thus, Etisalat and Telenor respectively picked up equity shares in Swan and Unitech by infusion of equity capital into the company for rolling out the telecom network in the licensed service areas. Both these companies have categorically mentioned that the investment brought in by their strategic foreign partners would be used for rolling out the services and this could enhance their capital base keeping the absolute shareholding of the promoters intact.

3.85 It is respectfully submitted that it is evident that telecom operations require a huge upfront investment to establish the physical infrastructure, to employ personnel and other initial costs. In order to fund these costs, operators resort to either debt or equity or some combination of both.

3.86 As per Foreign Direct Investment (FDI) policy applicable in Telecom sector, FDI (both direct and indirect) allowed for Unified Access Service License is 74%. FDI up to 49 % is under the automatic route. FDI in the licensee company/Indian promoters/investment companies including their holding companies shall require approval of the Foreign Investment Promotion Board (FIPB) if it has a bearing on the overall ceiling of 74 percent.

3.87 M/s Swan Telecom Pvt. Ltd., M/s Unitech Wireless Companies and M/s S Tel were awarded Licenses for Unified Access Services for 13, 22 and 5 service areas respectively in February-March 2008. These companies have made strategic partnership for investment in the company as per the Company Act and have entered into agreement with foreign companies namely, Etisalat Mauritius Limited, Telenor Asia Private limited, Singapore and BMIC Limited, Mauritius respectively for infusion of equity capital into the company by issuing fresh equity for rolling out the Telecom network in the licensed service areas.

3.88 The valuation of a company is a complex exercise and depends on a number of factors including the business case over the period of license and this is evident from valuation of shares of M/s Tata Teleservices and M/s. Unitech Wireless. The investment brought in by strategic foreign partners of these companies would be utilised for rolling out the services and even this would enhance their capital base keeping the absolute shareholding of the promoters intact. In all the above cases, the licensee companies have issued additional equity for bringing in foreign investment and as they have not transferred promoters' equity shares, promoters' equity has not been diluted. Foreign investment brings in capital as well as technology. It is a normal practice in the corporate world to bring investment into the company for rolling out or expansion of business. On earlier

occasions also, FDI has been infused in licensee companies as per FDI policy of the Government. Government has been encouraging FDI in the country since beginning and any narrow view will result in Government objective to be lost.

3.89 The Foreign Direct Investment in M/s SistemaShyam and Tata Teleservices upto 74% has been approved by FIPB. The FDI in M/s. Unitech Wireless has been considered by Cabinet Committee on Economic Affairs in their meeting dated 19th October 2009 and approved subject to license and security condition as well as lock in period guidelines of this department. In the case of M/s Swan, since the total FDI was less than 49%, it was permitted under automatic route and no FIPB approval was necessary.

3.90 Virtually most of the telecom operators (for instance M/s Bharti, M/s Tata Teleservices, M/s Idea Cellular, etc.) have some amount of FDI. That is same thing that has happened in the case of M/s Swan and M/s Unitech. These companies could have, for instance, chosen the IPO route and raised money from the general public. Merely because they chose to get the funds through the FDI route does not change the essential character of the transaction, which is equity infusion into the company. It is respectfully submitted that treating this as "sale of spectrum" is simply absurd.

3.91 This aspect of the matter has also been clarified by the Finance Minister on numerous occasions. This also was discussed by me with the Hon'ble PM, recorded in my letter dated 07.11.2008 and I acted in accordance with his wishes.[27]

3.92 The second theory has been to compare the process by which 3G spectrum was auctioned and use it to determine the value of 2G spectrum. It is misleading to do such a comparison. The comparison would not be a comparison of equal commodities but a comparison of unequals.

3.93 While 2G services are a basic necessity mobile telephone service for the general public, 3G services are value added/ premium services. There was a legacy methodology for allocation of 2G spectrum while the 3G spectrum is being allocated first time. Accordingly, TRAI, in its recommendations dated 28.08.2007, recommended that "*As far as a new entrant is concerned, the question arises whether there is any need for change in the pricing methodology for allocation of spectrum in the 800, 900 and 1800 MHz bands. Keeping in view the objective of growth, affordability, penetration of wireless services in semi-urban and rural areas, the Authority is not in favour of changing the spectrum fee regime for a new entrant. Opportunity for equal competition has always been one of the prime principles of the Authority in suggesting a regulatory framework in telecom services.*

[27]PMO File No. 1, p. 1

Any differential treatment to a new entrant vis-à-vis incumbents in the wireless sector will go against the principle of level playing field. This is specific and restricted to 2G bands only i.e. 800, 900 and 1800 MHz. This approach assumes more significance particularly in the context where subscriber acquisition cost for a new entrant is likely to be much higher than for the incumbent wireless operators". Therefore, it is not be appropriate to compare the pricing of 2G spectrum with the 3G spectrum.

3.94 Recently, also, TRAI, in its recommendations dated 11.05.2010 on "Spectrum Management and Licensing Framework" has recommended that Spectrum in the 800,900 and 1800 MHz bands (presently used as 2G spectrum) should not be subject to auction. Thus TRAI has maintained a consistent position, despite all the litigation and controversy on this issue.

3.95 Another theory (now adopted by the CBI) has been to compute the notional loss based on the theory of growth in AGR. The CBI claims that the DoT itself had suggested that spectrum should be charged based on growth in AGR, and has therefore used this formula to compute the loss. The irony in this theory is that the idea that spectrum should be charged based on growth in AGR itself was my idea, which is now being used against me! However, what the CBI has conveniently ignored is that this was always with reference to additional spectrum over and above the start-up spectrum. I was the

MoC&IT who directed that there should be a one-time fee for additional spectrum, which could be calculated based on AGR, and this was also agreed to by the MoF and communicated to the Hon'ble PM. Even in the PMO files, it has clearly been recorded that only additional spectrum will be charged in this manner. Thus, it was accepted by all that start-up spectrum would not be charged or auctioned.

3.96 Finally, the recently held auction of spectrum – pursuant to the Supreme Court's judgement – is the best evidence in support of my stand. The auction was an unequivocal failure.

4. FIRST COME, FIRST SERVED POLICY

4.97 One of the most misunderstood issues in this entire matter is the FCFS policy followed by the DoT. The allegation against Sh. A. Raja is that he altered the FCFS policy so as to benefit certain applicants. The following portion of this Written Statement will show that neither the FCFS policy was altered, nor did any applicant benefit from the so-called altered policy.

A. Preliminary Factors

4.98 There are two preliminary factors that need to be understood in the context of FCFS in the telecom sector. The first is that, unlike other sectors (such as mining), here there is no statutory definition of FCFS. It is not even defined in any rules or other delegated legislation.

4.99 The second aspect that needs to be understood is that there are two different statutes involved. In order to offer telecommunication services, one first needs to obtain a license under the *Indian Telegraph Act 1885*. This is the UAS License. This is an umbrella license that is required for the licensee to offer both wireline and wireless services. (Earlier separate CMTS and BTS licenses were issued.) Any company wishing to offer telecommunication services and satisfying the eligibility criteria may apply for UASL by sending the application form prescribed in the UASL Guidelines. The services to be offered may require spectrum or may not require spectrum (such as landline services).

4.100 Thereafter, in order to offer wireless services, one more license is required under the *Indian Wireless Telegraphy Act 1933*for the allocation and use of spectrum. This is called the Wireless Operating License. A separate application as per the prescribed format is required to be made to the WPC Wing of the DoT, which is in charge of allocation of spectrum.

4.101 The application of the FCFS principle to a situation where there are two sets of applications leading to two sets of licenses is what is required to be understood.

B. Origin of FCFS

4.102 FCFS finds its first mention in the BTS Guidelines of 2001. It may be recalled that BTS licensees were permitted to offer WLL services, for which spectrum was required. In this context, Cl. 26 of the Guidelines provided:

> *For Wireless Access Systems in local area, not more than 5+5 MHz in 824-844 MHz paired with 869-889 MHz band shall be allocated to any Basic Service Operator including the existing ones on first come first served basis.*

4.103 Thus, the FCFS principle was brought in for the purpose of allocation of spectrum. It has been pointed out above that the process of allocation of spectrum begins with the application for spectrum. Therefore, the date of application for spectrum would determine the seniority for allocation of spectrum.

4.104 The DoT had prescribed a procedure for allocation of spectrum on FCFS Basis on 23.03.2001.[28] This provided that spectrum would be allocated on FCFS basis, but in order to be eligible to apply for spectrum, the operator had to fulfil certain requirements concerning establishment of points of presence and compliance with roll out obligations.

[28]D-831 (CD-2) p. 78.

4.105 After the Cabinet decision of 2003 and the introduction of the UASL regime, the issue arose as to the procedure to be followed. In a note dated 21.11.2003[29] the Director (LF) wrote,

> *It is also presumed that such new licenses in the category of UASL would be on a first come first serve basis on the basis of applications.*

4.106 This is followed by a note by the Director (VAS-II) dated 21.11.2003[30] that:

> *As regard the point raised about grant of new licenses on first come first served basis, the announced guidelines have made it open for new licenses to be issued on continuous basis at any time. However, the spectrum is to be allotted subject to availability. This in effect would imply that an applicant who comes first will be granted the spectrum first so it will result in grant of license on first come first served basis.*

4.107 This was approved by the then MoC&IT on 24.11.2003.[31]

4.108 It is important to note that the officers were proceeding on some presumptions and assumptions – as is evident from the use of words like 'presumed', 'imply', etc. – and not on the basis of any statute or rule. Once this was approved by the MoC&IT, the FCFS procedure became applicable to both sets of licenses: first the UAS License would be granted on the basis of the application, and then spectrum would be allocated on the basis of a separate application. The WPC

[29]D-592 at 2-3/N.
[30]D-592 at 4-5/N.
[31]D-592 at 6/N.

Wing would maintain the seniority of applicants based on the date of application for spectrum, not the date of application for UASL. This is the consistent procedure followed by the WPC Wing throughout.

C. Sequential vs Simultaneous Issuance of LOIs

4.109 Adopting this procedure, in the period 2003-07, about 51 new UAS Licenses were issued. The issue of seniority never arose because the procedure followed by the DoT was to process the applications for UASL *sequentially* in order of receipt and *take up the next applicant after the earlier applicant has been given LOI*.[32]

4.110 However, the DoT officials understood that the above procedure could not be followed in the 2007 scenario:

> *In the present scenario the number of applications is very large and therefore such sequential processing will lead to inordinate delays depriving the general public of the benefits which more competition will bring out.*[33]

4.111 Therefore, the officers proposed that LOIs would be issued *simultaneously* to all the eligible applicants. This was proposed on 24.10.2007 by the Director (AS-I) in the Draft Statement of Case for obtaining opinion of the Ld. AG/SG[34] and approved by DDG (AS), M(T), S(T) and finally by me on 06.11.2007. It has been expressed very clearly in the note of the DDG (AS):

[32]Draft Statement of Case para 7, D-7 @ 4/C.
[33]Draft Statement of Case para 7, D-7 @ 4/C.
[34]Draft Statement of Case, D-7 @ 4/C.

As per discussion with Secretary (T) & Hon'ble MoC&IT, LOIs are to be issued simultaneously to prima facie eligible applications who have submitted their applications up to 25.09.2007.

4.112 The above note is to be found in the individual file of each and every licensee.[35]

4.113 As noted above, the question of seniority did not arise earlier because only one application was processed at a time. But now when LOIs were to be issued simultaneously, the licensing process would have to be one that was fair to all the LOI holders.

4.114 It is crucial to note that there is no provision in the UASL Guidelines or elsewhere by which the DoT could *refuse* to accept LOI compliances, when an LOI holder came forward. Further, when the DoT officers proposed simultaneous issuance of LOIs, they did not make any provision in the Notes to the effect that seniority of LOI holders should be preserved on the basis of the date of application. It would also be wholly unfair to the LOI holder who was ready with his compliances that his compliances could be accepted only after the case of some other LOI holder was processed.

[35] See Files D-10 @ 7/N and 10/N, D-15 @ 4/N, D-17 @ 4/N, D-19 @ 4/N, D-21 @ 4/N, D-23 @ 4/N, D-25 @ 4/N, D-27 @ 4/N, D-29 @ 4/N, D-31 @ 4/N, D-33 @ 5/N, D-35 @ 10/N, D-38@ 21/N, D-41 @ 3/N, D-44 @ 20/N, and D-45 @ 3/N.

D. Discussions with EAM & SG

4.115 It is in this context that the discussions between the then EAM, the then SG and myself assume relevance. The Hon'ble Prime Minister and I had exchanged letters on 02.11.2007 on various issues relating to the telecom sector[36] and also had subsequent personal discussions on this subject. It was agreed in these discussions that I would have discussions with Sh. PranabMukherji, the then EAM, since he was heading the Group of Ministers on vacation of spectrum. It must be noted here that the issue of FCFS was purely within the domain of the DoT and I had no obligation under the Allocation of Business Rules or Transaction of Business Rules to discuss this matter with any other Minister, but still out of respect for the Hon'ble PM and the EAM, I did so.

4.116 Accordingly, discussions were held between the EAM and Iin December 2007 on inter alia the following issues: subscriber base criteria for allotment of additional spectrum; issue of dual technology; and issue of new licenses. The SG was also present in these discussions, since the same issues were the subject matter of litigation in the TDSAT.

4.117 For the purpose of the discussions with the EAM, the SG prepared a note dealing, item-wise, with subscriber base criteria for allotment of

[36]D-358 & D-359

additional spectrum; issue of dual technology; manner in which spectrum will be allocated; and the issue of new telecom licenses. This note specifically recorded, "*Thus Government is obliged to scrutinise the pending applications and if the applicants are found eligible, to issue licenses on a first-come-first-served basis. Once an applicant becomes licensee after complying with the LOI conditions, the applicant then becomes eligible for spectrum as per the WPC guidelines.*"[37]

4.118 The above paragraph contains the essence of the DoT policy. It provides:

(i) the Government is "obliged" to consider the pending applications for UASL;

(ii) an applicant becomes a licensee only after complying with LOI conditions; and

(iii) such an applicant only thereafter becomes eligible for spectrum allocation.

4.119 The entire actions of the DoT have been based on the above principles.

4.120 It is interesting to note that the SG was not even willing to admit to the aforesaid meeting till a copy of his note surfaced in the public

[37]PMO File 2 pp. 8-10.

domain and the EAM also confirmed to the PAC that this meeting had taken place.

E. Role of the Hon'ble PM

4.121 Based on the above note, on 26.12.2007 the EAM also prepared his own note and forwarded both notes to the Hon'ble Prime Minister.[38]

4.122 On the same day, i.e. 26.12.2007, I also sent a letter to the Hon'ble Prime Minister based on the discussions with the EAM and the SG.[39] This letter again covers the same issues, that is, subscriber base criteria for allotment of additional spectrum; use of dual technology; and issue of new licenses. All the issues have been dealt with in the same manner as in the note of the SG. On the issue of new licenses, it states:

> ***Issue of License****: The First-come-First Served Policy is also applicable for grant of license on compliance of LOI conditions. Therefore, any applicant who complies with the conditions of LOI first will be granted UAS license first. This issue never arose in the past as at one point of time only one application was processed and LOI was granted and enough time was given to him for compliance of conditions of LOI. However, since the Government has adopted a policy of "**No Cap**" on number of UAS License, a large number of LOIs are proposed to be issued simultaneously. In these circumstances, an applicant who fulfils the conditions of LOI first will be granted license first, although several applicants will be issued*

[38]PMO File 2 pp. 6-7.
[39]PMO File 2 pp. 1-5.

LOI simultaneously. ***The same has been concurred by the Solicitor General of India during the discussions***.

Grant of Wireless License*: The First-come First-Served policy is also applicable for grant of Wireless License to the UAS Licensee. Wireless License is an independent license to UAS license for allotment of Radio Frequency and authorising launching of GSM/ CDMA based mobile services. There is a misconception that UAS license authorises a person to launch mobile services automatically. UAS license is a license for providing both wire and wireless services. Therefore, any UAS license holder wishes to offer mobile service has to obtain a separate Wireless License from DoT. It is clearly indicated in Clauses 43.1 and 43.2 of the UAS License Agreement of the DoT.*

(Emphasis in the original)

4.123 This is exactly what had been discussed with the SG. The basis of this letter is in fact the note given by the SG: once the LOIs have been issued, there is no rule that can be used to *prevent* an applicant from furnishing compliances with the LOI conditions. Once the compliance is made, the license has to be signed, and the applicant is then free to go and apply for spectrum. This is exactly what is being explained in the letter.

4.124 It is evident that the letter of 26.12.2007 sent by the MoC&IT to the Hon'ble PM is nothing but an encapsulation of the note given by the SG and the subsequent discussions between the SG, EAM and MoC&IT. Thereafter I met the Hon'ble PM in the first week of

January 2008 and this issue was again discussed and he agreed with the proposed course of action of the DoT.

F. Press Release

4.125 On 07.01.2008, Sh. Nitin Jain, Director (AS-I) put up a detailed note dealing with various issues including eligibility, net worth requirements, etc.[40] He pointed out that earlier, on receipt of an application for UASL, it used to be processed on the basis of a checklist. If there were any discrepancies, the applicant used to be given time for compliance, and sometimes even extended time was given. Processing of the subsequent application was kept on hold till the first application was disposed of, i.e., only one application was taken up at a time. Further, eligibility of the applicant used to be considered till the last correspondence before the stage of LOI, and sometimes even after issuance of LOI. He sought a decision on whether, in the present case, keeping in view the simultaneous issuance of large number of LOIs, eligibility had to be considered on the date of application or it could be a subsequent date also.

4.126 This was approved and followed by a note of the DDG (AS).[41] He pointed out that the earlier procedure of sequential processing of applications could be followed since the number of applications was small. Thus that procedure did not conflict with the interest of various

[40]D-7 at 22-26/N.
[41]D-7 at 26-27/N.

applicants. In the present unprecedented scenario, LOIs were to be issued simultaneously and eligibility was to be checked on the date of application. The policy of the DoT as communicated to the Hon'ble PM was quoted and extracted, including the statement, "***The same has been concurred by the Solicitor General of India during the discussions***" (Emphasis in the original).

4.127 This was followed by a note of Sh. B.B. Singh of the LF Branch, who observed that the view of the LF Branch was that paid up equity requirement for eligibility for all service areas was Rs. 138 crore. He wrote that LF Branch had no comments on other issues, and put up the file to Secretary (T) through proper channel.[42]

4.128 The Secretary (T) in turn marked the file for approval to me, with a note that the view of the LF Branch regarding paid up equity may be accepted. He then added a post script (clearly marked as "P.S.") that "if approved, a Press Release may be issued, draft of which is placed at Flag X."

4.129 On receipt of the file, I approved the proposals of the DoT put up to him by writing "approved". I further wrote, "pl. obtain Solicitor General's opinion since he is appearing before the TDSAT and the High Court of Delhi".[43]

[42]D-7 at 27-28/N.
[43]D-7 at 28/N.

4.130 It must be noted that I was approving the proposals of the DoT and at the same time directing that the opinion of the SG be sought on the said proposals. I was not approving any draft Press Release. It is not the practice in the DoT or any other Ministry for the Minister to approve a press release – his/her job is to take the final decision on policy. (The exception is of standalone Press Notes issued under FEMA etc., which are approved by the Cabinet.) Issuance of the press release is a departmental function to inform the public at large as to what decision has been taken.

4.131 However, before I could return the file to the Secretary (T), my attention was drawn to the draft Press Release. I realised that it had a last paragraph that read, "However, if more than one applicant complies with LOI condition on the same date, the inter se seniority would be decided by the date of application". This was a totally new stipulation that was not to be found in the file notes, the original note of the SG, or the letter written to the Hon'ble PM. It would in fact be an entirely different method of determining seniority.

4.132 For instance, if there are four applications, which in the order of date of application are A, B, C and D. As per the file, the license is to be signed in the sequence of compliance with LOI conditions. The order in which they comply with LOI conditions is say D, B, C, and A. Now suppose D and B complied on Day 1, and C and A complied on Day 2. If the last paragraph of the draft press release remained, then

the sequence of signing licenses would be B, D, A, C – that is, the sequence gets changed, and this change does not have any basis in the file. It would in fact not be first come, first served at all.

4.133 When the draft press release was shown to me, I realised this and therefore deleted the last paragraph with the noting that it was not necessary as it was a new stipulation.[44]I then recorded in my own note, "*press release appd as amended*" marked the file to the Secretary (T).[45]

4.134 The Secretary (T) then marked the file to the SG, with the note "May like to see, as directed by MoC&IT".[46] It is again evident from this that the file was being sent to the SG for his opinion on the proposed course of action of the DoT, and not on some press release. Indeed, the file nowhere records that the SG's opinion is being taken on the press release. There was no occasion, and it was not the practice in the DoT, to seek the SG's opinion on press releases.

4.135 Thereafter, on 07.01.2008, the SG had a discussion with the Secretary (T) and the DDG (AS). He recorded his opinion as follows:[47]

> *I have seen the notes. The issue regarding new LOIs are not before any Court. What is proposed is fair and reasonable. The press release makes for transparency. This seems to be in order.*

[44]D-7 at 25/C.
[45]D-7 at 28/N.
[46]D-7 at 29/N.
[47]D-7 at 29/N.

4.136 On a plain reading of the above opinion, it follows that the SG has perused the preceding notes (starting at least from 22/N, where the notes substantially begin). He has factually mentioned that the issue regarding new LOIs is not before any Court – this would any way have been in the knowledge of the DoT. He then says, "What is proposed is fair and reasonable". "*What is proposed*" is obviously a reference to the proposal of the DoT, as succinctly set out in the note of the DDG (AS), slightly modified by the LF and approved by the Secretary (T) and me. He also notes that the press release makes for "*transparency*" – this can only be a reference to the amended press release, because otherwise the press release would not be transparent as it would contain a new stipulation.

4.137 It has been reported that the then SG, in his deposition to the JPC, has stated that he met the Secretary (T) on 07.01.2008 because the latter wanted to know if there was any stay on the issuance of new LOIs. This is patently unbelievable and absurd: first of all, this is not what is recorded in the file. Secondly, as already seen, the proceedings of each and every hearing were being recorded in the file by the DoT. The services of the Advocate-on-Record were available. The file notes make it clear that there was no stay by any court. If at all the Secretary (T) wanted to know if there was a stay, all he had to do was ask his subordinates or just go through the files. There was absolutely no need or occasionto ask the learned SG this factual question.

4.138 There is also another absurd theory – that the words "approved; pl. Obtain Solicitor General's opinion since he is appearing before the TDSAT and High Court of Delhi" and the words "press release appd as amended" appear to have been written with different pens/ ink, it suggests something to be amiss in the records. As anyone who would have dealt with governmental files would know, at any given time there are a number of pens kept on the Minister's desk, and it is purely a matter of chance as to which one he happens to pick up. To make such a major claim of forgery/ fabrication based on this fact is just without any understanding of law or practice.

4.139 The SG also is reported to have pleaded ignorance of the letter dated 26.12.2007 written to the Hon'ble PM. It is beyond all imagination as to how he can do so, when the letter has been extracted (including a portion in bold typeface) and he has thereafter written his note. The note of Sh. Srivastava in fact also refers to the location of the letter in the file.

G. Developments in the PMO

4.140 The letter sent by me was examined by the Hon'ble PM and discussed in the PMO. On the letter itself, there is a note dated 29.12.2007 by the Private Secretary to the PM that "*Urgent. PM wished this letter to be examined urgently*" (emphasis in the original). It is followed by a note dated 29.12.2007 by the Principal Secretary to the PM that "*Pl. link with a note from EAM to PM on this, examine & put up urgently*".

4.141 Pursuant to the Principal Secretary's instructions, a note was prepared by the Secretary to the PM on 31.12.2007. The matter was further discussed with the Principal Secretary and a further note was prepared on 06.01.2008 and marked to the PM.

4.142 This is followed by a note dated 10.01.2008 by the Private Secretary to the PM that "*PM says that the DoT has issued licenses today. That may be taken into account and the issues accordingly modified and submitted to him pl.*"

4.143 Accordingly a further note is prepared by the Secretary to the PM on 15.01.2008, wherein he inter alia writes:

> *DoT proposes to continue the existing policy of first-come-first-served basis for grant of licenses. This is a 3-stage process as follows:*
>
> > *1) issue Letters of Intent (LsOI) on first-come-first-served basis to applicants;*
> > *2) issue UAS licenses to those who fully comply with LOI conditions (payment of fee etc.) on first-complied-first-served basis;*
> > *3) issue Wireless License for allotment of radio frequency (spectrum) on first-licensed-first-served basis*

4.144 The note was marked to the PM, and there is then a note dated 23.01.2008 by the Private Secretary to the PM that "*PM wants this informally shared with the Deptt. Does not want a formal communication & wants PMO to be at arms lengthpl.*"

4.145 As stated above, in January 2008 also I had meetings with the Hon'ble PM in Cabinet meetings and otherwise and updated him of the situation. I went ahead with the grant of LOIs only after informing the PM and obtaining his assent. It is therefore abundantly clear that the FCFS Policy of the DoT was formulated keeping in view the unprecedented situation that the DoT was faced with. It was formulated based on the advice of the then SG and duly discussed with the EAM and communicated to the PM also.

H. All concerned were informed

4.146 One could understand that the FCFS method was somehow problematic if any of the applicants had not been informed about the date and time of issuance of LOIs. However, this is not the case. Each and every applicant was informed personally and asked to come to the DoT. Every successful applicant did come and all were ready with the compliances in advance (since the amounts of bank guarantee etc. were already in public domain). No applicant has complained ever that he was in any way prejudiced by the manner of grant of LOIs.In fact, so long as all the applicants were informed of the procedure and all of them had the necessary compliances ready, there was even no need of issuing a Press Release on 10.01.2008, as stated by the DoT in one of its Affidavits filed in the Delhi High Court:

> *Though all the applicants were present in DoT in the afternoon of 10.01.2008 to receive LOIs, but for a formal announcement and convenience of the applicant and the petitioners and other*

interested parties, respondent again issued a press release stating the venue and time in the afternoon. However, there was no need for such announcement through press release as per the past practice.[48]

4.147 What used to be done over a long period of time was now done at one go, as part of the DoT's overall efforts to speed up the process of entry of new operators.

I. Four Counters

4.148 There has been criticism of the four-counter method adopted by the DoT to distribute LOIs. I wish to make it clear neither me nor theS(T) nor the M(T) were involved in this distribution method. As explained above, from as far back as 24.10.2007 the DoT was clear that LOIs were to be distributed simultaneously. It was for the officers to devise the proper method to distribute the LOIs. I understand that they chose to do it through four counters simply because there were four Directors in the AS Division. It is of course a matter of common sense that 120 LOIs cannot actually be given 'simultaneously', if this term is given its literal meaning. All that it means is that they will be distributed at one go, in chronological order. As such, there may be nothing wrong with this approach and it made no material difference to any applicant.

[48] D-107 at p. 65.

4.149 Prior to distribution of LOIs, the note put up by the DDG (AS) was "*LOIs shall be simultaneously issued in respect to all UASL applications received up to 25.09.2007…*"[49] After LOIs were distributed, it was again recorded by the AS Wing that they had been distributed simultaneously in first come first served basis.[50] At no point of time was any reference made to me about the four-counter set-up to distribute LOIs. Even subsequently, no operator ever complained about this.

J. FCFS Litigation

4.150 Shortly after issuance of the Press Release and LOIs, certain cases came to be filed in the Delhi High Court and TDSAT. Parsvnath Developers Ltd filed W.P. (C) No. 1159/2008 in the High Court challenging the decision of the DoT to reject their applications. Spice Communications Ltd filed Petition Nos. 12/2008 and 23/2008 in the TDSAT also challenging the decision of the DoT to reject some of their applications. Both these companies also specifically contended that they had lost their seniority (based on date of application) because of the Press Release and sought preservation of their seniority based on date of application. This was also the relief sought by Idea Cellular Ltd in Petition No. 20 of 2008.

[49] D-7 at 26/N.
[50] D-7 at 31/N.

4.151 Vide interim orders dated 13.02.2008 and 28.02.2008, the Delhi High Court and the TDSAT respectively asked the DoT to maintain the petitioners' seniority as per their date of application, till final disposal of the petitions.[51] After these interim orders were passed, the DoT again sought the SG's opinion on how to proceed further.[52] The SG gave his opinion on 29.02.2008:[53]

> *In my opinion, there is nothing in the orders that preclude the signing of UAS Licenses as already approved. The signing of licenses does not mean automatic grant of spectrum. The grant of spectrum comes in at a later stage. It is at that stage that the position of the three petitioners would have to be protected. If there is adequate availability of spectrum in the circles to which the application related to, there would be no difficulty. In relation to circles where availability of spectrum is in doubt, the Department would have to consider suitable measures to protect the rights of the petitioners in the event of the ultimate success in the petition.*

4.152 This opinion proceeds exactly on the same principle that had already been discussed with the SG and EAM and communicated to the Hon'ble PM. This course of action was faithfully followed by the DoT and seniority of these companies was maintained and no prejudice was caused to them. It may however be noted that subsequently Idea and Spice withdrew their petitions in the TDSAT and the judgement in the Parsvnath case is still awaited.

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[51]D-7 at 36-39/C.
[52]D-7 at 38-39/N.
[53]D-7 at 40/N

4.153 It is relevant to note that Spice is the only company that can claim to have been adversely affected by the FCFS policy (since its Application for grant of UASL in Delhi Service Area was of the year 2006 and therefore prior to that of Swan). However, once Spice merged with Idea, which already had license and spectrum in Delhi, they ceased to have any grievance and withdrew their petition. No other company can be said to have been adversely affected in any manner, and no other company has made any sort of complaint whatsoever.

4.154 A public interest litigation being W.P. (C) No. 7815 of 2008 was filed by Arvind Gupta. He also specifically challenged the Press Release of 10.01.2008. The counter affidavit of the DoT in this case was also settled by the SG.[54] The Press Release was specifically adverted to and defended in this counter affidavit:[55]

> *Accordingly a press release was issued in this respect on 10-01-2008. In the Press Release it was also informed that "DoT has been implementing a policy of First-come-First Served for grant of UAS licences under which initially an application which is received first will be processed first and thereafter if found eligible will be granted LOI and then whosoever complies with the conditions of LOI first will be granted UAS licence." The Press release dated 10.01.2008 was to only clarify the continuous stand of DoT regarding the award of UAS Licenses and no new policy of first come first served basis*

[54] DoT Additional File No. 14, pp. 133-180.
[55] DoT Additional File No. 14, pp. 133-180 at 166.

was formed which was actually already continuing since November 2003.

4.155 It is simply unbelievable that the SG would have settled all these pleadings and defended the Press Release if he had not been convinced of its legality. At any rate, if (as he now claims), the Press Release as issued was different from the version seen by him, these were the perfect occasions to speak out. The SG has given no explanation for his conduct during this entire period.

K. Seniority was a non-issue

4.156 Even thereafter, my bona fides are clear from the fact I ensured, as far as possible, that seniority was a non-issue. This was done by the simple method of allotting spectrum to all applicants on the same day. Wherever spectrum fell short in a few districts, consent of the concerned applicants was taken for district-wise allocation of spectrum. Thus, on the one hand, LOIs were given simultaneously and on the other hand, spectrum also was allotted simultaneously. This symmetry ensured that seniority was not a cause of grievance for any UASL applicant.

4.157 To conclude on this issue, the following points may be noted: FCFS in the telecom sector was not statutorily defined. Its application in a context where there are two sets of applications and licenses was never made clear. The UASL guidelines were not adhered to strictly and extensions of time were being given before I was appointed as

MoC&IT. All this did not have an impact on seniority because only one application was processed at a time. When the DoT decided to issue LOIs simultaneously, the officers did not ever suggest that seniority should be preserved on the basis of date of application even if an LOI holder was not coming forward with compliances. This would also be extremely unfair to other LOI holders who were ready to comply. Hence, the only logical, transparent and fair method was to fix seniority by taking the date of compliance with LOI conditions.In any event, as explained above, as long as applicants were informed in advance and had their compliances ready, nobody was prejudiced by the simultaneous issuance of LOIs. Thereafter, by allotting spectrum on the same date as far as possible, I ensured that no UASL applicant had any grievance on the basis of seniority.

L. The Hon'ble PM was duly and fully informed

4.158 Since it has often been alleged that I "misled" the Hon'ble PM, I wish to deal with this issue here. I would first of all point out that this allegation has been made by the CBI, without even recording the statement of the Hon'ble PM! On what basis do they then say that he was misled? I do hope that the JPC will not commit the same blunder: if they wish to draw any conclusions on this issue, it is mandatory to record both my statement and the statement of the Hon'ble PM.

4.159 The following factors may now kindly be noted:

(i) I have written several letters to the Hon'ble PM, including on 02.11.2007 (two letters); 26.12.2007; 07.11.2008; 01.04.2009; 21.04.2010; and 02.07.2010, thus keeping him updated about all decisions and developments in the telecom sector. Each one of these letters was considered by him personally and duly acknowledged.[56]

(ii) Apart from the above, I had several personal discussions with the Hon'ble PM on telecom issues throughout my tenure and particularly in the period November 2007 – January 2008. These would happen either on the side of Cabinet meetings or separately at his office/ residence.

(iii) DoT officers were in touch with PMO officers regularly, without even involving me, as seen by the file notings of the PMO itself.

(iv) In my first letter to the Hon'ble PM, I explained why the view of the MoLJ to refer the matter to EGOM was out of context, and also informed him that the DoT had decided to issue LOIs to eligible applications received up to 25.09.2007. This is exactly what has been recorded in the DoT file on the same date.

[56]PMO File No. 1.

(v) In my second letter to the Hon'ble PM, I explained why spectrum auction was contrary to TRAI Recommendations, unfair to new applicants and arbitrary because it violated the principle of level playing field. I assured him that no deviation or departure in the rules was being contemplated and that full transparency was being maintained.

(vi) In my third letter to the Hon'ble PM, I mentioned my personal discussions with him and my discussions with the EAM and the SG. I set out the entire procedure for issuance of LOIs and grant of spectrum. I explained that the earlier procedure of sequential processing of applications was not suitable to the present context and that therefore DoT proposed to issue LOIs simultaneously. This had already been specifically recorded with detailed reasons in the DoT Files. I also specifically mentioned that I had been enlightened by the several discussions with the EAM and the SG, who concurred with my proposals.

(vii) I further explained that the issue of seniority based on compliance of LOI conditions did not arise earlier since only one application was being processed at a time. But now, when large numbers of LOIs were being issued simultaneously, the person who complied with LOI conditions first would have to be granted UAS License first.

(viii) As explained by me above, this was the only logical method that could be adopted by the DoT that was also faithful to the FCFS principle. A combined reading of the fact that there are two separate licenses, the decision to issue LOIs simultaneously and the note of the SG where he clearly said that the License had to be given on compliance with LOI conditions lead only to this position. This is what had happened even in the past, when LOIs had been given simultaneously.

(ix) Thus, I reiterate my position that there was no deviation in the procedure and complete transparency was maintained. If at all, only the decision to issue LOIs simultaneously can be regarded as a new procedure, but even for this there was precedent and the need for simultaneous issuance was properly documented and transparently disclosed to the Hon'ble PM.

(x) Furthermore, all these matters were discussed by me personally with the Hon'ble PM. The PMO files contain detailed notes on the procedure followed by the DoT, which is identical to what has been explained by me above. The Hon'ble PM was fully aware of all these matters. The DoT issued LOIs only after I obtained the Hon'ble PM's concurrence when I met him in January 2008. Similarly, spectrum was allocated only after I had the concurrence of the Hon'ble PM and Finance Minister.

(xi) I would respectfully mention that the Hon'ble PM continued me as the MoC&IT after the 2009 elections, despite this matter having become unnecessarily controversial. Surely, if he felt that I had misled him or offended him in any manner, my re-appointment would not have happened.

5. FIXATION OF CUT-OFF DATE

5.160 The next major issue to be understood is the issue of cut-off date. The allegation against me is that after originally announcing that UASL applications would be received till 01.10.2007, thereafter decided that applications received till 25.09.2007 only would be processed.

A. Sequence of Events

5.161 The sequence of events in this regard begins on 24.09.2007, when the DDG (AS) prepared a note as under:

> *The recommendations of TRAI has since been received by DoT on 29.08.2007. TRAI has, inter alia, recommended no cap on number of Access Service Providers in any service area among other recommendations on terms of UAS Licences. In the meantime, the new UASL applications are pouring in and till date 167 applications from 12 companies for 22 service areas have been received. It is felt that it may be difficult to handle such large number of applications at any point of time. Therefore, it is proposed that we may announce a cut-off for receipt of UASL applications such that no new applications will be received after cut-off date till further orders. We may give a reasonable time to all who wish to submit new. UASL applications so that the decision may not be challenged. The reasonable period may be, say, 15 days. Therefore, we may*

announce 10.10.2007 to be the cut-off date for receipt of new UASL applications till further orders.

DFA please.

5.162 However, the DFA put up by the DDG (AS) mentioned the cut-off date as 01.10.2007.[57]This was approved by the M(T) and the S(T). I also approved the proposal on the same day. I wrote:

> *In view of large number of applications pending and to discourage speculative players, we may close receiving applications on 01.10.2007, i.e. one month from the date of TRAI's recommendations.*

5.163 Therefore, there was a collective decision of the DoT, approved by me, to fix 01.10.2007 as the cut-off date for receipt of new UASL applications. A Press Release was accordingly issued, which was published in the newspapers on the next day, i.e. 25.09.2007.

5.164 The cut-off date was fully adhered and applications were indeed received till this date. A total of 575 applications were received till 01.10.2007, out of which 343 applications were received after publication of the Press Release.

B. Reference to MoLJ

5.165 DoT was yet to decide on the processing of the applications, because various issues including availability of spectrum had to be considered. At this stage, on 24.10.2007, the AS Division felt that it would be

[57]D-6 at 1/C.

advisable to seek the opinion of the SG/AG on the methodology to be adopted to process the applications, and prepared a draft Statement of Case for this purpose.[58] After discussions with the M(T) and the S(T), a revised draft Statement of Case was prepared.[59] This explained the situation that the DoT was faced with and proposed three alternatives:

> *Alternative I:*
> *The applications may be processed on first come first served basis in chronological order of receipt of applications in each service area as per existing procedure. LOIs may be issued simultaneously to applicants (the numbers will vary based on availability of spectrum to be ascertained from WPC Wing) who fulfil the eligibility conditions of the existing UASL Guidelines and are senior most in the queue…*
>
> *Alternative II*
> *LOIs to all those who applied by 25.09.2007 (the date on which the cut-off date for receipt of applications were made public through press) may be issued in each service area as it is expected that only serious players will deposit the entry fee and seniority for license/spectrum be based on*
>
> *(i) the date of application*
> *or*
> *(ii) the date/time of fulfilment of all LOI conditions*
>
> *Alternative III*
> *DoT may issue LOIs to all eligible applications simultaneously received up to cut-off date…*

5.166 I approved the Statement of Case after adding one more alternative:

[58] D-7 at 4/C.
[59] D-7 at 5/C.

Alternative IV
Any other better approach which may be legally tenable and sustainable for issuance of new licenses

5.167 Three things are very important in relation to this Statement of Case for obtaining opinion of the AG/SG:

(i) If there was any conspiracy in the DoT to adopt a methodology to benefit a particular applicant, we would never have sent the file the MoLJ for taking opinion of the AG/SG – we would have decided the matter internally within DoT.

(ii) My bona fides are established by the fact that I in fact expanded the scope of the opinion by adding Alternative IV (i.e. any other better approach), which had not been proposed by the DoT officers.

C. Different Options

5.168 The perception that has been spread in the media (principally because of the CAG Report) is that the decision to issue LOIs to applications received up to 25.09.2007 was my idea. In fact, nothing could be farther from the truth.

5.169 As already seen above, grant of UASL does not automatically lead to allocation of spectrum – a separate license is required for that. This is also the briefing given by the DoT officials to the MoLJ officials.[60] I

[60]D-7 at 8/C.

therefore saw no prohibition in issuing LOIs to all eligible applications received till the cut-off date and thereafter spectrum would be allocated as per the usual procedure, subject to availability. This fact was also in the knowledge of the Hon'ble PM: in the PMO files, there is a note dated 25.10.2007 that "*The MCIT was of the opinion that all applications for new licenses should be issued Letters of Intent and thereafter, all those who deposit the license fee, should be issued licenses*."

5.170 However, this was opposed by the S(T). He was of the view that as per NTP-99, availability of adequate spectrum was essential for introduction of additional operators. Since it may not be possible to allocate spectrum to all the applicants, he was of the view that this option did not stand.[61] Interestingly, the note of the S(T) and the note in the PMO are on the same date: 25.10.2007, indicating that the S(T) was directly in touch with the PMO.

5.171 The matter was then re-examined by the AS Wing in view of the note of the S(T). The DDG (AS) considered the provisions of NTP-99, UASL guidelines and TRAI recommendations and finally concluded that all the options suggested earlier were open to the Government. (All this shows the democratic manner of functioning of the DoT – all officers were free to make their observations irrespective of seniority.)

[61]D-7 at 2-3/N.

D. View of the Law Minister

5.172 When the file was sent to the MoLJ, however, the Law Minister on 01.11.2007 suggested that the 'entire issue' be referred to the EGOM and sent the file back. With great respect, I would submit that the Law Minister had misunderstood the Statement of Case. No new policy decision was to be taken, for which the matter could be referred to the EGOM. The issue was purely procedural as to methodology of processing the applications. The DoT officers, therefore, were of the view that the note of the Law Minister was out of context, and this has been specifically recorded in the file.[62]

E. Factors to be considered

5.173 Now the DoT had to take a decision keeping in mind various factors:

(i) According to NTP-99 [as stated by the S(T)], availability of spectrum was essential for introduction of additional operators.The S(T) was relying on one portion of para 3.1.1 of NTP-99 to say that availability of spectrum was essential for introduction of new operators. But this was in the context of CMTS licenses. The same NTP-99 also provided for issuance of BTS licenses on a continuous basis. After changeover to the UASL regime, when all licenses were issued as UAS Licenses

[62]D-7 at 6/N.

covering both wireless and wireline services, there actually remained an unresolved inconsistency in NTP-99 on this issue.

(ii) According to UASL Guidelines, the licenses were to be issued on a continuous basis and without any automatic grant of spectrum.

(iii) As per TRAI Recommendations, there was to be no cap on the number of licenses.

(iv) These three fundamental documents – NTP-99, UASL Guidelines and TRAI Recommendations – had to be harmoniously construed.

(v) Though processing of applications had not started, out of experience it was known that some of the applications would ineligible and would be rejected. (As it turned out, 110 out of 232 applications were rejected on this basis.)

(vi) In the past, companies had been issued licenses and then had to wait for over a year to get spectrum. This was an accepted fact in the industry.

(vii) Availability of spectrum was tentatively known. In fact, even well after the policy decision was taken, the WPC Wing was still 'working out' the amount of spectrum available.[63]

(viii) It must be noted that spectrum had always been available, but it was not properly disclosed. In the spectrum allocation done under my tenure, no spectrum was actually vacated by the Defence: only the spectrum that was earlier lying without being used was properly coordinated and made available for allocation. This is recorded in the WPC Wing files for each service area.

(ix) The fact that more spectrum was likely to become available because of vacation by Defence was also in public domain. It was mentioned in the Consultation Paper issued by TRAI itself in June 2007.

(x) The rush of applications had started after announcement of the cut-off date. Till then applications had been received in routine course. It was obvious that most of the applications after 25.09.2007 were speculative. The publication of the press release really divided the applications into two homogenous groups.

[63]Note of the WPC Wing dated 20.02.2008, D-7 at 37/N.

5.174 Thus, on a harmonious reading of the provisions of NTP-99, UASL Guidelines and TRAI Recommendations, and keeping in view the likely number of eligible applications, the likely availability of spectrum, and the industry precedent of licensees waiting for spectrum allocation, the most suitable method was to issue LOIs to all eligible applications received up to 25.09.2007.

5.175 In view of all of the above, the AS Wing proposed as under:

> *In order to avoid any legal implications of cut-off date, all the applications received till the announcement of cut-off date in the press i.e. 25.09.2007 may be processed as per the existing policy and decision on remaining applications may be taken subsequently.*[64]

5.176 This shows that the officers were conscious of the fact that on the one hand, some sort of line had to be drawn since all 575 applications could not be processed, and on the other hand drawing any sort of line could have legal implications. Thus they proposed the date of 25.09.2007, which was the most reasonable option given the circumstances. This approved by me on 02.11.2007.[65]

F. Hon'ble PM was duly informed

5.177 On the same date, I informed this decision to the Hon'ble PM. I also informed him about the note of the Law Ministry and explained to

[64]S-7 at 6/N.
[65]D-7 at 6-7/N.

him as to why it was felt to be out of context. My letter was duly considered by the Hon'ble PM.

5.178 After this date, I had several interactions with the Hon'ble PM and the Law Minister – in Cabinet meetings and other meetings. If either of them had desired that the EGOM should consider this matter, they would have told me and I would have acted accordingly. However, neither of them ever made this suggestion and rather they fully understood and endorsed my course of action. In fact, the Law Minister himself told me that if he had spoken to me before he wrote his note, this so called 'controversy' would never have arisen. The Hon'ble Law Minister had not realised that spectrum pricing had already been taken out of the purview of the GOM by the Hon'ble PM himself. All other issues such as FCFS etc were procedural matters solely within the purview of the DoT and there was no occasion to refer them to the GOM. Hence, the question of any reference to GOM did not arise at all, and that is why the DoT officers correctly termed it as 'out of context'. It is because the Hon'ble Law Minister was convinced by the stand of the DoT that subsequently, the MoLJ has throughout supported the stand of the DoT in all the litigation concerning this matter and also endorsed the view of the DoT that the CAG had no jurisdiction to question the policy decisions of the

Government.[66]Even in this JPC, if the then Law Minister and I had been called, this matter could have been clarified.

5.179 However, thereafter I did have discussions with the EAM, who was also the Chairman of the EGOM, on all these issues, as directed by the Hon'ble PM. Thus, in a sense, though the matter was not formally referred to the EGOM, I did take the advice of the Chairman of the EGOM and only then proceeded.

5.180 Furthermore, when the S(T) wished to discuss this matter again, a meeting was again held on 06.11.2007 where all issues were discussed threadbare and it was decided to issue LOIs simultaneously to all eligible applications received up to 25.09.2007. As stated earlier in this Statement, this has been recorded in a note of 12.11.2007 by the DDG (AS) in all the individual license files and thereafter approved by the M(T) and S(T).

5.181 This decision to issue LOIs to eligible applications received up to 25.09.2007 was subsequently publicised through a Press Release on 10.01.2008. Some criticism has been levelled against this as being a delayed disclosure. However, this criticism misses the point that this Press Release was actually not even necessaryas no new policy decision was being communicated.That the action of DoT was reasonable was accepted even by S Tel, which had initially challenged

[66]MoLJ Opinion dated 19.08.2010, copy contained in DoT File No. 20-213/2008-AS.I pp. 4-11

this Press Release on this issue. In its letter dated 09.03.2010, S Tel wrote:[67]

> *We acknowledge the fact that the decision of the Government for giving UASL licenses to those who applied up to September 25, 2007 was not arbitrary but based on likely availability of spectrum and administrative decision thereon.*

5.182 This was again confirmed by S Tel in its Additional Affidavit filed in the Supreme Court.[68]

5.183 But in this entire process, as explained above, the policy notes were also seen by the SG, who advised that what was proposed was fair and reasonable.

G. No benefit to Unitech

5.184 The charge against me has been that this date of 25.09.2007 was fixed in order to accommodate the applications of Unitech group. In fact, the real beneficiary of this date has been ShyamTelelink (later Sistema), who applied on 25.09.2007 and was granted license and spectrum also subsequently.

5.185 Thus, to summarise the points on this issue: it was not my idea to issue LOIs to applications received up to 25.09.2007. I was open to issuing LOIs to all applications received up to 01.10.2007, but the S(T) was against this. On a harmonious reading of the provisions of

[67]DoT File No. 20-250/2009-AS-I Vol. III (Additional File No. 12), p. 64.
[68]DoT File No. 20-250/2009-AS-I Vol. III (Additional File No. 12), p. 208

NTP-99, UASL Guidelines and TRAI Recommendations, and keeping in view the likely number of eligible applications, the likely availability of spectrum, and the industry precedent of licensees waiting for spectrum allocation, the most suitable method was to issue LOIs to all eligible applications received up to 25.09.2007. This was duly informed to the Hon'ble PM immediately and neither the PM nor the Law Minister had any objection. Subsequently this was also approved by the SG. Unitech Group got no benefit by this date being fixed; if at all there was a beneficiary it was ShyamTelelink, and there is no charge of any conspiracy between us.

6. DUAL TECHNOLOGY

6.186 The next issue that I am dealing with is dual technology. The allegation against me is that I should have treated the dual technology applications of TTSL and TTML (collectively "**Tatas**") as a category that had priority over new UASL applicants insofar as allocation of spectrum is concerned. It is also alleged that I delayed the clearing of the Tata file to ensure that licenses of Swan Telecom were signed earlier.

A. TRAI Recommendations

6.187 Much prior to my becoming the MoC&IT, the DoT had received requests for allocation of GSM spectrum from three CDMA operators: Reliance Communications Ltd (on 06.02.2006), HFCL Infotel Ltd (on

11.07.2006), and ShyamTelelink Ltd (on 07.08.2006). These requests were neither processed nor rejected, but simply kept pending. In light of the pendency of these applications, on 13.04.2007 TRAI was requested to give recommendations on allocation of dual technology spectrum.

6.188 TRAI gave its recommendation on 28.08.2007 that dual technology was permissible. The following extracts from the recommendations are relevant:

> *4.27 [A] licensee using one technologymaybe permitted on request, usage of alternative technologyand thus allocation of dual spectrum. However, such a licensee must pay the same amount of fee which has been paid by existing licensees using the alternative technology or which would be paid by a new licensee going to use that technology*
>
> *4.34 [As] the existing licensee becomes eligible for allocation of additional spectrum specific to the new technology, such a licensee has to be treated like any other existing licensee in the queue and the inter se priority of allocation should be based on the criteria that maybe determined by the Department of Telecommunications for the existing licensee.*
>
> *4.35 [The] Authority is of the view that if an existing licensee wishes to provide services using another technology then he must be treated as per the norms of spectrum allocation in bands for alternate technologies. On payment of the specified fee for the Service area for which the LICENSEE wishes to provide plurality of technologies, the licensee maybe given additional spectrum equal to the initial spectrum allowed in the license for that technology. The Authority further recommends that in order to ensure that this additional spectrum is*

efficiently and properly utilized in a timely manner; the licensee should also be required to fulfill the contingent roll out obligation.

5.27 (ii) No additional spectrum may be allocated to licensee till he does not fulfill the roll out obligations.

6.189 It is evident from the above that the TRAI recommendation was that dual technology was permissible, but spectrum in the alternate technology should not be allocated unless the licensee had complied with its existing roll out obligations. This is for the obvious reason that spectrum hoarding is to be discouraged. If a licensee had not fulfilled its roll out obligation with its already allocated spectrum, there was no question of giving it additional spectrum in alternate technology. It may be noted that 'additional spectrum' includes the initial spectrum in the alternate technology, as clearly mentioned in the TRAI Recommendations extracted above.

B. Understanding of AS Wing

6.190 This was the clear understanding of the AS Wing of the DoT also. In the Draft Statement of Case prepared by the AS Wing, it has been clearly recorded:

Similarly it is proposed to give approvals for usage of alternate technology to other UASL operators also presently using any one of the wireless access technology (GSM or CDMA) on payment of required fee. However, in order to ensure that only serious players are to be considered, such requests for dual technology spectrum may be considered only from those

applicants who have already met the existing roll out criteria in their existing UAS Licenses.[69]

6.191 This continued to be the consistent stand of the AS Wing. Even on 07.08.2009, the following note has been recorded:

Before processing the pending requests for dual technology spectrum of these companies, it is also expected to get rollout of services by these companies using their single technology spectrum so that these companies do not hoard the scarce resource of spectrum.[70]

6.192 In addition, all the existing conditions of the UASL would also continue to apply. This was also made clear in the letters of in principle approval for use of dual technology. One of the important conditions here is that before any additional spectrum can be allocated, the licensee should a 'No Dues Certificate' from the WPC Wing for its existing spectrum charges.

6.193 Now returning to the dual technology applications by Reliance, Shyam and HFCL, I issued the following orders on 17.10.2007 after the Telecom Commission gave its report on the TRAI Recommendations:

In view of above approvals, pending requests of existing UASL operators for use of dual/ alternate wireless access technology should be considered and they should be asked to pay the required fees. Allocation of spectrum in alternate technology

[69]D-7 at 4/C, para 8(i).
[70]F. No. 20-228/2009-AS-I at 21/N para 7(ii). (DoT Additional Documents received on 04.07.2012, Sl. No. 3)

should be considered from the date of such requests to WPC subject to payment of required fees.[71]

6.194 Again after discussions with the S(T), on 18.10.2007 I recorded:

For allocation of spectrum for dual technology, the date of payment of required fee should determine the seniority.[72]

6.195 Some allegations have been made that there is some contradiction between the orders of 17.10.2007 and 18.10.2007. Actually they are complementary to each other. Since I was dealing with applications that had been pending since early 2006, at which time even the dual technology policy was not clear, the applications could not be given seniority from those dates. the only possible date for giving seniority had to be the date of payment of the crossover fee.

6.196 Accordingly, in the Press Release issued on 19.10.2007, it was provided as follows:

The existing UAS Licensees, who have already applied for allocation of spectrum for the alternate technology shall also be considered for allocation of spectrum in alternate technology from the date of payment of prescribed fee.

6.197 It must furthermore be noted that all these orders and Press Release were issued specifically to deal with the pending applications for dual technology only. That is made expressly clear in the orders as well as the Press Release. They did not deal with future applications for dual technology.

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[71] D-5 at 19/N.
[72] D-5 at 21/N.

C. Processing of Tatas' Applications

6.198 The Tatas' application for dual technology was received in the DoT on 22.10.2007. I will first deal with the allegation of delay in clearing the file.

6.199 The view of the S(T) on these applications of Tata was:

> *Some more applications have been made for permission to use GSM technology in areas where the applicant is using CDMA technology. These applications should be considered along with the applications for new licenses numbering 575 – some pending since more than six months in chronological order as they are received. In case applications made now for permission to use GSM technology in areas for which the applicant is licensed to use CDMA technology are allowed, these applicants would get an unjustifiable advantage in allocation of GSM spectrum.*

6.200 As noted earlier, all the applications for new UASLs were received up to 01.10.2007. The Tatas' application for dual technology was received on 22.10.2007. Thus if these were to be treated together and considered chronological order based on date of application, Tatascould be considered only after all 575 applications were disposed of.

6.201 This view was not shared by the AS Wing. In the draft Statement of Case prepared by the officers, it was provided:

> *M/s TATA are existing operator using CDMA technology in 20 service areas and their request for alternate technology spectrum in GSM was received by DoT on 22.10.2007. The*

date of priority for spectrum allocation may be the date of payment of required fee for each service area.[73]

6.202 This was modified by the S(T) to read:

Their request for permission should be taken up along with new applicants, as per Alternative I.

6.203 Thus there was a difference of opinion at the level of the officers on how to deal with the Tata file. My initial view on the subject was to wait for the advice of the Law Ministry. This did not happen, as already discussed above. However, before any decision could be taken on this, the COAI filed Petition No. 286 of 2007 before the TDSAT challenging the decision to permit dual technology. Hence, AS Wing proposed that decision on the Tata applications could be deferred till the TDSAT gave its verdict. I approved this proposal.

6.204 Ultimately, after the TDSAT specifically rejected the COAI's prayer for stay, the DoT again proposed on 14.12.2007 that the Tata application could be processed and in principle approval could be issued. This was approved by the SG also. I again approved the proposal, and the letter of in-principle approval was issued to the Tatas on 10.01.2008 along with the LOIs to new UASL applicants. The Tatas also deposited the crossover fee on the same day, like all the other applicants. The Tatas had also applied for new UASLs in three circles, and LOI for these were also issued on the same day.

[73]D-7 at 4/C, para 8(i).

6.205 Thus, two files of the Tatas were being processed together – one file for grant of UASL and one file for amending the existing UASL to permit dual technology. Both the files were considered together by me also.

6.206 The Tatas did not produce the 'No Dues Certificate' from the WPC for a considerable period of time and it is only on 27.02.2008 that there is a note by the S(T) that the No Dues Certificate has been issued and the license may be signed.[74] I approved the proposal on the same day.

6.207 On the same day (27.02.2008), I also cleared the file for amendment of Tatas' existing UASL to enable dual technology. Though there is no discussion in this file regarding No Dues Certificate, the fact is that both files were considered together by me and the moment Tatas furnished the No Dues Certificate, I cleared both files.

6.208 Thus, there is no substance in the allegation that I delayed the clearing of the Tata file.

D. Order of Priority

6.209 Now we come to the question of allocation of spectrum. Here, there was a fundamental difference between the views of the officers of the AS Wing and the WPC Wing, which I did not know about as it was

[74]D-43 at 34/N.

never brought to my notice on file or otherwise. While as per the AS Wing, seniority should have been considered on the basis of date of payment, the WPC Wing maintained that seniority would be considered on the basis of date of application for spectrum.

6.210 Thus in the WPC files for each service area, the cases have been processed on the basis of date of application for spectrum only.Tatas' complete application for spectrum was received on 04.03.2008 (they had filed applications before, but these were incomplete because their UASLs had not been amended and as such no spectrum could be allocated on this basis) and they were placed in the queue accordingly.

6.211 GSM spectrum was allotted to the Tatas in all service areas except Delhi on the basis of their applications dated 04.03.2008. Wherever spectrum was not allotted in all districts in a service area, their consent was obtained for spectrum allotment. However, the fact is that they had not complied with roll out obligations and as such no GSM spectrum should have been allotted to Tatas until they complied with their roll out obligations.

6.212 In 2010, the Tatas filed a petition in TDSAT for allotment of spectrum in Delhi service area, which was ultimately allowed as it was not opposed by the DoT. But even here, the question of compliance with roll out obligations has not been considered either in the DoT files or

in the TDSAT proceedings. This aspect of the matter has been completely overlooked (or deliberately ignored) by the CBI as well.

6.213 If this whole matter of Tatas' seniority had been referred to me, then some decision could have been taken after due discussion. But no officer of the WPC or the AS Wing referred the matter to me. The Tatas also never brought any grievance to me. In fact, in their letter dated 13.11.2009addressed to me, they specifically pleaded that insofar as Delhi service area was concerned, they should be placed after Swan Telecom in order of priority based on time of payment.[75]

6.214 The fact of the matter is that there appears to have been two factions in the DoT itself – the S(T) wanted Tatas to be at the bottom of the list, whereas some other officers wanted them to be at the top of the list. What in fact happened is that they were treated on par with the applications for new UASLs. If they had obtained the necessary No Dues Certificate, their license also could have been amended earlier. This may have helped them to approach the WPC even earlier for allotment of spectrum. Of course, no spectrum should have been allotted to them at all till they complied with their roll out obligations.

6.215 Hence, the allegation of discrimination or unfair treatment to Tatas also does not have any substance.

[75]Letter No. TTSL/DoT/GSM/2009 dated 13.11.2009, D-82 Ann. 9.

7. ELIGIBILITY OF APPLICANTS

7.216 This is the final issue that I would like to address. The allegation is that UAS Licenses were given to companies that did not satisfy the eligibility criteria. More particularly, it is alleged that Swan Telecom was ineligible because of the cross-holding restriction in clause 8 of the UASL Guidelines, and the Unitech Group was ineligible because the objects clause of the companies' Memorandum of Association had not been amended.

7.217 It is not necessary for me to deal with the merits of this allegation at all, except to briefly note that the MoLJ and the Ministry of Corporate Affairs appear to have taken positions that suggest that there was no violation of the eligibility criteria.

7.218 I would however place for the consideration of the JPC a different perspective on this matter. *First*, at the level of policy, the earlier approach of the DoT was that eligibility conditions could be satisfied at any time till the grant of LOI and in some cases even after the grant of LOI. I was the MoC&IT who ordered that this practice cannot be continued and eligibility conditions must be satisfied on the date of application and not thereafter. If the earlier regime had continued to operate, then there is no question of any ineligibility by either Swan Telecom or Unitech Group, since the admitted position in both cases is that they were eligible on the date of grant of LOI. The charge against them is that they were ineligible on the dates of their

application. *This charge can be levied only on the basis that eligibility criteria should be satisfied on the date of application – which is a decision taken by me!* This shows the absurdity of the entire charge – that a decision taken by me to make the process more stringent is made the basis for a charge against me!

7.219 At this stage, one parallel development that was taking place in the DoT may be taken note of. The DoT was using a particular format for the LOI, which had been legally vetted also. On 07.11.2007, the AS Wing prepared a revised draft LOI, which they proposed to issue.[76] When this revised draft was seen by the LF Branch, they advised on 23.11.2007 that "*LOI be granted in the existing legally vetted format only after all the eligibility conditions are met and the application is complete in all respects.*"[77]

7.220 This advice was accepted by me on 04.12.2007, when I recorded my note, "*[the] LOI pro forma as used in the past may be used for LOIs in these cases also. However, separate letter seeking duly signed copies of all the documents submitted at the time of applying for UASL as per existing guidelines may be obtained.*"[78] This again shows my bona fides that I agreed with the advice of the LF Branch to continue to use the existing LOI format, but I ensured that eligibility conditions will have to be complied with as on the date of application.

[76]D-7 at 12-13/N.
[77]D-7 at 17/N.
[78]D-7 at 20/N.

7.221 *Second*, at the level of implementation, I have not interfered with the examination of any file of any licensee to determine its eligibility. This examination was done by a Committee of DoT officers, constituted by the S(T), and I have approved the decision of the officers – whether it be to grant LOI or reject the application – in each and every case.*There is not one case where I have tried to change the decision*. This shows my bona fides. In fact, after the draft CAG report raised some questions on eligibility, I did have the matter examined by the LA(T), who gave a detailed note on the issue on 11.11.2010.[79]No officer took the view that any eligibility norms had been infringed.

7.222 Thus, the allegation that licenses were given to ineligible companies has no basis against me personally. As stated above, even on merits this appears to be a weak allegation, but there is no need for me to address the JPC on this.

8. CONCLUSION

8.223 This JPC has been constituted to examine all matters relating to allocation and pricing of Telecom Licenses and Spectrum from 1998-2009. I am submitting this Written Statement to the JPCin an attempt to set out the entire sequence of events and roles of various individuals in relation to the grant of UAS Licenses and allocation of

[79]DoT File No. 20-213/2008/AS-I Vol. I (Part 2), page 2

2G spectrum. I have had to do this because despite my repeated requests, the Chairman of the JPC has declined to permit me to depose before the Committee.

8.224 As the proceedings of the JPC have shown, the facts pertaining to the grant of licenses and allocation of spectrum can be appreciated only after taking into account the huge number of records and documents along with the oral testimonies of the hundreds of persons involved. At the end of the day, however, the story is simple: an effective and affordable nation-wide telecommunication system is crucial for the development of the country as a whole. Successive governments have realised this and thereby treated telecom as an infrastructure item. We have also realised that a properly regulated market-based approach was the best way to let the sector grow.

8.225 Accordingly, the primary aim of the government in the telecom sector was not to earn revenue, but to ensure effective and affordable services to the whole country. The idea was to keep entry barriers low and encourage more players to enter the sector. As the players competed with each other to add subscribers, teledensity increased and tariffs fell. At the same time, income to the Government, based on the revenue-share model, exponentially increased with an in-built indexation. This was a situation to the benefit of all stakeholders.

8.226 Spectrum is the core resource on which the entire wireless industry is built. A certain amount of spectrum had to be given to every operator, so that he could conduct his operations. At the same time, there had to be an efficient regulatory system that ensured that the operator used the allotted spectrum optimally, and the industry did not fall prey to spectrum hoarding. I attempted to achieve this by tightening the subscriber base criteria for allocation of spectrum over and above start-up spectrum. After tremendous opposition from the COAI, these criteria are now in place and are forcing the operators to use spectrum efficiently.

8.227 The unfortunate fact is that prior to my tenure, there was no transparency in disclosure of spectrum availability and allocation. This acted as a major barrier to entry of new operators and the GSM segment was virtually cartelised by the COAI. It is only as a result of my efforts that we were able to introduce new players and allocate spectrum to them, which was earlier lying unused. *It is worth reiterating that not even 1 MHz of spectrum allotted by me came from the Defence Services or any other source: it was simply lying without being coordinated; a waste of a national resource*. Why was it kept this way, and why new players were not allowed earlier? Why did companies that got licenses in December 2006 have to wait till January 2008 to get spectrum? I suspect that the answer is known to all.

8.228 The DoT was supposed to have been following the FCFS system, but nowhere was it defined as to how FCFS would operate when there were two sets of licenses and two sets of applications. Both the AS Wing and the WPC Wing have separately followed FCFS. This is what I explained to the Hon'ble PM in my letter of 26.12.2007: "*The first come first serve policy is also applicable for grant of wireless license to the UAS Licensee*". The nuances of how the FCFS system would operate never became an issue earlier, since the DoT was processing only one application at a time – and since the applicants were all mostly COAI members, nobody protested against this method. This sequential processing obviously could not be done when a large number of new applications arrived, and I approved the DoT proposal to issue LOIs simultaneously. After LOIs had been issued, it was also duly informed to me that they had been issued simultaneously.

8.229 Once LOIs had been issued simultaneously, there is no procedure, and really there cannot be a procedure, to refuse to accept the LOI compliances from an LOI holder and ask him to wait till some other LOI holder gave his compliances. The only logical and transparent method is to fix priority in order of receipt of compliances, which is what was done. All the applicants did in fact submit compliances on the same day or the next day, and none was prejudiced by this method. I further ensured this by the method of simultaneous

allocation of spectrum, as far as possible. Thus, seniority became a non-issue and that is why no operator raised any grievance.

8.230 The decision to process applications received till 25.09.2007 and the issue of dual technology are relatively smaller issues. I approved the proposal to process applications received till 25.09.2007 because it was consistent with a harmonious reading of NTP-99, UASL Guidelines and TRAI Recommendations, considered along with the likely number of eligible applicants, likely availability of spectrum (including possibility of spectrum vacation), and past precedent of licensees waiting for spectrum allocation. I was in fact open to processing all the pending applications, but the thenS(T) was not in favour of this and hence this decision was taken. Insofar as dual technology was concerned, the Tata file was cleared as soon as they furnished the required No Dues Certificate and was not delayed for any reason. The question of their inter se priority with new applicants was never referred to me for a decision and was handled by the WPC internally.

8.231 The earlier procedure followed by the DoT was to allow several extensions of time to applicants to comply with eligibility conditions till issuance of LOI, and in some cases even after issuance of LOI. There is no power in the UASL Guidelines or anywhere else for this to be done, but it was being done. On what basis? Again, I suspect that the answer is known to all. After I took charge, I stopped this

practice and directed that eligibility had to checked at the time of application and not subsequently. It is on the basis of this decision that the CBI has charged Swan Telecom and Unitech Group as being ineligible – and the twist in the tale is that I am supposed to have conspired with them! It is really absurd.

8.232 Today, after the intervention by the Supreme Court, cancellation of licenses and the attempted auction of spectrum, the telecom wheel has turned a full circle. There are no new operators, and no one is keen to enter the business. Tariff increases have already been announced, and are likely to be announced again. The telecom success story is finished.The so-called theory of conspiracy between me and some private operators has fallen flat after the combined investigation of CBI, ED and Income Tax Departments could not identify a single rupee of any bribe with me or even my extended family. Where has this left the country?

8.233 I took no unilateral decisions. Every major decision of mine was taken after consultation first with the DoT officers and thereafter with the Hon'ble PM, FM and EAM. All issues including entry fee, non-auction of spectrum, FCFS, processing of applications till 25.09.2007, etc., were personally discussed by me with the Hon'ble PM and the DoT proceeded only thereafter.

8.234 On several issues in this case, one can the view that the decision is a matter of opinion. Different options were available, and the DoT chose a particular option. I also accept that some other authority may have a different opinion. For instance, the Planning Commission says that telecom should not be seen as a source of revenue, but the CAG is concerned only with maximising revenue. These sort of institutional differences should be left to be determined by the Executive, which is of course answerable to Parliament. Instead, the CBI, the Supreme Court and various other bodies started imposing their opinions, leading to this current situation.

8.235 It must be understood that the CBI is the investigative and prosecuting arm of the Central Government. If the Hon'ble PM says in Parliament that there has been no loss to the exchequer, how can the Government stand by and watch silently while the CBI prosecutes me for allegedly causing loss to the exchequer? It is truly unbelievable and this attidude of the Government can perhaps only be explained as an exercise in blame-shifting or acting on political considerations.

8.236 The inter-institutional differences and aberrations mentiond above have been responsible for my personal liberty being sacrificed for fifteen months, though I do believe that I have emerged stronger from this. But all this could easily have been avoided if the Government had backed its Minister and presented the case properly before the Supreme Court.I can only hope that if this kind of situation recurs, no

other Minister is made to suffer my fate. In conclusion, I would like to state that I stand by every decision that I took, and I am confident of emerging from this controversy with my name cleared by the judiciary and by history.