

Satellite Spectrum OHD, 14th July

Preliminary Remarks

- 1. This is a landmark open house consultation of the TRAI on assignment of spectrum for space-based communication services. There is probably no parallel to this anywhere in the world in the history of space communication and this holds enormous implications for the future and in fact, for the very survival of the space sector in India. In view of the most unusual and extraordinary circumstances, I earnestly request the kind permission of this esteemed authority for making a few preliminary remarks that are extremely relevant and pertinent for this consultation.**
- 2. At the very outset, we would like to most respectfully state that the very reference for this consultation is quite sub-optimal. It could have been more appropriate for the reference to have sought from the authority its recommendations after consultations, on the most appropriate and optimum method of assigning spectrum for space-based communication services. We seem, instead, to have, in the reference, a pre-decided direction for auction of space spectrum on exclusive basis (ref. DoT letter dated 16/08/22).**
- 3. We once again strongly compliment the esteemed authority for a very comprehensive and balanced consultation paper, in the face of a challenging and complex reference, to facilitate suitable discussions on this open house.**

We also note that an overwhelming majority (75%) of the large number of respondents is clearly against the proposal of auction of space spectrum. In particular, it is important to note that 100% of space startups and 100% of satellite/broadcast operators/service providers are emphatically against the idea of the auction for satellite spectrum auctions.

After many many years, the space sector is trying to lift itself and there are over 200 space startups budding and blossoming. The future of these as well of the existing satellite

and broadcast communication depends entirely on the outcome of this OHD.

4. We verily believe that the push for satellite spectrum auction is based on :-

I. Supreme Court's 2G spectrum verdict,

II. Level playing field between terrestrial telecom service providers and satellite since both are using spectrum.

5. We respectfully submit that both above premises are totally flawed.

Legal Opinion

I. Firstly, on taking opinion as regards implications of Supreme Court judgement from one of the top most legal luminaries of this country, a senior counsel of great repute and well-known to Government has cited the following from the Court's advisory in the Presidential Reference:-

“81... The choice of the word ‘perhaps’ suggests that the court considered situations requiring a method other than auction as conceivable and desirable. Further, the final conclusions summarised in para 102 of the judgement (SCC) make no mention about auction being the only permissible and intra vires method for disposal of natural resources; the findings are limited for the case of spectrum”.

“83... We find that the 2G case does not even consider a plethora of laws and judgement that prescribe methods, other than auction, for dispensation of natural resources; something that it would have done, in case, it intended to make an assertion as wide as applying auction to all natural resources...”

The Legal Luminary goes on to state that I have summarised the legal principles from the Reference, which are relevant to the present opinion, as under:

i) State actions, whether it relates to the distribution of natural resources or grant of contracts, must be tested against the touchstone of Article 14 of the Constitution, and may not be struck

down for being arbitrary without consideration to the actual constitutional infirmities associated with such action.

ii) Auction cannot be considered invariably a "constitutional mandate", as it would stand in complete contravention to the scheme of Article 14.

(iii) Allocation of natural resources to the highest bidder may not necessarily be the only way to subserve the common good and, at times, may run counter to the public good. "Distribution", as envisaged under Article 39(b) has broad contours, and cannot be limited to meaning only a singular method of resource disposal i.e., auction. The overarching and underlying principle governing distribution is the 'furtherance of common good. As the allocation of resources is primarily intended towards serving public interest and the "common good", it cannot ipso facto be interpreted that auction represents the best method for allocation. (para. 119, Reference (Supra) For example, supply and distribution of cooking gas and other essential needs of the citizenry cannot be done by auction as some of these items are subsidized. In such cases, auction cannot be resorted to, given the objective of providing essential commodities to the poor.

(iv) Lastly, the potential for abuse in other resource allocation methods could not be the basis for considering auctions as a legal constitutional mandate, as there was an equal potential for abuse in an auction,

v) Normally speaking, auction should be the commonly used method even for satellite spectrum akin to terrestrial spectrum, but the obstacle in the instant case is that satellite spectrum does not exclusively belong to the Government of India. It belongs, say, along with India, to the UK, Bangladesh, USA, China, etc. There is no room for exclusivity to any sovereign state for that matter. In such a situation, the normal option of sale of spectrum via auction is not possible or feasible. This has been recognized by the body of nations over the last so many years and it is, therefore,

administratively assigned/allocated by Governments. It is because of this peculiar situation that auction is not the preferred option for allocation of satellite spectrum.

I am cognizant of the fact that the 2G Case, was solely examining the issue of allocation in respect of mobile/terrestrial spectrum without deliberating on the allocation of satellite spectrum. The Querist has brought to my attention that telecom/mobile license holders have access to 'back haul' networks, which were not disturbed/cancelled. This is indicative of the fact that the sole consideration in the 20 matter was the method and the manner of the grant of licenses for the operation of mobile/cellular networks, which is distinct from the satellite -spectrum.

In light of the above decisions, the issue of satellite spectrum allocation, in my considered opinion, be guided by the overarching principles of: (a) maximizing the greater good/ furtherance of the common good; and (b) adopting a fair, reasonable and transparent method of allocation which is in consonance with principles of Article 14 of the Constitution...

Based on my reading of the legal exposition as set out above and the distinctive features of satellite spectrum, I am of the considered opinion that auctioning satellite spectrum may not be the most appropriate and efficient method of resource allocation. In light of the Court's decision of auction not being a mandatory process for resource allocation and that the principle underlying the distribution of natural resources should be in furtherance of the common good, administrative allocation of satellite spectrum is a more efficient form of allotment of spectrum. My view in support of administrative allocation of satellite spectrum is based on the following:

(i) Querist has brought to my attention that satellite spectrum is a shared resource. Therefore, it cannot be auctioned which requires exclusive allocation to one bidder, unlike the terrestrial spectrum. The basic prerequisite of a resource that is to be auctioned, is that it

should be available for sale as discrete, unique products. Satellite spectrum does not satisfy this elementary criterion.

(ii) Querist has informed me that satellite spectrum has no national territorial limits. It is coordinated and managed by ITU. Consequently, satellite spectrum management is subject to the radio regulation of the ITU, and the various filing requirements which are necessary for orbital slots and satellite deployment. Unlike terrestrial spectrum, satellite spectrum is never exclusively assigned to the operator but coordinated internationally and shared among multiple operators for different orbital slots and all types of satellites. Thus, the terrestrial concept of exclusivity does not apply in the case of satellite spectrum.

(iii) While determining the most feasible method of spectrum allocation due consideration ought to be given to global practices. I have perused the TRAI Consultation Paper (Supra), as per which it appears that internationally, satellite spectrums have only been allocated through administrative routes. No nation allocates satellite spectrum through auction. In view of this overwhelming international precedent which supports the allocation of spectrum through a non-auction, administrative route, I am of the view that an administrative mechanism should be chosen for allocating satellite spectrum as opposed to auctioning it.

In view of the above, in conclusion, I summarise my response to the queries in paragraph 2 of the present opinion as under:

(i) Whether the law requires that the only way to allocate satellite spectrum is auction? No

(ii) Whether allocation of satellite spectrum for space-based communication services through a non-auction, administrative route, be permissible in law? Yes

Any other comments? NO

II. Level Playing Field between TSPs and Satcom Players
Mistakenly, the spectrum used by TSPs is likened to that used by Satcom Players. This is highly erroneous.

i) Satcom spectrum is shared spectrum whereas TSP spectrum is in exclusive blocks which is the complete opposite in character and usage.

ii) TSPs are in high revenue-generating business of approximately Rs. 3 Lakh crores last year in India. However, Satcom Players' have a total revenue of only about Rs. 500 crores per annum i.e. less than 0.2% of the TSP revenue. How can both be placed in the same field or level?

iii) Satcom is the last practical resort for bridging the digital divide and connecting the rural, remote and inaccessible areas. Terrestrial operators face huge challenges in trying to rollout their network to such regions. Needless to mention, satcom also has to cater to lower affordability of these areas.

iv) Terrestrial communication generally becomes problematic in disaster situations. Invariably, satcom is the Messiah that comes to rescue the affected through communication in these situations.

v) There is abundant case law to establish that equality under Article 14 is available only to entities that are placed in similar circumstances. When such similar circumstances are not seen, it is mandatory to treat the concerned entities unequally. Equal is not equitable in these situations.

6. Expert ICRIER Working Paper No. 417 on Satellite Spectrum Assignment by Prof. Rekha Jain, July 2023:-

“In this context, the paper analyzes the spectrum assignment process along several dimensions such as The Technical Characteristics of the Relevant Bands, The International Nature of Space Based Spectrum, Ensuring Coherence with Dot's Existing Policy on the Space-Based Communication Spectrum, The Integrity of the Sector Governance Structure, The Applicability of Auctions for Space-Based Communications,

International Best Practices, Appropriate and Contextual Interpretation of the 2012 SC Judgment, Impact on the TV Broadcasting Sector and DoT's Past Spectrum Assignment and Auction Design Outcomes.

Subsequently, we identify the following criteria for evaluation of the spectrum assignment process with respect to the effectiveness and efficiency in meeting the Policy Objectives. These are Effective Utilization by Satellite Service Providers, Facilitating Competition, Fair and Transparent Assignment Process, Harmonization with Best International Practices, Maximal Productive Use of Spectrum, Achieves the Public Policy Aims of Universal Coverage, Preserves and Enhances the Diversity and Plurality in the Satellite TV Industry. Helps the Satellite Sector to Take Off and Enables Indian Telecom Companies to be Globally Competitive.

We find that exclusive assignment through auctions for space-based communication meets the policy objectives of effective and efficient spectrum management and regulation inadequately. Since satellite spectrum is a shared resource and there are hardly any empirically or practical models of assignments through auction, an administrative assignment of spectrum on a shared basis is a better way of regulation. We suggest an administered price model that has a one-time license fee and an annual revenue share based on the AGR. The determination of the actual quantum is beyond the scope of this paper.

Using prioritization and coordination mechanism for spectrum sharing within the overall ITU RR. contextualized to our domestic environment will provide regulatory certainty. This will enable the objectives of spacecom sector to provide universal coverage, help the fledgling satellite sector to take off and allows Indian telecom companies to be globally competitive. Further, and more importantly, by ensuring a healthy satellite TV industry, it would help preserve or enhance the diversity and plurality of content that is the bedrock of a vibrant democracy.

As a trustee of the spectrum, a scarce public natural resource, DoT/TRAI will not be fulfilling its remit by adopting exclusive assignments and auctions for space-based communication services. This will lead to a weakening of the institutional and governance structure as such a mechanism would have been adopted without due consideration of the role of TRAI in formulating it. Given the value and contribution of this sector to the economy and potential for its growth, it is important to ensure appropriate spectrum assignment regulation.”