
(2009) 07 DEL CK 0030

In the Delhi High Court

Case No : Writ Petition (C) No. 363 of 2008

S. Tel Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 01-07-2009

Acts Referred:

Constitution of India, 1950 — Article 12, 14

Telecom Regulatory Authority of India Act, 1997 — Section 11, 11(1)

Citation : (2009) 07 DEL CK 0030

Hon'ble Judges : G.S. Sistani, J

Bench : Single Bench

Advocate : Dayan Krishnan and Gautam Narayan, for the Appellant; P.P. Malhotra, ASG and Divya Chaturvedi, for the Respondent

Judgement

G.S. Sistani, J.—Petitioner seeks quashing of the impugned Press Release dated 10.01.2008 issued by the Respondent to the extent that it deprives the petitioner from being granted Letters of Intent for USA Licences for 16 circles applied for after 25.9.2007 but before the government announcement cut-off date of 1st October, 2007.

2. As per the petition providing of Cellular Mobile Services (Services) was governed by the National Telecom Policy (NTP 1994), which was announced in the year 1994. The services are offered using 2G technologies, namely, Global System for Mobile communications (GSM Services) and Code Division Multiple Access (CDMA Services). GSM Service is being provided since 1994-1995 and CDMA Service is being provided since 1997-1998. Prior to 1999, all licenses were issued based on the highest bids received from the applications. There was a cap as regards the maximum number of operators which was restricted to two for each service area. The telecom service was liberalized by the National Telecom Policy (NTP 1999), which introduced various changes including the fixed one time entry fee and ongoing revenue sharing for licence, increase the licensees to four operators, which included BSNL as the third operator and the fourth operator was

chosen based on highest bids received from applicants. This process was completed in the year 2000. Accordingly, all licensees subsequently migrated from fixed licence fee regime to revenue share regime. From 2003, the service providers were permitted to choose the preferred technology i.e. GSM, CDMA or any other technology, for providing the service under a Composite Unified Access Service Licence and unlimited mobility was permitted for CDMA service as well. However, each of the respective licensees was allowed to provide the service using the chosen technology and not all the technologies. The cap for maximum number of operators was also removed and all aspiring applicants who were willing to pay the entry fee paid by the fourth operator and agreed to abide by revenue share conditions, were made eligible to obtain licences.

3. On 13.04.2007, Government of India, requested the Telecom Regulatory Authority of India (hereinafter referred to as the TRAI) to furnish its recommendations in terms of Section 11(1)(a) of the Telecom Regulatory Authority of India Act, 1997. The Government sought various recommendations including on the issue whether a limit should be put on the number of access service providers in each service area.

4. On 12.06.2007 a consultation paper was issued by the TRAI in respect of the various issues referred to it in the above mentioned communication dated 13.04.2007. One of the Issues in the said consultation paper was as to whether the number of service providers in each area should be limited. The consultation paper dealt with the issue, namely, determining a cap on number of access provider in each service area in Chapter 6 of the said paper. The TRAI also formulated two questions for ready reference:

6.51 The issue for consideration are as follows:

Q1. Should there be a limit on number of access service providers in a service area. If yes, what should be the basis for deciding the number of operators and how many operators should be permitted to operate in a service area?

Q2. Should the issue of deciding the number of operators in each service area be left to the market forces?

5. In terms of the extant policy the petitioner applied for UASL licences to provide mobile telecom service for 6 circles on 07.07.2007.

Date

License area / Circles

July 7th 2007

(6 circles)

All Category C. Circles Assam, Bihar, Himachal

Pradesh, North East, Orissa and Jammu & Kashmir

6. There was no deadline for filing applications to the Government, for UASL, and it was not even contemplated.

7. The TRAI gave its recommendations in terms of Section 11 of the TRAI Act on 28.08.2007. The recommendation in respect of entry limit in access service provision was dealt with in Chapter 2 of the said report. The TRAI recommendations on this aspect are extracted below:

2.35 The authority has thus reviewed various arguments and counter arguments evidences cited by the stakeholders representing conflicting view points in this matter. The Authority has extensively surveyed the empirical evidences on its own, through published material and has carefully examined the sector experience and the existing provisions of the license agreement governing access service provision. The Authority has also examined the whole issue from the standpoint of the current and upcoming technological developments. Principle of competition and other vital economic criteria have also guided the Authority in understanding this crucial issue of entry regulation in the access service market. Separately, the Authority has examined issues relating to the utilization of spectrum keeping in view the emerging scenario of spectrum availability, optimum use of spectrum, requirements of market and competition in the market. It is noteworthy these are the guiding principles that have been laid down in NTP, 1999.

2.36 Having considered all the above aspects and considering the implication of having to suggest a framework covering other issues that have been referred by the Government; the Authority is not in favour of suggesting a cap on the number of access service providers in any service area. It is not advisable to exogenously fix the number of access service providers in a market which is in a dynamic setting. 2.37 Accordingly, the Authority recommends that no cap be placed on the number of access service providers in any service area.

8. It is evident from the recommendations that the TRAI was against any limit on the number of access service providers in any service area. The TRAI also issued a press release No. 74 of 2007 whereby the above mentioned recommendations were published and circulated for publication on 29.08.2007.

9. Learned Counsel for the petitioner contends that contrary to the recommendations of the expert body i.e. the TRAI, the Government proposed to fix 01.10.2007 as a dead line for receiving UASL applications and decided that no further applications would be received from the said date. Accordingly, the press note dated 24.09.1007 was issued. It is further contended that although the deadline was contrary to the existing policy for processing licences and contrary to the advice of the expert Regulatory Authority, namely, the TRAI, the petitioner in compliance with the press note applied for UASL licences in 16 circles to provide mobile telecom service on 28.09.2007.

September, 28th 2007 (16 Circles)

All Category "A and "B Circles Mumbai, Delhi, Kolkata, Andhra Pradesh, Gujarat, Karnataka, Maharashtra, Tamil Nadu, West Bengal, Haryana, Kerala, Madhya Pradesh, Punjab, Rajasthan, Uttar Pradesh East and West

10. It is submitted that the petitioner acted on the promise of the Government and made the necessary application within the stipulated deadline and, thus, a right accrued in favour of the petitioner for being considered for the grant of UASL licences and the petitioner has fulfilled all required criteria. The Department of Telecommunications received the applications of the petitioner without any demur. Meanwhile, the Department of Telecommunications issued a press release dated 19.10.2007, accepting the TRAI recommendation that there should be no cap on the number of access providers in any service areas.

11. Learned Counsel for the petitioner contends that the Minister of Communication and Information Technology wrote to the Prime Minister on 02.11.2007 seeking to revise the deadline of 01.10.2007 fixed by the Government, as per the press note dated 24.09.2007. The Minister indicated that only those applications for UASL that were received prior to 25.09.2007 would be considered. This letter was published in the Economic Times.

12. It is strongly urged before this Court that the aforesaid communication apart from arbitrarily revising the cut off for receiving applications given in the press release of 24.10.2007 also lost sight of the fact that the Government by its press release of 19.10.2007 had reiterated the earlier position of no cap of service providers. Thus, the revision of the cut off was not only arbitrary but without application of mind.

13. Learned Counsel for the petitioner contends that revision of the deadline has far reaching consequences as similar mobile services are provided by using radio frequency spectrum, which are admittedly a scarce national resource. Spectrum is allocated in 900 MHz and 1800 MHz band for GSM service and in 800 MHz for CDMA service. The licence conditions provided for initial spectrum of 4.4 MHz for GSM service and 2.5 MHz for CDMA service.

14. It is also contended that the service providers are required to pay a percentage of their revenue as Spectrum charges, apart from the licence fees. Thus, the licensee would be entitled to such Spectrum band/capacity as per the technology it opts for providing the service. Accordingly, separate contracts are drawn for spectrum allocation with Wireless Planning and Coordination, which is the concerned authority under Department of Telecommunications, in this regard. Any additional Spectrum was subject to prescribed minimum subscribers achieved by the service provider. The basis for determination of prescribed minimum subscribers achieved by the service provider was raised as an issue during late 2007, with a view to regulate and achieved optimum utilization of Spectrum. In the process, TRAI and Telecom Engineering Center under Department of Telecommunications recommended that the service provider must achieve an increase between two to six times. and up to eighteen times. of the

present norms respectively, depending on the service area. As of now, the TRAI's recommendations are the accepted norms for allocation of additional Spectrum. At present, it is learnt that, limited spectrum is available for immediate allocation between all the present and new applicant service providers, providing/wanting to provide GSM Service. Hence licenses/allocation of spectrum are being considered on first- come-first-served basis by the Department of Telecommunications. The race for Spectrum are between the existing service providers who are claiming for additional Spectrum for their existing service areas, existing service providers who are awaiting start up Spectrum in service areas for which they have obtained licences, existing CDMA service providers who are wanting to provide GSM Service in their existing service areas, and the new entrant applicants. Therefore, it is crucial for all qualifying applicants to obtain Letters of Intent/licences without being discriminated inter se amongst themselves.

15. The petitioner, with a view to establish his bona fide and credibility as regards to his financial and technical capability, made a representation to the Prime Minister on 05.11.2007. The representation was also made on 27.12.2007 to the Minister for Communications. The petitioner was shocked and surprised to see the press note dated 10.01.2007 issued, by virtue of which, the Government arbitrarily decided to issue letters of intent to all eligible applicants who applied upto 25.09.2007.

16. It is submitted that the revision of the deadline for submission of applications to 25.09.2007 is without any basis or rationale inasmuch as the Government had reiterated the extant policy that there would be no cap on the service providers and that the underlying basis of the UASL guidelines was to increase competition.

17. It is stated that the petitioner is a serious contender. Even otherwise, the Department of Telecommunications has no doubt on its financial and technical capability, which is evident from the fact that the Government/Department of Telecommunication, pursuant to its decision to process applications received till 25.09.2007 issued Letters of Intent dated 10.01.2008 for the six circles applied by the petitioner on 07.07.2007.

18. The petitioner vide its letter dated 11.01.2008 represented to the Department of Telecommunication and raised a grievance as regards the non-grant of Letters of Intent for 16 circles for which it had applied on 28.09.2007.

19. Learned Counsel for the petitioner submits that the preponement and fixation of cut off date of 25.09.2007 is arbitrary and ex facie not based on any rational basis discernible from the impugned press note dated 10.01.2008. While relying upon D.R. Nim v. Union of India, reported at AIR 1967 SC 1305, counsel submits that the date of 25.09.2007 has been irrationally picked out of the hat.

20. Learned Counsel for the petitioner also relies upon D.S. Nakara and Others Vs. Union of India (UOI), , wherein the Apex Court struck down the pension scheme to those who had retired before the cut off date. The Apex Court ruled

that this division which classified pensioners into two classes is not based on any rational principle and if the rational principle is the one of dividing pensioners with a view to give something more to persons otherwise equally placed, it would be discriminatory.

21. Counsel for the petitioner further placed reliance on *B. Prabhakar Rao and Others Vs. State of Andhra Pradesh and Others*, , where the principles regarding fixation of dates with reference to the same class of employees has been elaborately discussed by the Supreme Court. Attention was invited to page 461:

Now if all affected employees hit by the reduction of the age of superannuation formed a class and no sooner than the age of superannuation was reduced, it was realized that injustice had been done and it was decided that steps should be taken to undo what had been done, there was no reason to pick out a class of persons who deserved the same treatment and exclude from the benefits of the beneficent treatment by classifying them as a separate group merely because of the delay in taking the remedial action already decided upon. We do not doubt that the Judges friend and counselor, "the common man, if asked, will unhesitatingly respond that it would be plainly unfair to make any such classification. The commonsense response that may be expected from the common man, untrammelled by legal lore and learning, should always help the Judge in decided question of fairness, arbitrariness, etc. Viewed from whatever angle, to our minds, the action of the Government and the provisions of the legislation were plainly arbitrary and discriminatory. The principle of *Nakara* clearly applies. The division of government employees into two classes, those who had already attained the age of 55 on February 28, 1983 and August 23, 1984 on the one hand, and the rest on the other and denying the benefit of the higher age of superannuation to the former class is as arbitrary as the division of government employees entitled to pension in the past and in the future into two classes, that is, those that had retired prior to a specified date and those that retired or would retire after the specified date and confining the benefits of the new pension rules to the latter class only.

22. Counsel also draws the attention of the Court in the case of *All India Reserve Bank Retired Officers Association and others Vs. Union of India and others*, , wherein the Apex Court upheld the cut-off date on the ground that there was no homogenous group and the two retirement schemes were different. The Court drew a distinction between the continuance of the existing scheme in its liberalized form and the introduction of the new scheme and held that the cut-off date is not violative of Article 14. The following observations of the Court were relied upon:

There is no doubt that whenever any rule or regulation having statutory flavor is made by an authority which is a State within the meaning of Article 12 of the Constitution, the choice of the cut-off date which has necessarily to be introduced to effectuate such benefits is open to scrutiny by the Court and must be supported on the touchstone of Article 14. If the choice of the date results in

classification or division of members of a homogeneous group it would be open to the Court to insist that it be shown that the classification is based on an intelligible differentia and on rational consideration which bears a nexus to the purpose and object thereof. The differential treatment accorded to those who retired prior to the specified date and those who retired subsequent thereto must be justified on the touchstone of Article 14, for otherwise it would be offensive to the philosophy of equality enshrined in the Constitution.

23. Per contra learned Additional Solicitor General of India has submitted that present petition is based on wrong facts and incorrect averments. The petitioner in the garb of the present petition is indirectly trying to seek a writ of Mandamus for Reservation /Allocation of Spectrum for its UAS licences. It is contended that 575 applications for UAS licences, were received till the cut-off date i.e.1.10.2007 from 46 applicant companies in respect of 22 service areas in the country. In view of the volume of applications, competent authority decided to issue letter of intent (LOI) to all eligible applicants for UASL, who applied up to 25.9.2007 (i.e. the date, on which the cut-off date for receipt of applications were made public through press) in each service area, at present on uniform basis. It is next contended that accordingly a press release was issued in this respect on 10.1.2008. As per the decision taken by the competent authority, 16 eligible applicant companies have been issued 121 LOIs out of 232 UASL applications received up to 25.9.2007 from 22 companies. Learned ASG submits that none of the applications received after 25.9.2007 have been considered and all such applications have been kept in abeyance, thus the action on the part of the respondents is uniform and not arbitrary and neither the petitioner has been singled out. Learned Counsel contends that the pending UASL applications shall be considered subsequently in terms of the Government policy. In the counter affidavit, the brief chronology of licensing of CMTS /UAS has been given. The relevant portion of which is reproduced below:

(viii) The number of UASL applications have been increasing and there were already about 5 to 8 licensed Access Service Providers in each service area. The increase in number of applications had increased the demand of GSM spectrum in a substantial manner. Therefore, a reference was made to TRAI on 13.4.2007, inter-alia, seeking their recommendations whether to put a limit on the number of access service providers in each service area. TRAI was also requested to give its recommendation on certain other terms and conditions of Access Service Providers licences. The recommendations of TRAI dated 28-8-2007 were received on 29th August, 2007, inter-alia, recommending that no cap be placed on the number of access service providers in any service area. (ix) The TRAI's recommendations were examined in DoT and were placed before the Telecom Commission on 10.10.2007. After approval of the Telecom Commission, the matter was considered by the Government and the matter was decided on 17.10.2007. Accordingly Press Release submitted on 18.10.2007 was approved on 19.10.2007 and the Press release was published by PIB on the website and circulated to Press on 19.10.2007 itself announcing the Government decision on

TRAIs recommendation. TRAIs recommendation, inter alia, that there should be no cap on the number of access providers in a service area has been accepted by the Government.

(x) It was observed that there has been a spurt in the number of applications received by DOT for grant of USA licenses after receipt of TRAI recommendations including no cap on number of licences in any service area. Therefore, a cut-off date was announced as 1.10.2007 standing that no new USAL application will be received after this cut-off date till further orders. A copy of Press Release dated 24.9.2007 which appeared in press on 25.9.2007, in this regard is enclosed as Annexure R-3.

(xi) It is mentioned that 575 applications for UASL licences were received till the cut-off date, i.e. 01-10-2007, from 46 applicant companies in respect of 22 service areas in the country. (xii) it is submitted that 232 UASL applications were received till 25.9.2007 from 22 different companies.

(xiii) In view of the volume of applications, competent authority decided to issue Letter of Intents (LOIs) to all eligible applicants for UASL who applied upto 25-9-2007 (i.e. the date on which the cut-off date for receipt of applications were made public through press) in each service area.

(xiv) Accordingly a press release was issued in this respect on 10-01-2008. With the appropriate decision by the competent authority, 16 eligible applicant companies have been issued 121 LOIs out of 232 UASL applications received upon 25.09.2007 from 22 different companies.

(xv) It is respectfully submitted that Government has not rejected the remaining 343 (=575-232) applications filed within the period of 26.09.2007 and 1.10.2007. Further proceeding of pending UASL shall be considered subsequently in terms of Government policy.

24. Learned Counsel for the respondent further submits that as per Clause 5.1 of the terms and conditions of the licence, the terms of licence can be modified if in the opinion of the licensor it is necessary for expedient to do so in public interest. The parawise reply to the writ petition is reproduced below:

1. The averments made in para 1 need no comment.

2. The averments made in para 2 of the petition are denied and disputed. It is denied that press release dated 10.01.2008 of the DoT is arbitrary, discriminatory, irrational, unfair, unreasonable, incorrect and induced a legitimate expectation devoid of any cogent reasons. Further it is also denied that the said impugned decision is violative of all principles of level playing field, natural justice. It is also denied that the said impugned decision of the DoT is contrary to any representations of the Government.

The contents of para 2 of Preliminary Submissions may also be read as part and parcel of reply in respect of para 2 of the petition.

3. The contents in Para 3 are admitted to the extent the averments are part of the record and rest are denied. Further processing on pending UASL applications (received after 25.09.2007) shall be considered subsequently in terms of Government policy.

4. The contents in para 4 are admitted to the extent the averments are part of the record and rest are denied. Further processing of pending UASL applications (received after 25.09.2007) shall be considered subsequently in terms of Government policy.

5. In response to the contents in Para 5(a) to (x), it is submitted that the preliminary submissions and "Submissions On Voluntary Offer Of the petitioner for Spectrum Allocation as stated hereinabove be read as reply to this para and further are admitted to the extent the averments are part of the record and rest are denied.

6. That the averments, claims and submission of the petitioner made in the grounds (A to V) in Para 6 are absolutely false, frivolous and denied in its entirety. The petitioner has concealed material facts in this petition. The answering respondent denies all the averments made in the petition except those which are matter of record and specifically admitted herewith as these are factually wrong and misleading. The petitioner herein is trying to create confusion to twist the facts in their interest. It is submitted that Spectrum is to be allocated as per eligibility and laid down policy as amended from time to time, subject to availability and as per terms of licence. The contents of Preliminary Objections and Preliminary Submission may be also treated as reply to this Para. The answering responding seeks liberty to substantiate the above submission with further evidences, extracts, etc.

7. The contents of para 7 are denied and disputed. Respondent submits that the petitioner has baseless grievances and same needs no redressal from this Hon"ble Court.

8. The contents of para 8 are denied for want of knowledge.

25. The submission of counsel for the petitioner can be summed up as under:

(i) Once a cut-off date has been fixed and parties have acted thereupon, the respondent cannot retrospectively amend the same.

(ii) Where a party has a legitimate expectation of a substantive right, the same can be deprived only if overriding public interest is shown.

(iii) In the facts of the present case no overriding public interest is discernible, especially when the impugned notification itself noticed that the Hon"ble Prime Minister also emphasized on increased competition while inaugurating India Telecom, 2007 and thus there is admittedly no overriding public interest, Justifying the change in cut-off date.

(iv) Even otherwise, the respondent has been unable to address or establish

what is the overriding public interest.

(v) In view of the press note dated 24.9.2007, petitioner has legitimate expectation to be considered for grant of letter of Intent.

26. The sum and substance of arguments of learned ASG is that 575 UAS applications were received till the cut-off date and in view of the volume of applications competent authority decided to issue LOIs to all eligible applicants for UASL, who applied upto 25.9.2007. A reading of the counter affidavit would show that this is the sole ground for fixing a cut-off date. It was urged that the application of the petitioner has not been rejected, has been kept pending and would be considered subsequently. The second argument of learned ASG is that the cut-off date has been applied uniformly to all persons and the petitioner has not been singled out.

27. I have heard learned Counsel for the parties and given my thoughtful consideration to the matter.

28. In the case of Munark Infrastructure Pvt. Ltd. 2000 (v) SC 287, the Apex Court has held that ordinarily Courts should not interfere with the matters of administrative action or changes made therein, unless the Government action is arbitrary or discriminatory or policy adopted has no nexus with the object it seeks to achieve or is mala fide. In the case of Munark Infrastructure (Supra), the respondent Corporation had issued a notice inviting tenders for appointment of agents for collection of octroi, subject to the terms and conditions, thereby fixing 4:00 p.m. to 5:00 p.m. to be the time of submission and opening of tenders on 23.3.2000. Five parties tendered their documents, however, in view of the interim order of the High Court the tenders could not be opened till 24.3.2000. In the meanwhile Municipal Corporation deleted Clause 6 (a) of the tender booklet. Subsequently, Commissioner awarded the tender in favour of a tenderer M, who at the time of submission of the tender did not satisfy the conditions under Clause 6 (a). The High Court had taken the view that if a term of the tender having been deleted after the players entered into the arena, it is like changing the rules of the game after it had begun. Approving the decision of the High Court, the Apex Court has held as under:

11. Broadly stated, the courts would not interfere with the matter of administrative action or changes made therein, unless the Governments action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide.

12. If we bear these principles in mind, the High Court is justified in setting aside the award of contract in favour of Monarch Infrastructure (P) Ltd. because it had not fulfilled the conditions relating to Clause 6(a) of the Tender Notice but the same was deleted subsequent to the last date of acceptance of the tenders. If that is so, the arguments advanced on behalf of Konark Infrastructure (P) Ltd. in regard to the allegation of mala fides of the Commissioner of the Municipal Corporation in showing special favour to Monarch Infrastructure (P) Ltd. or the

other contentions raised in the High Court and reiterated before us are insignificant because the High Court had set aside the award made in favour of Monarch Infrastructure (P) Ltd. The only question therefore remaining is whether any contract should have been awarded in favour of Konark Infrastructure (P) Ltd. The High Court had taken the view that if a term of the tender having been deleted after the players entered into the arena it is like changing the rules of the game after it had begun and, therefore, if the Government or the Municipal Corporation was free to alter the conditions fresh process of tender was the only alternative permissible. Therefore, we find that the course adopted by the High Court in the circumstances is justified because by reason of deletion of a particular condition a wider net will be permissible and a larger participation or more attractive bids could be offered.

29. Similar view has been expressed by the Apex Court in a recent decision in *K. Manjusree Vs. State of A.P. and Another*, , para 27 and 32 of which are reproduced below:

27. But what could not have been done was the second change, by introduction of the criterion of minimum marks for the interview. The minimum marks for interview had never been adopted by the Andhra Pradesh High Court earlier for selection of District & Sessions Judges, (Grade II). In regard to the present selection, the Administrative Committee merely adopted the previous procedure in vogue. The previous procedure as stated above was to apply minimum marks only for written examination and not for the oral examination. We have referred to the proper interpretation of the earlier Resolutions dated 24-7-2001 and 21-2-2002 and held that what was adopted on 30-11-2004 was only minimum marks for written examination and not for the interviews. Therefore, introduction of the requirement of minimum marks for interview, after the entire selection process (consisting of written examination and interview) was completed, would amount to changing the rules of the game after the game was played which is clearly impermissible. We are fortified in this view by several decisions of this Court. It is sufficient to refer to three of them *P.K. Ramachandra Iyer and Others Vs. Union of India (UOI) and Others*, , *Umesh Chandra Shukla Vs. Union of India (UOI) and Others*, and *Durgacharan Misra Vs. State of Orissa and Others*, .

30. In the light of the decisions of the Apex Court it is now to be considered whether it was open for the respondent to change the out off date after receiving the applications and whether there was any overriding public interest to change the cut-off date. Admittedly, on 13.4.2007 the Government of India had requested the TRAI, to furnish its recommendation in terms of Section 11(i)(a) of the TRAI Act, 1997. Copy of the letter dated 13.4.2007 has been placed on record. In this communication the Government sought various recommendations including on the issue as to whether a limit should be put on the number of access service provider in each service area. The TRAI issued a consultation paper on 12.6.2007 in respect of various issues referred to it in the communication of 13.4.2007. One of the issues in the said consultation paper

was as to whether number of service providers in each area should be limited. The consultation paper dealt with the issue namely, determining a cap on number of access provider in each service area, in Chapter 6 of the said paper.

31. The TRAI formulated two questions for consideration in this regard. The TRAI thereafter gave its recommendation in terms of Section 11 of the TRAI Act, on 28.8.2007. The recommendations relevant to the controversy in issue as well as the two questions have been reproduced above.

32. A bare perusal of the recommendation would show that the TRAI was against any limit on the number of access service provider in any service area. The recommendations of the TRAI were also published by means of a press release. The Government then proceeded to fix 1.10.2007 as a deadline for receiving UASL applications by a press release of 24.9.2007. Once having fixed a deadline of 1.10.2007 and once having received the applications up to the deadline, the respondent could not have unilaterally changed the date for considering the form only upto 25.9.2007, particularly, when the respondent has failed to show any overriding public interest. The only justification for the retrospective revision which has been put- forth by respondent is that there was a large volume of applications. The recommendation of the expert body i.e. the TRAI which considered the matter in detail, had suggested that it is not in favour of suggesting a cap on the number of access provider in any service area nor it is advisable to exogenously fix the number of access service providers in a market which is in dynamic setting. Accordingly, it recommended that no cap be placed. As per the impugned press note itself the respondent has been stated that the TRAI on 28.8.2007 recommended that no cap be placed on the number of access service providers in any service area. The Government also accepted this recommendation of the TRAI First para of the press note reads as under:

Press Release

In the light of the Unified Access Services License (UASL) guidelines issued on 14th December 2005 by the department regarding number of licenses in a Service Area, a reference was made to TRAI on 13-4.2007. The TRAI on 28.08.2007 recommended that no cap be placed on the number of access service providers in any service area. The Government accepted the recommendation of the TRAI. Hon"ble Prime Minister also emphasized on increased competition while inaugurating India Telecom 2007. Accordingly, DOT had decided to issue LOI to all the eligible applicants on the date of application who applied up-to 25.-9-2007.

UAS license authorizes licensee to rollout telecom access services using any digital technology which includes wire-line and/or wireless (GSM and/or CDMA) services. They can also provide Internet Telephony, Internet Services and Broadband services. UAS license in broader terms is an umbrella license and does not automatically authorize UAS licensees usages has to obtain another licence i.e. Wireless Operating Licence which is granted on first- come-first serve

basis subject to availability of spectrum in particular service area.

DOT has been implementing a policy of First-cum-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 who so ever complied with the conditions of LOI first will be granted UAS licence.

Department of Telecom

(AS Cell) 10.01.2008

The above Press release has approval of Hon"ble MOC & IT and may kindly be released immediately.

To,

Sd/-

Dy. Director General (AS)

Director (M & C), PIB, Patel Bhawan, New Delhi Deptt. Of Telecom. Govt. of India
New Delhi

Copy to:

DDG(C&A), DoT for uploading on DoT website.

33. Thus on the one hand the respondent has accepted the recommendation of the TRAI in the impugned press note, but acted contrary thereto by amending the cut-off date and thus placed a cap on the number of same providers. The stand taken by respondent and the justification sought to be given for fixing a cut-off date retrospectively is on account of large volume of applications, is without any force in view of the fact that neither any justification was rendered during the course of argument, nor any justification has been rendered in the counter affidavit as to what is the effect of receipt of large number of applications in view of the fact that a recommendation of the TRAI suggests no cap on the number of access service providers in any service area. This recommendation was duly accepted and published in the newspaper. Further as per the counter affidavit 232 UASL applications were received till 25.9.2007 from 22 companies.

Assuming there was increase in the volume of applications, the respondent has failed to answer the crucial question as to what was the rationale and basis for fixing 25.9.2007 as the cut-off date. Even otherwise, admittedly 232 applications were made by 25.9.2007 and between 25.9.2007 and 1.10.2007 only 76 were applications were received. It was only on 1.10.2007 that 267 applications were made. Thus on 28.09.2007 it cannot be said that large number of applications were received. Thus taking into consideration the opinion of the expert body, which as per the press note of the respondent itself was accepted by the respondent, certainly the respondent cannot be allowed to change the rules of the game after the game had begun, to put it in the words of the Apex Court

especially when the respondent has failed to give any plausible justification or the rationale for fixing the cut-off date by merely a week.

34. In support of his submission with regard to legitimate expectation, learned Counsel for the petitioner had relied upon *Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector and E.T.I.O. and Others*, and (2005) 1 SCC 25:

133. Legitimate expectation is now considered to be a part of the principles of natural justice. If by reason of the existing state of affairs, a party is given to understand that the other party shall not take away the benefit without complying with the principles of natural justice, the said doctrine would be applicable. The legislature, indisputably, has the power to legislate but where the law itself recognizes existing right and did not take away the same expressly or by necessary implication, the principles of legitimate expectation of a substantive benefit may be held to be applicable.

35. Counsel for the petitioner has also relied upon *Union of India and others Vs. Hindustan Development Corpn. and others*, wherein the Apex Court held that Where a person's legitimate expectation is not fulfilled by taking a particular decision, then the decision maker should justify the denial of such expectation by showing some overriding public interest.

36. The aforesaid decision was also followed in *Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer and Others*, and *MRF Ltd., Kottayam Vs. Assistant Commissioner (Assessment) Sales Tax and Others*, .

37. Learned Counsel for respondent have relied upon *Union of India (UOI) and Another Vs. International Trading Co. and Another*, as well as *Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer and Others*, in support of his plea of doctrine of promissory estoppel and legitimate expectations cannot come in the way of public interest as well as the fact that the choice of policy is for the decision maker and not the court. I am afraid the aforesaid decision would not apply to the facts of the present case as the respondent has failed to justify or show how public interest would be affected in the matter, in case all the applications received upto 1.10.2001 are considered.

38. Taking into consideration that on 13.4.2007 the Government of India had recommended TRAI to furnish its recommendation in terms of 11 (e) of the TRAI Act, 1997 on the issue as to whether a limit should be put on the number of access service providers in each service area. The TRAI having given its recommendations on 28.8.2007 which were duly accepted by the Government, the respondent cannot be allowed to arbitrarily change the cut-off date and that too without any justifiable reasons. The respondents having failed to satisfy the Court as to how any public interest would be affected in the matter, the impugned press release dated 10.1.2008 is quashed. The respondents are directed to consider the applications submitted by the petitioner on 28.9.2007 for 16 circles. The respondent will also while considering the application of the petitioner submitted on 28.9.2007, consider the letter of the petitioner dated

27.12.2007 wherein the petitioner has made an offer to pay 17.752 crores towards additional revenue share over and above the applicable Spectrum Revenue share.

39. In view of above, petition stands disposed of. There shall be no order as to costs.