Uninor's Response to the Consultation Paper

On

Draft Guidelines for Unified License/Class License

And

Migration of Existing Licenses

I. Draft Guidelines for Unified License

A. UNIFIED LICENSE

Convergence of Markets and Technologies necessitate introduction of Unified Licensing. The Comments/suggestions on specific clauses are as follows:

2. Eligibility Conditions

Clause 2.2

(i) The recent Consolidated FDI Policy, issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India ("**Consolidated FDI Policy, 2011**") which has been effective from October 1, 2011, *inter alia*, lays down certain sector specific conditions wherein the general conditions, *inter alia,* pertaining to foreign investment (clause 6.2.15.1.1 of the Consolidated FDI Policy, 2011) in the telecom sector are as follows:

"*....(ii)Both direct and indirect foreign investment in the licensee company shall be counted for the purpose of FDI ceiling. Foreign Investment shall include investment by Foreign Institutional Investors (FIIs), Non-resident Indians (NRIs), Foreign Currency Convertible Bonds (FCCBs), American Depository Receipts (ADRs), Global Depository Receipts (GDRs) and convertible preference shares held by foreign entity. In any case, the 'Indian' shareholding will not be less than 26 percent.*
(iii) 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. While approving the investment proposals, FIPB shall take note that investment is not coming from countries of concern and/or unfriendly entities.
(iv)The investment approval by FIPB shall envisage the conditionality that Company would adhere to license Agreement……"

(ii) Chapter 4 of the Consolidated FDI Policy, 2011, provides for calculation of foreign investment, wherein guidelines for calculation of total foreign investment in an Indian company are laid down, which is as follows:

"*4.1.3 Guidelines for calculation of total foreign investment i.e. direct and indirect foreign investment in an Indian company:*
(i) Counting the Direct Foreign Investment: All investment directly by a non-resident entity into the Indian company would be counted towards foreign investment.
(ii) Counting of indirect foreign Investment:
(a) The foreign investment through the investing Indian company would not be considered for calculation of the indirect foreign investment in case of Indian companies which are 'owned and controlled' by resident Indian citizens and/or Indian Companies which are owned and controlled by resident Indian citizens .
(b) For cases where condition (a) above is not satisfied or if the investing company is owned or controlled by 'non resident entities', the entire investment by the investing company into the subject Indian Company would be considered as indirect foreign investment, provided that, as an exception, the indirect foreign investment in only the 100% owned subsidiaries of operating-cum-investing/investing companies, will be limited to the foreign investment in the operating-cum-investing/ investing company. This exception is made since the downstream investment of a 100% owned subsidiary of the holding company is akin to investment made by the holding company and the downstream investment should be a mirror image of the holding company. This exception, however, is strictly for those cases where the entire capital of the downstream subsidiary is owned by the holding company."

In order that the Unified License is consistent with the Consolidated FDI Policy, 2011, we propose that clause 2.2 a. be amended to read:

The FDI in the applicant company will conform to the provisions of the Consolidated FDI Policy, 2011.

Clause 2.3 The combined Net worth requirements should be qualified with the words "of the licensee company or of the promoter of the licensee company". As regards Net worth figures, these levels of net worth would make it difficult for young entrepreneurs to qualify, and need to be reviewed for downward revision, so as to align them with the objectives of the draft NTP 2011.

3. Application Procedure

Clause 3.5 In the interest of transparency, it should be incumbent on the licensor to provide reasons for rejecting a license application to the applicant.

4. Entry Fee

Clause 4.1(b) Categorization of circles/districts for entry fee purposes was called for at the time of introduction of Mobile Telephony Services in the early 90's. Now all circles/districts, by and large are at the same level of Telecoms Development, and offer

equal opportunities of business growth. Therefore, there is no need for different categories, and also since this is only a vanilla license without bundling any scarce resources like spectrum, Entry Fee should be a uniform Rs 50 lakh per circle. This would be in line with the statement of the Hon. Minister of Communications in DoT's press release of 10th October, 2011 " *In achieving the goal of National Telecom Policy 2011 revenue generation will play a secondary role.".*

6. **Ownership of Licensee Company**

6.1 The Net worth of the company need not be maintained during the currency of the license as per clause 2, as long as the Net Worth of the promoters meets the requirements.

9. Suspension/ Revocation/Termination/Surrender of License

Clause 9.1 The License is a commercial contract between licensor and the licensee. Therefore licensor cannot empower itself with unfettered powers, except where security of the state is involved, and is should be explicitly so specified.

10. Penalty

It is neither possible to identify every type of violation and seriousness of its impact in advance, nor does every violation have direct correlation with the type of license. Hence, it is not the type of license but the nature of violation which should determine the level of penalty. Only violations which are detrimental to the security of the state should attract a penalty. For any other violation, if it leads to financial benefit to the licensee, the amount so amassed by the licensee should be recovered. There should be no penalties for minor violations. Penalties may be imposed only in cases of proven gross negligence and/or intentional violations, after affording opportunity to the licensee for his defense.

11. Fees Payable

Clause 11.2 License Fee The paper has introduced a new nomenclature for AGR as "Annual Gross Revenue". We presume that the intent was to continue with the current nomenclature i.e. "Adjusted Gross Revenue"**.** Calculation of AGR (Adjusted Gross Revenue) should provide for deduction of all pass through costs such as rental of Network access, MVNO costs, purchase of wholesale services etc. Since these are vanilla licenses, and not bundled with any right to allocation of any scarce resource, there need not be any requirement of a minimum annual license fee (i.e. no floor).

Clause 11.3 Since in future the price of any scarce national resource like spectrum would be based on market mechanisms, there should not be any additional WPC charges based on AGR, but only a fixed token fee to cover administrative costs.

12. Bank Guarantee

Mention of "any additional amount as deemed fit by the licensor", provides an open-ended discretion in favour of the Licensor. It is not called for, as there is an inbuilt provision for revision based on the estimated License Fees and other dues payable.

General Conditions

Clause 16 It should also contain the stipulation that DoT /TRAI on their part shall ensure that their directions / orders are within the ambit of basic concepts enshrined in the license contract, and in no way result in contravening the basic essence of the contract.

General Comments

One objective of ULR is also to provide a fillip to expanding business activities and generating new revenue streams under telecom licenses such as permitting resale and wholesale services. Therefore it also requires to create level playing fields amongst the existing and new licensees, giving equal opportunities of growth to the competing market forces. The proposed guidelines should address such concerns.

B. Additional Guidelines for Spectrum assignment associated with Unified License

Clause 29: There is a class of existing UAS License which has been created by the recent Supreme Court judgment. These licenses are to be cancelled in 4 months, ***for reasons not attributed to their promoters***. The promoters may bid for new Licenses and Spectrum in the proposed auctions in order to continue with their operations, and to protect their capital investments. In the event that a company/legal person having substantial equity in an applicant company applying/bidding for spectrum through a Unified License also continues to hold substantial equity holding, directly or indirectly, in the above mentioned class of existing license created by the Supreme Court judgment at the time of applying/bidding for spectrum then Clause 29 SHOULD NOT be applicable to such a company/legal person and the applicant company applying/bidding for spectrum.

Clause 34: Roll out obligations specified at the time of allocation of spectrum is acceptable, but allowing for them to be "specified from time to time" is too indeterminate. If they are to be changed subsequently, it should be done only after mutual agreement between the Licensor and Licensee.

A provision needs to be inserted to define the spectrum caps that would be applicable under the License. In case those caps are to be the subject of a separate spectrum policy, the same needs to be mentioned in this section.

II. Draft Guidelines for Class License

The general principles regarding our comments offered on the Draft Guidelines for Unified License, also apply to the class license guidelines.

III. Migration of Existing License to Unified License

Clause 12: The roll out obligations should be no more onerous than those in the existing license. They are a contractual essence of the existing License, and to make them "…subject to changes/ modifications from time to time" may not be legally tenable if they are sought to be made more onerous for the Licensee, or if they are changed unilaterally by the Licensor.

There is a class of existing License which has been created by the recent Supreme Court judgment. These licenses are to be cancelled in 4 months, ***for reasons not attributed to their promoters***. The promoters may bid for new Licenses and Spectrum in the proposed auctions in order to continue with their operations, and to protect their capital investments. We believe that a provision needs to be made wherein these licenses are treated on par with other existing Licenses for the purposes of business continuity. All existing approvals and allocations like, inter alia, SACFA clearances, security clearances, number series allocations, SP code allocations, spectrum spot frequencies (GSM + microwave access + microwave backbone), import licenses, MNP clearances, roll out obligation certifications, contracts between the Licensees and their vendors, interconnection agreements between the Licensees and their interconnecting partners etc, and most importantly, the existing customers (including their CAFs, tariff plans and any other contractual commitments), should be migrated seamlessly to the new licenses without any interruption in service/ operations.

In continuance of the above mentioned concern of continuity of operations and protection of investments of the licenses affected by the Supreme Court judgment, we request TRAI to take into account the following while finalizing its recommendations on the proposed 2G auctions:

- Ensure that there is a timely auction
- Recommend an auction design that:
    a) prevents incumbents from bidding strategically to reduce competition in the market
    b) Reduces or removes the risk faced by bidders that per the Supreme Court judgement no longer possess spectrum
- Puts up block of 2 x 6.2 MHz for auction, this being the contracted amount for the above class of licenses.

Furthermore, in order to ensure maximum participation and competition in the auctions we also propose that TRAI should recommend to:

- Maximise the availability of 2G spectrum and ensure all available spectrum is put up for auction
- Set reserve price at a realistic level (ideally at the level of the last market discovered price of 1658 crores)

IV. Migration of Existing License to Class License

No comment.

V. Issues for Consultation

1. Kindly give your response to each clause of Chapters I to IV above.

Provided in earlier sections.

In addition,

2. What are your views on the scope of License for Unified License (National level/Service area level/District level) and Class License? (Clause 5 of draft guidelines for Unified License and Clause 5 of draft guidelines for Class License)

Provided in earlier sections.

3. What, in your opinion, are the actions that should be classified as minor violations and major violations? (Clause 10 of draft guidelines for Unified License)

Provided in earlier sections.

4. Even within minor and major violations respectively, what, in your opinion, should be the factors to be taken into consideration while determining the actual amount of penalty? (Clause 10 of draft guidelines for Unified License)

Provided in earlier sections.

5. These draft guidelines do not provide for Licensing through Authorisation. In your opinion, considering the services that are already covered under Unified License and Class License, is there any need for Licensing through Authorisation? If so, which are the services to be so covered? And, what should be the guidelines for such a license?

Not required.

6. Whether Voice mail/Audiotex/UMS services and Radio paging should continue to be under licensing regime?

No comment

7. Is there any other service(s), which needs to be brought under licensing regime?

No comment

8. In the new licensing regime, spectrum has been delinked from the Unified License. In such a scenario, should TRAI be entrusted with the function of granting all types of Unified License as is prevalent in majority of the countries in the world?

We feel no requirement for a change.

9. Presently, in case of IP- I, there is no restriction on the level of foreign equity in the applicant company. However, in case of Unified License, the total foreign equity in the total equity of the Licensee is restricted to 74%. Please indicate the maximum time which should be given to the IP-I to comply with the FDI condition of 74% after grant of Unified License.

12 months may be adequate

10. Presently, the access service licenses viz. BASIC/CMTS/UASL have restrictions regarding holding of substantial equity by a promoter in more than one access service license in the same service area. However, apart from access service license, this condition is not applicable for any other license. Accordingly, the proposed guidelines remove the restriction on holding of substantial equity in a company having UAS / CMTS/ Basic License in the same service area on migration to Unified License and also from the eligibility conditions given in Para 2.3 of the draft guidelines for Unified License. Please comment on the pros and cons of this proposal.

Clause 29 under Section I B (Additional Guidelines for spectrum assignment associated with Unified License) stipulates a company / legal person cannot have substantial equity (10% or more) in more than one Licensee Company which also holds spectrum, in any service area. As long as substantial equity is restricted to one spectrum holding license per service area, we have no reservations if the substantial equity clause is not applicable to Unified Licenses without spectrum.

11. Please raise any other issues you feel are relevant and offer your detailed comments on the same.

Nil.