# Centre For Public Interest Litigation vs U.O.I.& Ors on 8 April, 2016

## Equivalent citations: AIR 2016 SUPREME COURT 1777, 2016 (6) SCC 408, 2016 (3) ADR 448, AIR 2016 SC (CIVIL) 1585, (2016) 3 MAD LJ 516, (2016) 3 SCALE 712, (2016) 3 JCR 109 (SC), (2016) 3 ALL WC 2378

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## Bench: R. Banumathi, A.K. Sikri, T.S. Thakur

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

WRIT PETITION (C) NO. 382 OF 2014

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| CENTRE FOR PUBLIC INTEREST LITIGATION | .....PETITIONER(S) | |
| VERSUS | | |
| UNION OF INDIA & ORS. | .....RESPONDENT(S) | |

J U D G M E N T

A.K. SIKRI, J.

The petitioner herein, viz., Centre for Public Interest Litigation, is a society registered under the Societies Registration Act, 1860. It claims that the very purpose for which this society was established was to bring causes to the Superior Courts, which are of grave public importance, by way of public interest litigation in an organised manner. In the present writ petition filed under Article 32 of the Constitution of India, the petitioner challenges the decision of the Government of India, taken sometime in March 2013, allowing voice telephony to respondent No. 2 (Reliance Jio Infocomm Ltd.) on payment of Rs.1,658 crores entry fee. Allegation of the petitioner is that the aforesaid amount at which the license for voice telephony is granted to respondent No. 2 is a pittance inasmuch as in normal course grant of this license would have fetched a whopping sum of Rs.25000 crores approximately. This insinuation is based upon a draft report of the Comptroller and Auditor General of India (CAG) which report estimated the aforesaid license fee/entry fee. It is also alleged that respondent No. 1, while allowing voice telephony to respondent No. 2, has not revised the Spectrum Usage Charges (SUC) matching with the charges which are paid by other operators who bought voice telephony. It is stated in the petition that whereas the other operators pay 3% to 5% revenue annually depending upon quantum of the spectrum they hold, respondent

No. 2 in contrast would be paying just 1% of the revenue. In this way, alleges the petitioner, an undue favour is given to respondent No. 2 by charging abysmally less entry fee and demanding much lesser SUC, thereby causing loss of revenue to the Government over 20 years license period. It has also resulted in disturbance in the level-playing field between respondent No. 2 vis-a-vis other operators. The petitioner has tried to project that unwarranted favouritism is shown to respondent No. 2 and the decision making process, in this behalf, was also not only faulty but in violation of accepted norms as well.

The factual details leading to the aforesaid allegations are averred in the petition which can be summated in the following manner:

> On 25.02.2010, the respondent No. 1 issued Notice Inviting Applications (NIA) for the auction of:
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> (i) 3G: Three or 4 blocks each of 5+5 MHz spectrum for 3G services in

2.1 GHz band at a reserve price of Rs. 3,500 crore for a Pan-India license, and

(ii) BWA (4G): Two blocks each of 20 MHz spectrum for BWA services in 2.3 GHz band at a reserve price of Rs. 1,750 crore for a Pan-India license.

In respect of BWA (4G), as per the NIA conditions, a bidder could be an existing ISP-A licensee or UAS licensee (or obtain any of these licenses later if successful in the bid), but it can provide only such services which are allowed under the license it chooses. For example, an ISP-A licensee cannot provide voice telephony. In this regard, reliance is placed on the following clause of the NIA:

> Clause 3.1.2: “Services can only be offered subject to the terms and conditions of the license obtained by the operator. Award of spectrum does not confer a right to provide any telecom services, and these are governed by the terms and conditions of the license obtained by the operator.” During May-June 2010 the auctions for 3G and BWA were concluded. The 3G auction fetched Rs. 16,750.58 crore for 5+5 MHz spectrum in 2100 MHz (or 2.1 GHz) band. Thus, per MHz price worked out to be Rs. 1,675 crore. This spectrum price bequeathed the rights to provide both data and voice.

Immediately, after the 3G auction, the BWA auction began which fetched Rs. 12,847.77 crore for 20 MHz pan-India license in the 2300 MHz (or 2.3 GHz) band. This works out to be Rs. 642.39 crore per MHz.

Infotel Broadband Services Pvt. Ltd. (IBSPL) emerged as the only company to have acquired pan-India BWA spectrum. Five other companies viz. Bharti Airtel (4 Service Areas), Aircel (8 Sas), Qualcomm (4SAs), Tikona (5 Sas) and Augere (1 SA) shared the remaining other Pan India slot (22 Serve Areas) of BWA spectrum in the country.

It is also averred that IBSPL had an ISP-A license since November 2007 and had just one subscriber with revenue of Rs. 16.28 lakhs during 2009-10, and its authorized share capital was Rs. 3 crore and the paid up capital was Rs. 2.51 crore. Infotel Digicomm Pvt. Ltd. (IDPL) held 99.99% share of the IBSPL at the time of submission of application in March 2010 for the BWA auction.

It is alleged in the petition that within hours of completion of BWA auction on 11.06.2010, IBSPL increased the authorised share capital from Rs. 3 crore to Rs. 6,000 crore. On 17.06.2010, the company authorised its Board of Directors to allot 475 crore equity share of Rs. 10 each to Reliance Industries Ltd. (RIL) and 25 crore equity share of Rs. 10 to Infotel Digicomm Pvt. Ltd. (IDPL) aggregating to the equity capital of Rs. 5,000 crore. On the same day, the company also decided to change from a private company to Public Limited Company (Infotel Broadband Services Ltd). Thus, the company within a week of winning the BWA spectrum disposed off 95% shares to RIL while 5% was retained by IDPL. Much later in March 2013, the company was renamed as Reliance Jio Infocomm Pvt. Ltd. On that basis, some suspicion is nurtured as to how IBSPL acquired BWA spectrum and thereafter stakes in IBSPL came under the control of RIL. The said IBSPL is now known as Reliance Jio Infocomm Pvt. Ltd.

However, we may like to add here itself that the auction of BWA in which IBSPL turned out to be successful bidder resulting into acquisition of Pan-India BWA spectrum in its favour is not the subject matter of dispute and was never questioned by anybody. This auction, as is clear from the above, was held way back in May-June, 2010. Though, there were other prominent companies of repute who participated in the said auction and shared the remaining other Pan-India slot (22 Serve Areas), no competitor of IBSPL challenged BWA auction. The subject matter of challenge in the instant writ petition is the conversion of BWA spectrum to Unified License (UL) i.e. migration of existing BWA spectrum to UL which has been done by respondent No.1.

In respect of the aforesaid central issue raised, it is pointed out by the writ petitioner that on 16.04.2012, TRAI submitted its recommendations to respondent No. 1 on Guidelines for UL and migration of existing license. Thereafter, on 02.05.2012, respondent No. 1 sought clarification from TRAI on migration of ISP licensees having BWA spectrum to UL regime. TRAI in its response to respondent No. 1 clarified that the spectrum of 3G/BWA was liberalized and the operators can migrate to UAS license, which meant allowing voice telephony to them as well on such migration. According to the petitioner, though TRAI had clarified that the spectrum of 3G/BWA was liberalized and operators could migrate to UL, a Committee of Department of Telecommunication (DoT) took the view, sometime around May 2012, that under ISP licenses, voice telephony cannot be provided. This view was reiterated by the DoT Committee once again in August, 2012. The allegation of the petitioner, however, is that on 25.01.2013 another Committee was constituted under the Chairmanship of Secretary (Telecom), though the order in this respect was issued only on 11.02.2013, to go into this issue and suggest the way forward. It is stated that Secretary (Telecom) was made Chairman of the Committee even when he was due to superannuate two months later i.e. in March, 2013. This Committee prepared its draft report on 30.01.2013 as per which the said Committee was not ready to make any recommendations on ISP (holding BWA spectrum) migration to UASL. However, still in its final report given on 13.02.2013, the Committee recommended that on payment of Rs.1,658 crores, ISP (holding BWA spectrum) could be migrated to UASL, thereby

permitting voice telephony. This recommendation was approved by Telecom Commission in its meeting on 18.02.2013. The official from the Ministry of Finance who also attended this meeting, while agreeing with the aforesaid proposal, ignored Finance Ministry's own recommendations on the 2G spectrum issue inasmuch as in the year 2007 when the then Telecom Minister wanted to award the licenses at Rs.1,658 crores, the then Finance Secretary had objected to it. After the Telecom Commission approved the recommendation, the same was forwarded to the Telecom Minister who gave his final approval on 05.03.2013. It is this decision of migration of BWA spectrum given to respondent No. 2 into USL which is termed as totally arbitrary, illegal, unfair, impermissible and against the public interest.

It would be pertinent to mention at the outset that in the writ petition, the petitioner has specifically accepted that it has not made any representation to the Government before approaching the Court in the form of present writ petition. Reason given is that the CAG itself has investigated this matter and in its draft report dated 07.11.2013 adversely commented upon the manner in which the aforesaid migration is allowed to respondent No. 2 at the cost of exchequer resulting into whopping loss of public revenue thereby giving undue advantage of Rs.22,842 crores to respondent No. 2. Thus, heavy reliance is placed on the said CAG report by the petitioner in support of its contention and following part of the said report is specifically referred to:

> "(x) It was found that the basis of the decision i.e. payment of entry fee of Rs. 1,658 crore by ISP lincensee for a permission to Pan India provision of mobile voice services using BWA spectrum considered by the DoT Committee, Telecom Commission and the MOC&IT, was primarily intended to fill the gap between the eligibility criterion stipulated for participation in the 3G/BWA auction in 2010 as UAS/CMTS licensees had paid entry fee of Rs. 1,658 crore while ISP licensees had paid only Rs. 30 lakh.
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> The DoT Committee, Telecom Commission and the MOC&IT however ignored the fact that the quantum of entry fee i.e. Rs. 1,658 crore was basically discovered in 2001 through the bidding for the 4th Cellular licenses. Market conditions since then have changed drastically, and this price needed to be modified to reflect the present value. Neither the DoT Committee/TC under the Chairmanship of the Secretary DoT nor the MOC&IT felt the need for revision of the price discovered in 2001 as the entry fee for UASL in 2013, even when the Hon'ble Supreme Court of India had cancelled 122 licenses granted in 2008 on the basis of the same entry fee stating that it was impossible for them to approve the action of the DoT.
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> 9. Therefore, by permitting ISPs to provide mobile voice service using BWA spectrum won in 2010 auction post-auction, the government has brought ISP licensees with BWA spectrum at par with UAS/CMTS 3G spectrum winners so far as provision of services are concerned – Voice, Data, etc., and post auction interpretation of such vital nature would appear to be arbitrary, inconsistent and not appropriate. Hence, IBSPL, now Reliance Jio Infocomm, appeared to have been accorded undue advantage of Rs. 22,842 crore i.e. the difference of the proportionate prices for 20

MHz block size in 2.1 GHz spectrum band (3G spectrum) and 2.3 GHz spectrum band (BWA spectrum) plus the Net Present Value of the entry fee for UASL at the end of FY 2009-10 (Rs. 20,653 crore plus Rs. 3,847 crore – Rs. 1,658 crore). Besides, the sanctity of the entire auction process has been rendered vitiated due to post auction interpretations and interventions after three years. It was therefore no surprise that Reliance Jio Infocomm was among the first group of companies which applied for UL immediately after introduction of the scheme and obtained the Letter of Intent (LOI). Had the spectrum blocks been specified and declared as liberalised spectrum blocks i.e. open for all technology/services in the NIA in February 2010, there was no doubt that bidders would have taken informed decision for putting up their bid and the market discovered price would have been significantly different for 3G and BWA spectrum." Mr. Prashant Bhushan, at the time of arguments, pointed out the aforesaid procedural and other alleged irregularities and the comments of CAG thereupon. He submitted that there was no reason to allow migration of ISP (holding BWA spectrum) to UASL. Instead, according to him, what was needed was to hold independent auction of voice telephony. He submitted that allowing the migration from one type of license to another with added benefits was in the teeth of judgment of this Court in the Presidential Reference on the issue of Alienation of Natural Resources[1] wherein this Court has held that when "precious and scarce natural resources are alienated for commercial pursuits of profit maximizing private entrepreneurs, adoption of means other than those that are competitive and maximize revenue may be arbitrary and face the wrath of Article 14 of the Constitution." All the three respondents in this petition, namely, Union of India (R-1), Reliance Jio Infocomm Ltd. (R-2) and TRAI (R-3) have stoutly contested the stand taken by the petitioner in this petition by disputing the averments.

Apart from putting stiff resistance to the issues raised in the petition on merits, the respondents have even questioned the bonafides of the petition by vehemently arguing that it does not serve any public purpose and on the contrary, the petition is motivated. In the counter affidavit filed on behalf of the Union of India, it is stated that the writ petition is preferred on an absolutely erroneous footing by misconstruing and misinterpreting the judgment of this Court in Centre for Public Interest Litigation v. Union of India[2] (hereinafter referred to as "2G Case") and also the provisions of the TRAI Act. It is stated that entry fee of Rs. 1,658 crore fixed earlier was for UASL along with spectrum bundled with it, whereas in the year 2010 for 3G and BWA spectrum, license and spectrum were delinked and it was only the spectrum which was auctioned. Moreover, the amount of Rs. 1,658 crore is not the entry fee as alleged by the petitioner but is only migration fee. It is further stated that the aforesaid decision of allowing migration was taken after it was duly permitted by the TRAI and, thus, such a decision was based on the economic policy of the Government with which the Courts normally do not interfere unless the same is found to be arbitrary, malafide or contrary to the public interest, which is not the case here. A detailed history from TRAI recommendation to the decision taken by the DoT is narrated in the counter affidavit with the emphasis that the decision in question was actuated by valid economic and other relevant considerations. On that basis, respondent No. 1 insists that neither the manner of allowing migration was irregular or illegal nor fixation of migration fee of Rs. 1,658 crore was arbitrary or

against public interest or prompted to give any undue favour to respondent No.2. On the similar lines is the counter affidavit filed by respondent No.2, which has attempted to explain the factual position in much greater detail and reference thereto shall be made at the appropriate stage.

Oral arguments on behalf of Union of India were addressed by Mr. Ranjit Kumar, learned Solicitor General whereas Mr. Harish Salve, senior advocate put up the defence on behalf of respondent No.2. Ms. Niranjana Singh appeared for TRAI. It is not necessary to separately take note of their respective arguments as we intend to refer to those submissions during our deliberations on the various facets of the case.

Before we embark on the specific areas of lis which need to be examined, it may be apposite to make some introductory remarks pertaining to Telecommunications sector and the manner in which spectrum is licensed from time to time. To put it pithily, it is well known that Telecommunication is a sector with fast changing technologies. Each technology has its features, compatibility and market adaptability. Some technologies which are at a horizon today may not be even commercially successful as updated and other technology become available before commercial deployment of that technology at affordable rates for common man in India. In the year 1991, India had 5 million telephone subscribers. At the end of July, 2007 this number increased to 233 million and as on July, 2015 it has touched 1006.96 million subscribers. This phenomenal growth has not been achieved in any country, other than China. The primary reason for this growth is the introduction of mobile services coupled with privatization of the Telecom sector. Mobile service in India is dominated by private sector enterprise and the Government religiously followed a policy of 'managed competition' by licensing more than one company in Telecom. This led to competition in the mobile industry, result whereof which not only resulted in providing better services but another direct effect of this competition is lower prices that the Telecom consumer has to pay. A call charge of Rs.16/- per minute in the year 1998 has come down to few paisa per minute. Another significant development over the years, which is a result of technological development influenced by market economic considerations is that though mobile services started with voice telephony, there is a gradual growth in data telephony. Mobile telephones are not used only for making telephone calls. Number of other services are provided by the service providers on these phones which are known as 'smart phones'. The various policy decisions are taken at a point of time considering various technological options, policy objectives and regulatory framework.

Auction of 3G spectrum & BWA spectrum in the year 2010 It is in this context we have to keep in mind that when notice dated 25.02.2010 was issued inviting applications (NIA), though it was for both 3G spectrum as well as BWA spectrum, there is a significant difference in the characteristics of both the spectrums, namely, 3G on the one hand and BWA on the other hand. It may be mentioned that 3G spectrum is in Frequency Division Duplex (FDD) mode whereas the Broadband Wireless Access (BWA) spectrum as per TRAI recommendations as well as Guidelines issued by DoT is in Time Division Duplex (TDD) mode. Distinct and different features of both are highlighted in the following manner:

a. FDD needs fewer base stations than TDD Since FDD devices achieve desired cell edge rates at farther distances, the number of base stations required to achieve a given area of coverage is

reduced.

b. In a coverage-limited system comparison using the same frequency band, the TDD system required 31% more base stations than FDD when using a 1:1 TDD system and 65% more base stations when using a 2:1 TDD system. Higher frequency bands required even more base stations.

c. FDD incurs lower costs Capital expenditure (CAPEX) and operating expenditure (OPEX) costs are associated with each base station. These costs are independent of the type of duplexing technique used (FDD or TDD). Since FDD requires fewer base stations for the same coverage, it incurs lower deployment and operating costs.

d. FDD/TDD: Basic difference FDD is implemented on a paired spectrum where downlink and uplink transmissions are sent on separate frequencies. This provides simultaneous exchange of information and reduces interference between the uplink and downlink. Therefore FDD is more suitable for Voice systems that require continuous duplex working.

TDD is implemented on an unpaired spectrum, implying the usage of only one frequency for both downlink and uplink transmissions. It is suitable for asymmetric transmission demands and in cases where paired frequency is not available while Voice services are symmetric transmission.

e. Efficiency of use:

FDD has higher frequency usage efficiency. There is wastage of spectrum in TDD as it requires more accurate timing & greater guard bands.

f. Range:

TDD has a lower range (area covered) due to fact that guard band timing needs to be met.

g. Carrier Aggregation:

With 3G and LTE big advantage is carrier aggregation, which allows receiving handsets to make better use of the fragmented bands that a carrier may have, in order to download data faster. This was not available in WiMAX at that time since the complete mobility was not available.

h. Network Evolution:

A clear roadmap to move to a new technology was available for 3G but it was not there for broadband networks in terms of mobility, carrier aggregation, etc. These are some of the comparisons of 3G spectrum which was based on FDD mode and TDD based digital Broadband Wireless Access (BWA) systems which are drawn by the learned Solicitor General on the basis of which it is stated that there was distinct advantage, clearly discernible, of 3G spectrum over BWA spectrum that was understood by TRAI & DoT and hence the pricing had to be differentiated on this basis. The only technology available at that time in 2.3 GHz band was WiMax as LTE (Long Term

Evolution) was not available. Although in theory any packet based network core can be used for Voice or data still there are requirements to ensure smooth and contiguous reception of packets which puts a extra burden on allocation of resources. Moreover, LTE was available only post 2012 and that too VOLTE (Voice over LTE) was experimental technology over LTE core.

It will also be pertinent to note some of the queries and responses for auction of 3G and BWA spectrum which were published by DoT on 25.02.2010 i.e. simultaneously with the issuance of NIA, wherein it was specifically clarified that usage of spectrum including BWA spectrum is linked to the license held or to be acquired by the bidder. It was, thus, envisaged that BWA spectrum can be used for all telecom services including voice telephony linked to the relevant license, as can be gaged from some of the queries and responses thereto which are as under:

> "Question 34: Does the BWA license allow use of voice to be offered by the BWA operators? Even in VOIP form?
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> Answer 34: There is no BWA license. Service conditions including allowing Internet Telephony will depend on whether the winner of the BWA spectrum holds UAS or ISP license.
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> Question 71: Spectrum usage rights shall be awarded separately for specific service areas. Please clarify.
>
> Answer 71: Spectrum usage rights are based on the provisions of the applicable license and the licenses are specific to a service area. The auction is for the award of spectrum only, while award of license is a separate process.
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> Question 72: To which entity BWA license will be given in case a company has both 'UAS' & ISP – Category A license?
>
> Answer 72: The successful bidder will be allowed to determine the license that it wishes to use for award of BWA spectrum." Auction for 3G and BWA spectrum was conducted between May and June, 2010. 10 bidders participated in 3G spectrum auction and 11 bidders participated in BWA spectrum auction. The results of BWA spectrum were published on 12.06.2010. It is emphasized by the respondents, and to which there is no denial, that this occasion was conducted over 16 days and involved 117 rounds of bidding across service areas. In the said occasion, all the 44 blocks that were put for auction across 22 service areas in the country were sold. Reserve price of BWA spectrum was fixed at Rs.1750 crores.

During bidding, highest bid that was given by IBSPL was Rs.12847.77 crores for one block of Pan-India BWA spectrum. In this way, respondent No.2 emerged as successful in acquiring various BWA frequencies in all 22 service areas across the country. Further, as already noted in the earlier part of this judgment, though 11 bidders had participated, none of the other bidders make any complaint about the fairness, transparency and as well as about the process of bidding.

In this scenario, insofar as IBSPL becoming successful bidder cannot be questioned at this stage. No doubt, the petitioner has alleged that shortly after acquiring Pan-India BWA spectrum, IBSPL increased its authorized capital from Rs.3 crores to Rs.6,000 crores and question the manner in which control of this company is taken over by RIL. However, that cannot be the subject of scrutiny in these proceedings inasmuch as it has no causal connection with the validity of the auction of BWA spectrum in the year 2000. We may stated that respondent No.2 has specifically denied such allegations and has endeavor to explain that promoters of IBSPL did not derive in unfair gains and also that they did not divest or sell their equity to RIL, it is for our reasons recorded above. It is not necessary to delve into this aspect any further as that is neither the subject matter of controversy nor any relief claimed by the petitioner in this behalf. If at all, there is a reference to the same by the petitioner in the chain of submissions on the central issue which pertains to post- auction permission to provide voice services on BWA spectrum.

Migration from BWA to UAS licence Without much ado, therefore, we would like to address the aforesaid central issue that arises for consideration viz. whether a decision of respondent No.1 allowing the migration from BWA to UAS license was valid and legal and whether such a decision has unduly benefited respondent No.2 who is charged a sum of Rs.1,658 crores for this purpose, which according to the petitioners, is abysmally low.

As highlighted above, there have been technological developments in telecommunication are taking place at abnormal pace. Various policy decision taken at one point of time may, therefore, require a re-look necessitating modifications and changes therein and the circumstances may even mandate change of existing policy altogether by substituting with new policy decision depending upon the such technological advancements coupled by commercial and economic considerations. It can be supported by the fact that first Telecom Policy was announced in the year 1994, which was replaced by revised Policy of 1999 and thereafter in the year 2004 and again substituted by Telecom Policy of 2012.

Having regard to such features/developments, in the year 2012, the TRAI started exercise of bringing Unified Licensing regime. On 10.02.2012, it issued a consultation paper on Draft Guidelines for Unified License/Class License and migration of existing licenses. It was followed by the statement of the Ministry for Telecommunication and IT on 15.02.2012 on Spectrum Management and Licensing Framework. This statement broadly indicated that there would be no more licenses linked with Spectrum and issuance of licenses and allocation of spectrum will be completely delinked. Thereafter, on 16.04.2012, TRAI addressed a letter to the Secretary, DoT enclosing its recommendations for Unified License/Class License and migration of existing licenses. After due deliberations at appropriate levels, the Government of India issued on 31.05.2012 the National Telecom Policy-2012 and announced approval for introduction of Unified Licensing regime. This was followed by the policy decision of DoT dated 13.03.2013 to allow migration to UL from UASL as well as ISP to UL regime. The detailed background in taking this policy decision is stated in the counter affidavit filed by the Union of India and the position stated therein is not in dispute. These details are required to be noted, which are as follows:

"1. The Department of Telecommunications (DoT) vide their D.O. letter No. L-14047/09/2005-NTG dated May 22, 2006 sought recommendations from the Telecom Regulatory Authority of India (TRAI) on the methodology for allotment of spectrum for 3G services and its pricing aspects.

TRAI gave the recommendations on 27th Sept 2006 after following the procedure of consultation and conducting open house discussion to have understanding of views of stakeholders.

TRAI while replying to DoT in recommendations said:

"The Authority is committed to the view that the consumers must get the benefit of new technology and variety of services. It also believes that the telecom service providers should have the flexibility to choose from the range of technologies available and the regulatory policies must not restrict the choice of the operator. Therefore, the Authority considered it appropriate to offer its recommendations both on 3G technology and on broadband wireless access (BWA) systems at the same time. It would also ensure that the spectrum issues are considered in a holistic manner and piecemeal or ad-hoc solutions do not find place in future planning. The Authority has also made suggestions on the wider issue management of spectrum, which is now a scarce resource in the country. The future growth in telecom would largely depend on the way we manage our spectrum." While forwarding its recommendations TRAI, inter-alia, considered the following:

Band identification for 3G services Allocation methodology and pricing for 3G spectrum Band identification, and allocation and pricing of BWA spectrum as well as Spectrum Management Allocation methodology and pricing for BWA spectrum Spectrum Pricing Spectrum for BWA The DoT examined the recommendations and had referred some of them back to TRAI as required by TRAI Act and took final views based on TRAI recommendations and DoT's internal discussions.

The TRAI issued another consultation paper "On Allocation and Pricing for 2.3-2.4 GHz, 2.5-2.69 GHz & 3.3-3.6 GHz bands" on 2nd May 2008 and issued its recommendations on 11th July, 2008.

The TRAI was clear that spectrum in 2.3-2.4 GHz band could be used for mobile services as mentioned in the preface of these recommendations itself which is reproduced as below:

"During the period of September, 2006 to October, 2007, there have been significant changes in the international scenario. The International Telecommunications Union-Radio (ITU-R) has identified 2.3-2.4 GHz band also as IMT (International Mobile Technology) band (spectrum in the band of 2.5- 2.69 GHz band was already identified as IMT-2000 band). The use of 2.3-2.4 GHz and 2.5-2.69 GHz band offers significant scope for innovation with the potential for induction of new technologies,

services, applications and devices. With the availability of mobile services in this band, it provides an important opportunity for the introduction of next generation mobile technologies (BWA).

Even TRAI in its recommendations admit that there could be different technologies by which BWA could be provided and stated that:

"5.12 During the consultation process, the respondents stated that there are various versions of BWA technology applications. The Authority also recognizes that given the wide range of possible technologies, it is essential that any policy concerned with identification and allocation of spectrum for BWA must be technology-neutral and flexible to permit co- existence of all types of BWA technologies....." "5.72 ....The average price for allocations comes to $0.65 (Rs.30) per Hz including South Korea, and $0.08 (Rs.3.75) per Hertz excluding South Korea ...." The final reserve price in NIA as issued by DoT was @Rs.87.5 per Hz. (Rs. 1750 crores for 20 MHz) which is much higher than recommended by TRAI.

In view of that Guidelines were followed in allowing Reliance Jio Infocomm RJIO to offer Mobile services which has been done after following due process of law by taking TRAI recommendations on the issue and considering the same in DoT and approving Unified License (UL) guidelines wherein ISP could migrate to UL.

The TRAI recommendations of April, 2012 on UL had recommendations on Guidelines for UL/Class License and migration of existing licenses. TRAI recommended that all present licenses be migrated to UL and in future only UL be issued. TRAI had recommended that all existing Basic/CMSP/UASL/ISP without spectrum/ISP with spectrum be allowed to migrate to UL. As per this an ISP after migration will have all India UL after payment as required.

It is pertinent to note that NTP 2012 states that National Telecom Policy – 2012 recognizes that the evolution from analog to digital technology has facilitated the conversion of voice, data and video to the digital form. Increasingly, these are now being rendered through single networks bringing about a convergence in networks, services and also devices. Hence, it is now imperative to move towards convergence between various services, networks, platforms, technologies and overcome the existing segregation of licensing, registration and regulatory mechanisms in these areas to enhance affordability, increase access, delivery of multiple services and reduce cost.

11. Further, it envisages providing secure, reliable, affordable and high quality converged telecommunication services anytime, anywhere for an accelerated inclusive socio-economic development. One of the objectives of the National Telecom Policy-2012 is "Strive to create One Nation – One License" across services and service areas..." From the aforesaid, it follows that a policy decision was taken by the

> Government not only with regard to introduction of Unified Licensing regime but it also including allowing migration to UL from UASL as well as ISP to UL regime. This meant that those having UAS license which permitted data services only were allowed to migrate to Unified License enabling them to provide both data service as well as voice telephony. This was a pure policy decision after due deliberations by the experts in the fields and even TRAI had recommended allowing such migration.

Such a policy decision, when not found to be arbitrary or based on irrelevant considerations or mala fide or against any statutory provisions, does not call for any interference by the Courts in exercise of power of judicial review. This principle of law is ingrained in stone which is stated and restated time and again by this Court on numerous occasions. In Jal Mahal Resorts (P) Ltd. v. K.P. Sharma[3], the Court underlined the principle in the following manner:

> 116. From this, it is clear that although the courts are expected very often to enter into the technical and administrative aspects of the matter, it has its own limitations and in consonance with the theory and principle of separation of powers, reliance at least to some extent to the decisions of the State authorities, specially if it is based on the opinion of the experts reflected from the project report prepared by the technocrats, accepted by the entire hierarchy of the State administration, acknowledged, accepted and approved by one Government after the other, will have to be given due credence and weightage. In spite of this if the court chooses to overrule the correctness of such administrative decision and merits of the view of the entire body including the administrative, technical and financial experts by taking note of hair splitting submissions at the instance of a PIL petitioner without any evidence in support thereof, the PIL petitioners shall have to be put to strict proof and cannot be allowed to function as an extraordinary and extra-judicial ombudsmen questioning the entire exercise undertaken by an extensive body which include administrators, technocrats and financial experts. In our considered view, this might lead to a friction if not collision among the three organs of the State and would affect the principle of governance ingrained in the theory of separation of powers. In fact, this Court in M.P. Oil Extraction v. State of M.P., (1997) 7 SCC 592 at p. 611 has unequivocally observed that:
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> "41. The power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme so that there may not be any occasion to entertain misgivings about the role of judiciary in outstepping its limit by unwarranted judicial activism being very often talked of in these days. The democratic set-up to which the polity is so deeply committed cannot function properly unless each of the three organs appreciate the need for mutual respect and supremacy in their respective fields."
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> 117. However, we hasten to add and do not wish to be misunderstood so as to infer that howsoever gross or abusive may be an administrative action or a decision which is writ large on a particular activity at the instance of the State or any other authority

connected with it, the Court should remain a passive, inactive and a silent spectator. What is sought to be emphasised is that there has to be a boundary line or the proverbial "laxman rekha" while examining the correctness of an administrative decision taken by the State or a central authority after due deliberation and diligence which do not reflect arbitrariness or illegality in its decision and execution. If such equilibrium in the matter of governance gets disturbed, development is bound to be slowed down and disturbed specially in an age of economic liberalisation wherein global players are also involved as per policy decision." Minimal interference is called for by the Courts, in exercise of judicial review of a Government policy when the said policy is the outcome of deliberations of the technical experts in the fields inasmuch as Courts are not well-equipped to fathom into such domain which is left to the discretion of the execution. It was beautifully explained by the Court in Narmada Bachao Andolan v. Union of India[4] and reiterated in Federation of Railway Officers Assn. v. Union of India[5] in the following words:

"12. In examining a question of this nature where a policy is evolved by the Government judicial review thereof is limited. When policy according to which or the purpose for which discretion is to be exercised is clearly expressed in the statute, it cannot be said to be an unrestricted discretion. On matters affecting policy and requiring technical expertise the court would leave the matter for decision of those who are qualified to address the issues. Unless the policy or action is inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of power, the court will not interfere with such matters." Limits of the judicial review were again reiterated, pointing out the same position by the Courts in England, in the case of G. Sundarrajan v. Union of India[6] in the following manner:

"15.1. Lord MacNaughten in Vacher & Sons Ltd. v. London Society of Compositors (1913 AC 107 : (1911-13) All ER Rep 241 (HL) has stated:

"... Some people may think the policy of the Act unwise and even dangerous to the community. ... But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction." 15.2. In Council of Civil Service Unions v. Minister for the Civil Service (1985 AC 374 : (1984) 3 WLR 1174 : (1984) 3 All ER 935 (HL), it was held that it is not for the courts to determine whether a particular policy or particular decision taken in fulfilment of that policy are fair. They are concerned only with the manner in which those decisions have been taken, if that manner is unfair, the decision will be tainted with what Lord Diplock labels as "procedural impropriety".

This Court in M.P. Oil Extraction v. State of M.P. (1997) 7 SCC 592 held that unless the policy framed is absolutely capricious, unreasonable and arbitrary and based on mere ipse dixit of the executive authority or is invalid in constitutional or statutory mandate, court's interference is not

called for.

Reference may also be made of the judgments of this Court in Ugar Sugar Works Ltd. v. Delhi Admn. (2001) 3 SCC 635, Dhampur Sugar (Kashipur) Ltd. v. State of Uttaranchal (2007) 8 SCC 418 and Delhi Bar Assn. v. Union of India (2008) 13 SCC 628.

We are, therefore, firmly of the opinion that we cannot sit in judgment over the decision taken by the Government of India, NPCIL, etc. for setting up of KKNPP at Kudankulam in view of the Indo-Russian Agreement." When it comes to the judicial review of economic policy, the Courts are more conservative as such economic policies are generally formulated by experts. Way back in the year 1978, a Bench of seven Judges of this Court in Prag Ice & Oil Mills v. Union of India and Nav Bharat Oil Mills v. Union of India[7] carved out this principle in the following terms:

> "We have listened to long arguments directed at showing us that producers and sellers of oil in various parts of the country will suffer so that they would give up producing or dealing in mustard oil. It was urged that this would, quite naturally, have its repercussions on consumers for whom mustard oil will become even more scarce than ever ultimately. We do not think that it is the function of this Court or of any court to sit in judgment over such matters of economic policy as must necessarily be left to the government of the day to decide. Many of them, as a measure of price fixation must necessarily be, are matters of prediction of ultimate results on which even experts can seriously err and doubtlessly differ. Courts can certainly not be expected to decide them without even the aid of experts." Taking aid from the aforesaid observations of the Constitution Bench, the Court reiterated the words of caution in Peerless General Finance and Investment Co. Limited v. Reserve Bank of India[8] with the following utterance:
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> "31. The function of the court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts." It cannot be doubted that the primary and central purpose of judicial review of the administrative action is to promote good administration. It is to ensure that administrative bodies act efficiently and honestly to promote the public good. They should operate in a fair, transparent, and unbiased fashion, keeping in forefront the public interest. To ensure that aforesaid dominant objectives are achieved, this Court has added new dimension to the contours of judicial review and it has undergone tremendous change in recent years. The scope of judicial review has expanded radically and it now extends well beyond the sphere of statutory powers to include diverse forms of 'public' power in

response to the changing architecture of the Government[9]. Thus, not only has judicial review grown wider in scope; its intensity has also increased. Notwithstanding the same, "it is, however, central to received perceptions of judicial review that courts may not interfere with exercise of discretion merely because they disagree with the decision or action in question; instead, courts intervene only if some specific fault can be established – for example, if the decision was reached procedurally unfair[10].

The raison d'etre of discretionary power is that it promotes decision maker to respond appropriately to the demands of particular situation. When the decision making is policy based judicial approach to interfere with such decision making becomes narrower. In such cases, in the first instance, it is to be examined as to whether policy in question is contrary to any statutory provisions or is discriminatory/arbitrary or based on irrelevant considerations. If the particular policy satisfies these parameters and is held to be valid, then the only question to be examined is as to whether the decision in question is in conformity with the said policy.

Keeping in mind the aforesaid parameters of judicial power, we now proceed to deal with the some specific arguments of the petitioner (1) Whether process of auction should have been resorted to?

The first argument raised by the petitioner is that in the NIA dated 25.02.2010, when 3G spectrum and BWA spectrum were to be auctioned there was a specific clause that the spectrum shall not be used for any activity other than the activities for which the operators has a license. On that basis, it was argued that there was no reason to allow the migration and for voice telephony there should have been a separate auction.

This submission lacks substance. During the course of arguments, the learned Solicitor General successfully demonstrated that what was auctioned in 2010 was spectrum, namely, 3G spectrum and BWA spectrum. Insofar as 3G spectrum auction is concerned, it was in blocks of 5 MHz i.e. each block of 2 x 5 MHz whereas BWA auction was in blocks of 20 MHz. The spectrum, therefore, was of different forms and thus, issuance of license would be different from spectrum. Moreover, NIA dated 25.02.2010 itself provided the eligibility conditions for an entity who could bid for BWA spectrum and further stipulation in this behalf was specifically stated as under:

"Successful Bidders in the BWA Auction that currently hold an ISP-category 'B' licence shall be required to migrate to an ISP-category 'A' licence, by paying the applicable fees/charges for migration, before they are awarded the BWA Spectrum. The DoT guidelines stipulate that a UAS license or an ISP licence can only be awarded to an Indian Company. Hence, any foreign applicants will need to form, or acquire, an Indian company, to obtain a UAS licence or an ISP-category 'A' licence. However, they are allowed to participate in the Auctions directly and apply for or acquire a licence subsequently through an Indian company, where they hold at least

26% equity stake.

Services can only be offered subject to the terms and conditions of the licence obtained by the operator. Award of spectrum does not confer a right to provide any telecom services, and these are governed by the terms and conditions of the licence obtained by the operator." It becomes apparent from the above that the spectrum was different from license inasmuch as award of spectrum did not confer a right to provide any telecom services. Insofar as providing of telecom services are concerned, these were to be governed by the terms and conditions of the license obtained by the operator. The learned Solicitor General also handed over a comparative chart of varying points of view of the different Departments when the matter regarding migration from UASL to UL regime was being discussed and contemplated. A perusal thereof would show that there was a threadbare discussion on the issue wherein pros and cons of migration of telecom licenses to UL regime were discussed; various apprehensions expressed were considered; and ultimately consensus emerged for switching over to this regime. The discussion reveals that the Committee of the DoT in its comments proceeded on the premise that the BWA spectrum could not be used for any other purpose other than providing internet services. The other departments did not share this view. It was ultimately found that the view of the Committee was contrary to the plain language of the Notice Inviting Applications and specifically Q&R which was published by the DoT itself for the purpose of the auction. Difference of point of view of different departments shows the process of institutional decision making.

The aforesaid discussion leads us to irresistible conclusion that decision of the Government permitting migration of telecom licenses to UL regime is valid, legal and without any blemish.

(2) Any undue favour to respondent No.2?

This brings us to another incidental aspect, namely, whether respondent No.2 could be allowed migration from BWA spectrum to Unified License (UL). We may observe at the outset that once a policy decision is taken to allow such a migration to all those who were holding BWA spectrum and this decision was not taken only for respondent No.2 individually, respondent No.2 also became entitled to avail the benefit of the said decision. However, the allegation of the petitioner is that respondent No.2 has been allowed a 'back door' entry to provide voice services. It is in view of such an allegation that we are delving on the aforesaid argument.

Some of the important features and aspects which have to be kept in mind, in order to deal with the aforesaid argument of the petitioner, needs to be noted in the first instance. It is not in dispute that IBSPL, when it bid for BWA spectrum, was holding ISP category 'A' license. Further, in terms of 3G or BWA spectrum, the acquirer thereof is eligible to provide any service using the spectrum during the period of 20 years during which the acquirer gets the right to use the spectrum under the auctioned terms. Also, as pointed out above, the license is delinked from the spectrum. The IBSPL

having acquired the spectrum in the course of bidding, was not barred from obtaining licenses for various telecom services issued by the Government from time to time during the period of 20 years for which BWA spectrum was given. Any other license issued by the Government from time to time, thus, would make such license holder eligible to provide various services as allowed under these licenses.

In the aforesaid backdrop, when license was delinked from the spectrum and having auctioned spectrum by allowing those who did not possess license to bid, it became necessary for the Government of India to come out with a regime for grant of licenses for providing various telecom services. A policy decision was taken, as discussed in detail above, for migration to new telecom service license, i.e., Unified License (UL) for ISP licensees with BWA spectrum. In its wisdom, this decision facilitated those having data services to acquire license thereby covering voice-telephony as well. All across the Board holding BWA spectrum became entitled to migrate to UL and, therefore, there is no discrimination on the part of the government authorities nor it aims at undue favoritism to respondent no. 2. It is not in dispute that as per the new policy/regime, respondent no. 2 was eligible to apply for UL from BWL spectrum. Therefore, it cannot be treated as a case of back door entry of respondent no.2. (3) Any loss of public revenue?

The only other issue which needs to be adverted to at this stage is the fixation of additional fee of Rs. 1,658/- crores which was paid by respondent no. 2 for migration to UL. The poser is : Whether such a fee fixed was abysmally low which had resulted in undue advantage to respondent no. 2, thereby causing loss to the public exchequer.

We may keep in mind that while taking this position, namely, respondent no. 2 is given undue advantage by allowing it to migrate from UAS license to UL with payment of so-called meager amount of Rs. 1,658 crores, the petitioner rested its case entirely on the draft report of CAG. This is so accepted and admitted in writ petition itself. It is pointed out that CAG's draft report had put the loss on this account at Rs. 22,842 crore besides significant loss of revenue on Spectrum Usage Charges (SUC). The petitioner had put both these benefits at about Rs. 40,000 crore, out of which about Rs. 17,000 crore was towards SUC. In its final report, however, the CAG has revised the loss figure to Rs. 3,367.29 crores, besides SUC on which it reiterated “significant loss of revenue to the government”.

On that basis, submission of the petitioner is that that had there been an independent auction of UL, the Government would have generated substantially higher revenue. It is also argued that granting of UL by adopting the methodology of conversion from existing UAS to UL, instead of putting it to auction, is also contrary to the judgment of this Court in 2G2 case. Though we have already dealt with this aspect of the argument, we are addressing the issue now in the context of frontal attack made on the fixation of fee of Rs. 1,658 crores which is charged from respondent no. 2 while allowing the migration from UAS to UL.

In the first instances, we may observe that once the policy decision of the Government allowing migration from BWA spectrum to UL is found to be justified in the circumstances already noted above, the argument of the petitioner predicated on the judgment of this Court in 2G2 case does not

hold good. Even otherwise the decision in the said case is based on altogether different backdrop. Judgment in the said case would reveal that in 2001, in order to increase competition from then existing two private players plus one PSU player per telecom circle, the Government introduced the 4th telecom operator in each circle. At this time, there was an auction conducted for grant of licenses and this license carried with it 4.4 + 4.4 MHz to start up spectrum and an assurance that further spectrum availability would be given to the licenses subject to availability (by 2010 the TRAI had suggested the grant of a minimum spectrum of 6.2 MHZ to each licensee as contracted spectrum). The Government had decided in 2001 when bids were invited for the 4th license that all future grants should be on market price. However, in a departure from this even in year 2007-08 the then Telecom Minister (following certain processes which was found to be flawed) invited applications for license based on a pre-determined license fee. This license fees was the same as the fee that was paid in 2001 by those who applied for the 4th telecom license. This Court found that the manner in which this decision had been arrived at was flawed and smacked of arbitrariness. It was also held that this spectrum is an extremely valuable natural resource and must only be made available at market price. The Court found that the license itself had no value, in that the real value was that of the spectrum.

On the other hand, insofar as present case is concerned, auction of 3G spectrum as well as BWL spectrum held in 2010 was not challenged by anybody and no fault has even been found in the same. It is the spectrum which a vital resource and that was duly auctioned. The decision now taken, which is the subject matter of controversy in the present case, pertains to license, namely, switching over from UASL to UL, validity whereof has already been upheld.

Insofar as fee of Rs. 1,658 crores that is charged from respondent no. 2 is concerned, it was pointed out by the learned counsel for the respondents at the Bar that migration/grant of unified license available today is at paltry fee of Rs. 15 crores. As against this, respondent no. 2 has paid Rs. 1,658 crores, much higher than fee fixed. One cannot lose sight of the fact that insofar as auction of BWA spectrum is concerned, it fetched a whopping price of Rs. 12,847.77 crores. On the other hand, license is acquired separately at a fixed license fee over and above the price of spectrum which requires a fee of Rs. 15 crores insofar as switch over from UASL to UL is concerned.

The foundation of the petitioner's allegation is draft report of CAG. However, that was only a draft report. Many queries and doubts in the said draft report were addressed and answered by the Government. The final report of CAG is materially different from the draft report. It appears that in the draft report, CAG proceeded on the wrong premise that the license was also to be auctioned. In fact, as far as 2G2 case is concerned, in that matter licenses along with bundles spectrum were awarded at a pre-determined price on a first come first serve bases and, thus, spectrum was bundled along with the license. However, in 2010, when 3G and BWA spectrum were auctioned, the spectrum were delinked from license. In this backdrop, when the policy decision had now been taken based on National Telecom Policy, 2012, whereby migration of UASL licence to UL was permitted, the question of fee that is to be charged is to be looked into. TRAI, in its recommendations, had not prescribed any additional fee to be charged for migration of ISP operators with BWS spectrum to UL regime. Instead, it had stated that the BWA spectrum assignee, whether holding a UAS license or ISP lincence and the scope for provision of services would be

uniform under the Unified License. It is only entry fee which is prescribed and that too Rs. 15 crores. Notwithstanding the same, the Government decided to permit migration from ISP licence to UL license with migration fee of Rs. 1,658 crores, calculated as the difference in entry fee of UASL and that of ISL license in order to provide a level playing field between the two classes licenses. The aforesaid facts would show that respondent no. 2 has paid spectrum price of Rs. 12,847.77 crores and also Rs. 1,658 crores for migration to UL, in addition to entry fee of Rs. 15 crores, which is the prescribed fee. It, therefore, cannot be said that the fee of Rs. 1,658 crores charged from respondent no.2 is in any way less or that it has caused any wrongful loss to the Government and wrongful gain to respondent no. 2 or that the Government would have fetched much more price.

We have already traced brief history of the development in telecommunication and, in particular, that of mobile/cellular services. Most significant development which is pointed out is as to how technological development has led to the growth of data telephony from mere voice telephony. As already stated, number of other services are provided by the service providers on these phones which are known as 'smart phones'. These services include video streaming, music streaming, social networking, instant messaging, download and save, emails, playing online games, browse/search, banking, bill payments, navigation, e-commerce and cloud storage etc. Even feature films can be downloaded and watched. TV programmes can be seen. It serves as camera as well. Smart Phone is able to serve the purpose of a computer as well to a significant extent. It has become a “miraculous devise” for the consumers which caters to all most all necessary and day to day telecom needs. A peep into the graph growth of total global monthly data and voice traffic would reveal that in the year 2007-2008 voice and data traffic was almost equal. However, by the end of 2010, traffic generated from mobile data was twice that for voice. In five years time, the data traffic has gone ahead of voice traffic by leaps and bounds and it is almost seven times more than voice traffic. Another trend which is visible from the available figures is that whereas in voice traffic growth from 2010-2015 is hardly 1½ times, it is more than seven times insofar as mobile data traffic is concerned. Between first quarter of 2014 and first quarter of 2015 itself mobile data traffic registered a growth of 55%. Future forecast of data traffic is expected @30% per year. In India itself, monthly mobile data consumption is expected to increase 18 fold by the year 2020 over current levels. In the aforesaid scenario, Telecommunication has emerged as a key driver of economic and social development in an increasingly knowledge intensive global scenario, in which India needs to play a leadership role. National Telecom Policy-2012 was designed to ensure that India plays this role effectively and transforms the socio-economic scenario through accelerated equitable and inclusive economic growth by laying special emphasis on providing affordable and quality telecommunication services in rural and remote areas. Thrust of this policy is to underscore the imperative that sustained adoption of technology would offer viable options in overcoming developmental challenges in education, health, employment generation, financial inclusion and much else.

The only purpose of highlighting the aforesaid features, particularly in contrasting the growth between voice-telephony and data traffic, is to show that main source of revenue for the service providers is from data services and not voice-telephony. In fact, Mr. Salve even claimed that voice-telephony for mobile companies, insofar as income generation is concerned, does not remain that attractive and in near future, there is a possibility of a situation when voice-telephony services may

be provided free of charge to those using mobile data services by paying for those services. Whether this happens or not is anybody's guess. However, what cannot be disputed is that main source of income for mobile companies is data services and not voice telephone services. This needs to be borne in mind while testing the argument of the petitioner.

Much is said on the veracity of CAG draft report by respondent no. 1 as well as respondent no. 2 in their attempt to show that the very basis of making calculation of alleged undue advantage of Rs. 22,842 crores (in the draft report) or Rs. 3,367.29 crores (in the final report). However, having regard to the aforesaid discussion, it may not be necessary to delve into this aspect in much greater details. It would be suffice to point out that the basic error committed by CAG was to compare 3G and BWA (4G) spectrum which mistake was realised in preparing the final report. It appears that these calculations are made by taking migration fee of Rs. 1,658 crores which were prevalent in the year 2001 and on that basis it arrived at a figure of Rs. 5025.29 crores which, according to CAG, should have been fixed. As respondent no. 2 paid a fee of Rs. 1,658.57 crores, according to the CAG it has resulted in the loss of Rs. 3,367.29 crores. However, the aforesaid assumption loses sight of the fundamental aspect, namely, in 2001 spectrum and license were unified which was not the position in the year 2010 when the two were segregated. It is stated at the cost of repetition that insofar as auction of BWA spectrum is concerned the same was auctioned at a price of Rs. 12847.77 crores which is the most material aspect and has been totally glossed over. We, thus, do not find any error in the action of the Government in allowing the migration from UASL to UL by making respondent no. 2 to pay a sum of Rs. 1,658 crores in this behalf.

With this, we address ourselves to the remainder issue, namely, fixation of 1% AGR as SUC for the use of BWA. As noticed above, the contention of the petitioner in this behalf is that when the respondent No. 1 allowed second respondent-Reliance Jio to offer voice telephony (by allowing their migration to UL regime), first respondent should insist for payment of SUC for level playing field like those offering voice telephony on BWA spectrum. So far as various operators who are offering voice services are paying SUC at 3% to 8% depending on the quantum of the spectrum they hold. The prevailing slab rates are shown in the rejoinder filed by the petitioner as under:-

| SUC (as a % of Revenue) | | |
|---|---|---|
| Spectrum quantum | Before 01.04.2010 | DoT Order 25.02.2010 |
| 2x4.4 | 2 | 3 |
| 2x6.2 | 3 | 4 |
| 2x8 | 4 | 5 |
| 2x10 | | 6 |
| 2x12.5 | 5 | 7 |
| 2x15 | 6 | 8 |

The justification/explanation which is given by the Union of India is that it was the TRAI which submitted its recommendation dated 27.09.2006 on 'Allocation and Pricing of Spectrum for 3G and BWA services' wherein additional 1% SUC was recommended.

It is also pointed out that TRAI reiterated that SUC be fixed at 1% AGR in its subsequent recommendations dated 11.07.2008 on 'Allocation and Pricing for 2.3-2.4 GHz, 2.5-2.69 GHz & 3.3-3.6 GHz bands'.

The learned Solicitor General argued that after receipt of the above TRAI recommendations, there were a lot of deliberations in the Department, consultations were held with other Ministries i.e., Department of Economic Affairs, Department of Industrial Promotion and Policy on the various issues relating of auction of 3G and BWA Spectrum. The submission is that all aspects, relevant to the issue were thoroughly examined and deliberated upon. It was noted that since BWA spectrum will be used for rural development, the SUC is kept at 1% of AGR. Further, it was also noted that since spectrum is being auctioned and the price discovery is through a market mechanism, the bidders will factor in the annual charges in their bids. Therefore, keeping BWA annual spectrum charge at 1% will have no adverse revenue implications. The aforesaid is the rationale given for fixation of 1% of AGR as SUC.

On going through the records, we find that the decision, namely, SUC be fixed at 1% AGR was based on relevant considerations. Not only TRAI had recommended the aforesaid charge to be fixed, there was an in depth examination of this recommendation of the TRAI by Government before accepting the same. Furthermore, it is also pertinent to note that on the basis of aforesaid decision, specific provisions were incorporated in the NIA for SUC for BWA spectrum. Clause 3.5 of the NIA, in this behalf, is as under:

| | |
|---|---|
| “3.5 | Spectrum usage charges |
| | Licensees using BWA Spectrum need to pay 1% of AGR from services using this spectrum as annual spectrum charge irrespective of the licence held by them. Such revenue would be required to be reported separately.” |

The aforesaid discussion, thus, demonstrates that the main consideration that prevailed with the Government in keeping the SUC at 1% of AGR was that BWA spectrum was to be used for rural development. It also needs to be highlighted that in line with the objective of rural development, more rural oriented roll out obligations for BWA spectrum in category A, B and C service areas, were prescribed, as can seen from the following clauses:

| | |
|---|---|
| “3.4.2 | Roll-out obligations for BWA Spectrum<br>Category A, B and C service areas<br><br>The licensee to whom the spectrum is assigned shall ensure that at least 50% of the rural SDCAs are covered within five years of the Effective Date using the BWA Spectrum. Coverage of a rural SDCA would mean that at least 90% of the area bounded by the municipal/local body limits should get the required street level coverage.<br><br>The Effective Date shall be the later of the date |

| | |
|---|---|
| | when the right to use awarded spectrum commercially commences and the date when the UAS licence or the ISP category 'A' licence, if and as applicable, is granted to the operator … ...” |

Mr. Ranjit Kumar, learned Solicitor General further demonstrated that the country has been divided into 3 metro service areas, namely Delhi, Mumbai and Kolkata and 18 Service areas which have been further designated as category A, B and C. SDCA stands for Short Distance Charging Area which comprises typically of one to two tehsils. The country has 2647 SDCAs out of which 2470 SDCAs has been designated as rural SDCAs. All operators including M/s Reliance Jio Infocomm Ltd who were awarded BWA Spectrum in 2010 and whose time period of 5 years for roll-out obligation was completed in 2015, have submitted proof of compliance of roll out obligations by registering with Telecom Enforcement and Resource Monitoring (TERM) Cell of Department of Telecom before the due date in all the 22 service areas. The date of registering the TERM Cell is taken as the date of completion of roll out obligation on successful testing. In this case, testing is in progress and is likely to be completed in next few months. It was, thus, pointed out that less rural coverage is stipulated for 3G spectrum which factor influenced the policy makers to fix SUC at 1% of AGR.

Apart from the above, there is one more reason not to interfere with the aforesaid stipulation of SUC. The Government has taken the position that the conditions in the license granted to respondent No. 2 empower the licenser/Government to change the terms of license and, therefore, whenever it is felt necessary and expedient in pubic interest, the percentage of SUC can be increased. However, the matter, for increase of SUC, was even examined after the recommendation of TRAI in the year 2013 that SUC be charged at an average rate instead of slab rate for various spectrum holdings as given in NIA of 2010 and subsequent NIAs of 2012 and January, 2013. The Telecom Commission considered this aspect and debated three options which could be considered for holders of BWA auction in the year 2010, namely:

| | |
|---|---|
| (i) | SUC be raised to 3%; |
| (ii) | SUC be kept at 1% and reported separately; or |
| (iii) | SUC for standalone BWA be kept at 1%, but if combined with spectrum bought in fresh auctions then the charge be the weighted average of acquired spectrum at 3% and BWA at 1%. |

Before taking a final decision as to which option be resorted to, the Telecom Commission recommended that a legal opinion be sought from the learned Attorney General. Matter was referred to the then Attorney General who opined that SUC charge be retained at 1% for BWA operators and on that basis, final decision in this behalf was taken. It is further pointed out that on the issue of revenue segregation, a committee had been formed which has submitted its report. The report is under consideration and decision on the report is likely in two months. After considering the report of the committee on the revenue segregation, appropriate action will be taken whether separate revenue reporting to continue or not or an increase in SUC is required for the proper conduct of telegraph as provided in the License Agreement. The decision on the report is expected in

two months. In view of the aforesaid developments, for the time being, we leave the matter to the Government to take an appropriate decision in this behalf.

We find no merit in this writ petition which is, accordingly, dismissed.

.....CJI.

(T.S. THAKUR) .....J. (A.K. SIKRI) .....J. (R. BANUMATHI) NEW DELHI;

APRIL 08, 2016.

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[1] (2012) 10 SCC 1 [2] (2012) 3 SCC 1 [3] (2014) 8 SCC 804 [4] (2000) 10 SCC 664 [5] (2003) 4 SCC 289 [6] (2013) 6 SCC 620 [7] (1978) 3 SCC 459 : AIR 1978 SC 1296 : 1978 Cri LJ 1281 [8] (1992) 2 SCC 343 [9] (See : Administrative Law: Text and Materials (4th Edition) by Beatson, Matthews, and Elliott) [10] Ibid