

## **Dissent Note By Sitaram Yechury to the**

JOINT PARLIAMENTARY COMMITTEE ON EXAMINING  
MATTERS "RELATING TO ALLOCATION AND PRICING  
OF TELECOM LICENSES AND SPECTRUM".

Dt. 25<sup>th</sup> September, 2013

**Shri P.C. Chacko,  
Chairman,  
Joint Parliamentary Committee on Examining Matters  
relating to “Allocation and Pricing  
of telecom licenses and spectrum”.**

Dear Chairman Sir,

I have prepared a detailed Dissent Note on the draft report that has been circulated by you for consideration and adoption at the JPC meeting on September 27, 2013.

There are various annexures cited in the Dissent Note which however, have not been appended to this note that I am sending you. All these annexures are in the possession of the JPC and as and when this report is adopted these annexures may kindly be added to my Dissent Note which I am sure you will publish alongwith the report if it is adopted.

I am also sending you the Executive Summary of my Dissent Note for your perusal. This executive summary also includes the questions, for which the answers were required to be given by both the Hon’ble Prime Minister and Hon’ble Finance Minister separately. One of the major concerns that prompted me to prepare this dissent note was that in the absence of answers to these questions from both the Prime Minister and Finance Minister, the mandate given to the JPC by both Houses of Parliament cannot be adequately discharged. I need to place on record my strong dissent and disapproval of the fact that the JPC has failed to live upto its mandate and hence failed to discharge its responsibility on this count.

Hence, the draft report circulated by you is not acceptable.

With regards,

Yours sincerely,

**(Sitaram Yechury)**

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## 1. Introduction:

1.1 The present Joint Parliamentary Committee (“JPC”) was set up vide a motion of the Lok Sabha dated February 24, 2011 (concurrent with by the Rajya Sabha on March 1, 2011) in order to examine matters relating to “Allocation and Pricing of Telecom Licenses and Spectrum from 1998 to 2009”. In accordance with the aforesaid Motions passed by the Parliament, the present Joint Parliamentary Committee was set up under the Chairmanship of Shri P.C. Chacko, MP, on March 4, 2011.

1.2 In the course of its hearings, the JPC examined a number of witnesses in person and through written evidence. To be noted that despite numerous requests by the undersigned and certain other members of the committee, the Committee failed to request and examine evidence from the Hon’ble Prime Minister and the Hon’ble Finance Minister despite the serious questions surrounding their involvement in the issues at hand. The undersigned would once again like to reiterate their dissatisfaction with the procedure followed by the Committee, particularly the Chairman, and therefore believes that the JPC failed to fulfil its mandate by examining *all* relevant evidence in the matter.

1.3 The Chairman of the Committee has now prepared and submitted a draft Report to the Committee (the “**Report**”). However, the contents thereof constrain the undersigned to regretfully present this Note of Dissent to the Report, on both procedural and substantive grounds as more fully detailed in this Note.

1.4 The undersigned is also concerned that the contents of the Draft Report of the JPC have been leaked in the public domain prior to its presentation before the JPC. The undersigned would like to place on record his displeasure at the leaking of the draft Report.

1.5 In the premises as aforesaid, keeping in mind the duty of this Committee and its Members toward both Parliament and the citizens of India, the undersigned is unable in all clear conscience, to sign and therefore accept the findings of the draft Report as presented by the Chairman of the Committee and in its current form and request the Chairman to reconsider the draft Report in its entirety.

## 2. Procedural Irregularities in the Functioning of the JPC:

### 2.1 Failure to call all material witnesses:

The undersigned and other members of the JPC repeatedly requested that the JPC examine evidence from the Hon'ble Prime Minister and the Hon'ble Finance Minister despite the serious questions surrounding their involvement in the issues at hand. Shri A. Raja is on record in his written evidence submitted to the JPC that he had kept the Prime Minister and the Finance Minister informed of every step during the allocation of UAS licenses / 2G spectrum (in 2007-08) and also fixing of the license fees. In spite of such repeated requests, the Committee failed to call the Hon'ble Prime Minister and the Hon'ble Finance Minister and thereby failed in its mandate to examine all evidence.

It may be noted that this refusal is despite their being sufficient precedent enabling and permitting sitting ministers to be called to depose before parliamentary committees.

The need to seek evidence from the Prime Minister and the Finance is made clear when considering the following facts:

The Report states in Paragraph 10.45:

*“In view of the above, the Committee are inclined to conclude that the Prime Minister was misled about the procedure decided to be followed by the Department of Telecommunications in respect of issuance of UAS licences. Further, the assurance given by the Minister of Communications and Information Technology in all his correspondence with the Prime Minister to maintain full transparency in following established rules and procedures of the Department stood belied.”*

Shri A. Raja in his letter to the Hon'ble Chairman of the JPC dated 22 April 2013 has reiterated that he had kept the Hon'ble Prime Minister informed at each step of the process and through personal meetings as well as during cabinet meetings. The Report also acknowledges that indeed he wrote three detailed letters to the Prime Minister prior to 10<sup>th</sup> January, 2008 when the LoI's for the UAS licenses were issued. The Report also states that the Prime Minister asked the Prime Ministers Office (PMO) to prepare a Note on Shri Raja's letter dated 26<sup>th</sup> December, 2007 wherein he details the various steps he was proposing to take and as recorded by the Report.

Taking the above into account, it is not possible for JPC to come to any conclusion about the veracity of Shri Raja's claim or the statement in the Report that the Prime Minister was misled, without the Prime Minister answering the following:

- (i) Is it true that Shri Raja had met the Prime Minister personally in the first week of January, 2008 as stated in his letter to brief the Hon'ble Prime Minister about the procedure he was going to follow? In his submission, Shri Raja states, *“Thereafter I met the Hon'ble PM in the first week of January 2008 and this issue was again discussed and he agreed with the proposed course of action of the DoT.”*

- (ii) If this meeting did take place, did the Hon'ble Prime Minister agree with Shri Raja on the proposed course of action as Shri Raja claims?
- (iii) On what specific count can we hold that Shri Raja misled the Hon'ble Prime Minister?
  - a. Is it about not auctioning/indexing license fees of 2001 for 2008?
  - b. Is it about the change in First-come-first-served policy regarding grant of license by which the date of fulfilling LoI first was to be used for grant of licenses and not the date of application
  - c. Is it about securing the consent of the Solicitor General to the procedure that was to be followed as stated by Shri Raja in his 26<sup>th</sup> December, 2007 letter?
- (iv) On what count did Shri Raja not maintain transparency regarding procedures that Shri Raja was following, in his communications with the Hon'ble Prime Minister as stated in the Report?
- (v) Even if the finding of the Report is correct – that Shri Raja misled the Prime Minister and did not maintain transparency, the following issues still remain, which the Hon'ble PM needs to answer:
  - a. Even after LoI's were issued on 10<sup>th</sup> January, 2008, since the licenses had not been issued, the Government could have cancelled the LoI's and followed a proper procedure. Why did the Hon'ble Prime Minister not take action as he had himself asked that the Note prepared by Pulok Chatterjee, Secretary PMO, dated 6<sup>th</sup> January, 2008 be modified to take into account the status after issuing of the LoI's?
  - b. The Hon'ble Prime Minister in October 29, 2011 had stated – in his meeting with TV editors – that the Finance Ministry and the DoT had agreed on keeping 2001 prices for entry and spectrum fees for 2008. Was this agreement between Finance Ministry and the Department of Telecommunications (DoT) reached before 10<sup>th</sup> January, 2008 or afterwards?
  - c. On what basis did the Hon'ble Prime Minister drop the suggestion for auctioning of the licenses he himself had made to Shri Raja in his letter dated 2<sup>nd</sup> November 2007?

Keeping in mind the high office he occupies, the Hon'ble Prime Minister could have given his answers to the JPC orally or in writing. Without answers from the Hon'ble Prime Minister on the above, it is difficult to understand how the JPC can come to any conclusion regarding the Hon'ble Prime Minister being “misled” by Shri Raja.

Similarly, the Report has made a number of observations regarding the Finance Ministry, and therefore of the Finance Minister's handling of the 2G license issues. It is not possible for

JPC to come to any conclusion about the role of the Hon'ble Finance Minister without answers to the following questions.

Specifically, the Draft Report mentions in Section 10.43 the following:

*“The Ministry of Finance have informed the Committee that no communication was sent by the Department of Economic Affairs in response to the letter dated 29 November, 2007 from the Department of Telecommunications. From the sequence of events, the Committee gather the impression that the Ministry of Finance was in agreement with the position explained by the Department of Telecommunications in respect of cross-over fee charged for allowing usage of Dual Spectrum Technology by the existing licensees.”*

In view of the aforesaid, it is essential to confirm whether the Finance Minister agrees with the Report that by not responding to the position as explained by DoT regarding license fees, the Ministry of Finance had in effect given its consent? Further, the issue of why the Finance Ministry did not press the issue of entry and spectrum fee being pegged to 2001 prices in 2008, especially as the DoT had referred to the Cabinet note where it was mandatory to have such an agreement between the Finance Ministry and the DoT as per Section 2.1.2 (3), deserves to be examined in greater detail. The Report also fails to examine whether any formal consent was given by the Finance Ministry (as is required for fixing of license fees).

Shri A. Raja in his letter to the Hon'ble Chairman of the JPC dated 22 April 2013 has also stated that his actions regarding license fees was with the concurrence of the Finance Ministry and the Finance Minister, whom he had met during the first week of January, 2008. The Report fails to examine if such a meeting took place and if so, if it is correct that the Hon'ble Finance Minister had given his consent to license fee being kept at the 2001 level for the 2008 issuing of licenses?

Further questions about the role of the Finance Minister that the Report has failed to address include:

- (i) Why did the Hon'ble Finance Minister agree – as can be seen from his note to the Prime Minister dated 15<sup>th</sup> January, 2008 – to treat the matter of entry and spectrum fees for LoI's issued on 10<sup>th</sup> January, 2008 as a closed matter?
- (ii) Why did the Hon'ble Finance Minister agree on 30<sup>th</sup> January, 2008 in his meeting with Shri A. Raja to treat the entry and spectrum fees for LoI's issued on 10<sup>th</sup> January, 2008 as a closed matter?
- (iii) As one of the most eminent lawyers of the country, the Hon'ble Finance Minister was undoubtedly aware that LoI's could be cancelled before the formal grant of licenses and therefore his consent was essential for the entry and spectrum fees being kept at 2001 levels in 2008. Why, then did he fail to take any action to stop the scam?
- (iv) Why did the Hon'ble Finance Minister not push for adherence to the Government of India (Transaction of Business) Rule-4, which makes such concurrence mandatory regardless of the Cabinet note?

- (v) Why did the Hon'ble Finance Minister not push for adherence to the Government of India (Transaction of Business) Rule-7, which specifies in the second schedule that in cases which involves financial implications on which the Finance Minister desires a decision of the Cabinet and if a difference of opinion arises between two or more ministries and a Cabinet decision is desired, the matter shall be brought before the Cabinet?

Keeping in mind the high office he occupies, the Hon'ble Finance Minister could have give answers to the JPC orally or in writing. Without answers from the Hon'ble Finance Minister on the above, it is difficult to understand how the JPC can come to any conclusion regarding the role of the Finance Ministry or the Hon'ble Finance Minister.

2.2 *The Report relies solely on the written submissions of Shri A. Raja without providing any opportunity for him to provide verbal evidence or for cross-examination by the JPC:*

Given the crucial testimony of Shri A. Raja, it is clear that the JPC ought to have taken the time to examine the evidence of the ex-Minister for Communications and Information Technology in a meticulous and comprehensive fashion. However, the JPC has had to rely merely on written submissions presented by Shri A Raja and no opportunity to cross examine the deponent was provided. Cross-examination of Shri A Raja would likely have clarified the context and statements made in the written submissions and would have enabled a full and contextual picture of the various irregularities committed by the Government of India to have emerged.

2.3 *The Report has been prepared without consultation with and inputs of the members of the JPC:*

In preparing the Report, the Chairman failed to discuss any of the substantive findings with the members of the JPC and has prepared a draft that is at variance with the evidence in front of the JPC as well as the opinion of the members of the JPC on a number of grounds. As a procedure, an agreement on the major findings of the JPC should have been arrived at before a detailed report. The Chairman made no attempt to reach a consensus on the major findings of the JPC but is attempting to provide his views as the Report of the JPC.

2.4 *The Report is selective in its use of evidence:*

A mere perusal of the Report indicates not only that the Report fails to adequately examine the evidence pertaining to the period when the UPA alliance was in government, but further that there appears to be a deliberate attempt to selectively quote from documents or completely ignore crucial evidence.

For instance, the Note prepared by Shri Pulok Chatterjee, Prime Minister's Office for the perusal of the Prime Minister has been selectively quoted and not annexed to the Report. Similarly the discussions of the Hon'ble Finance Minister and the MoCIT on 30 January 2008 as well as the Hon'ble Finance Minister's note dated 15 January 2008, while referred to have not been sufficiently examined or annexed to the Report. The fact that the Report attempts to brush over the scam committed while the UPA government was in power is evident from the fact that only nine documents are annexed to the Report that pertain to the entire 2007-08 period – that too these are mostly innocuous documents.

Crucial documentations such as the correspondence to and from the Prime Minister and MoCIT are not annexed to the Report (and presumably not examined in any detail). The number of documents annexed to the Report apropos of this period makes an interesting comparison with the number of documents examined and annexed to the Report apropos of the period the NDA government was in power.

### 3. **Substantive Shortcomings of the Report:**

In addition to the procedural infirmities in the conduct of the JPC as detailed above, the undersigned is unable to accept and agree with the substance of the Report as well as the conclusions reached therein.

The Report has, in examining the issues at hand and arriving at its conclusions selectively quoted from evidence presented before it, found it convenient to ignore crucial documents and verbal evidence and has failed to appreciate crucial evidence in the proper context.

It is clear that the Report has failed to consider the facts pertaining to the allocation and pricing of telecom licenses in their totality and as part of an overall pattern. The Report is replete with inaccuracies and contradictions – the lack of consistency may be highlighted by a cursory comparison of the findings of the Report to the judgement of the Hon'ble Supreme Court in the matter of *Centre for Public Interest Litigation v. Union of India and Ors*, WP(C) No. 423/2010 (Annexure – I), the findings of the One Man Committee (OMC) comprising Justice Shivaraj Patil who submitted his Report to the Government of India on 31 January 2011 (Annexure – II), as well as the seemingly different yardsticks used to judge the policy and administrative decisions taken at the time when the NDA government was in power as opposed to the UPA government.

The points of difference with the interpretation of facts as presented in the Report are broadly around the following issues:

- (i) The Report has failed to appreciate that there was significant undervaluation of UASL licenses and spectrum issued in the period 2007-2008. Therefore, there is a failure to recognise the presumptive loss occasioned by the arbitrary and *mala fide* allocation of UAS licenses and spectrum by the Government of India in the period 2007-2008;
- (ii) The failure of the Report to adequately analyse and apportion blame for the failure of the Government to follow the 'auction route' or indexation for apportionment of spectrum at a huge loss to the state exchequer (when it was clear that not only was this possible and preferable to a First Come First Serve Policy for allocating spectrum at 2001 price but had also been discussed in Government (specifically the Ministry of Communications and IT, the Finance Ministry and the Prime Ministers Office) as shown in numerous documents examined by the JPC);

- (iii) The Report claims that the pegging of spectrum at low rates in 2008 was done in order to ensure low telecom rates for the end user. The Report fails to examine whether this was actually the case and if so why was there a change in lock-in conditions -- roll out norms and in the merger and acquisition policy. These changes meant that there was effectively no lock-in for the parties securing cheap licenses and spectrum enabling therefore for a private auction of the spectrum instead of a public auction. Instead of gains to the consumers, cheap licenses and spectrum allowed for huge windfall gains to a select few parties;
- (iv) Failure to examine how the arbitrary changes in cut-off dates, and First Come First Serve (FCFS) procedures were explicitly designed to help a few select parties to jump queues and acquire licenses and spectrum;
- (v) Failure to examine that Shri A. Raja by allowing “intra-circle” roaming and changes in roll-out guidelines, allowed a select few of the new licensees to start acquiring subscribers without putting in any capital investments as was called for in the original roll-out plan;
- (vi) Changing mergers and acquisition conditions to allow a few select parties to sell/change shareholdings in their companies thereby gaining windfall gains without making any capital investments and solely on the basis of acquiring licenses and spectrum;
- (vii) Failure to recognize the roles played by the Hon’ble Prime Minister, the then Finance Minister and recognize their responsibility in the arbitrary and *mala fide* allocation of UAS licenses / 2G spectrum by the Government of India in the period 2007-2008 as well as changes introduced in the roll-out obligations, mergers and acquisition guidelines to help a select set of parties make windfall gains;
- (viii) Failure to recognize numerous procedural infirmities in the allocation of the UAS licenses by the Department of Telecommunications in the period 2007-2008;
- (ix) Failure to apply appropriate constitutional, legal and ethical yardsticks to determine and allocate responsibility, for instance in failing to recognize the constitutional principle of collective responsibility of the Cabinet or failing to recognise that an offence can be committed both by commission as well as acts of omission.

The Report has therefore failed to examine the matter holistically and in the proper perspective – for instance it is clear, based on the documents on record and evidence presented before the Committee, that the 2G scam was carried out to benefit certain private companies – the Report therefore fails to examine the crux of the matter. The Report also fails to consider events occurring post 2008 that are relevant to the period in question and establish the overall pattern of events. The Report appears to merely be an exercise in damage limitation with an attempt to ensure that an appropriate scapegoat is sacrificed to satiate public opinion, while those at highest levels of the Government are absolved of all liability.

3.1\_ Undervaluation of UAS licenses allocated in 2007-08 and Failure to Follow the Auction /Indexation Method to Price Spectrum:

It is clear from evidence on record (and that has been ignored by the Report) that the UAS licenses and spectrum allocated by the Government of India in the period 2007-08 was seriously undervalued thereby causing massive losses to the state exchequer and enabling windfall gains to private parties.

It is uncontroverted fact that the UPA Government under the leadership of Prime Minister Shri Manmohan Singh, issued a total of 184 licenses with spectrum at 2001 prices in the following break-up:

- (i) 27 licenses by Shri Dayanidhi Maran till May 2007
- (ii) 122 UAS licenses by Shri A. Raja till July 2008
- (iii) 35 dual technology licenses by Shri A. Raja between October 2007 and 10<sup>th</sup> January 2008

It is relevant at this point to briefly reiterate certain facts with respect to the allocations of licenses and spectrum in this period.

Once the UPA government came into power in 2004, Shri Dayanidhi Maran was appointed the Hon'ble MoCIT.

In the period between January 11, 2006 and December 2006, a GoM was constituted *inter alia* to focus on the vacation of spectrum by the defence forces. It is clear that the GoM was formed with the PM's approval and that the original Terms of Reference (ToR) for the GoM as drafted in February 2006 included the issue of spectrum pricing (Annexure – IV). The ToR of this GoM were subsequently changed upon insistence of the MoCIT to ensure that no reference was made to pricing of spectrum with the new Terms of Reference (submitted to the GoM on 16 November 2006 – Annexure - V) primarily concentrating on making available additional spectrum. On 7 December 2006, based on Shri D Maran's letter to the Prime Minister and 'the Prime Minister's approval' – as mentioned in the new ToR – a fresh and modified Terms of Reference for the GoM was issued, which retains most of the Terms of Reference from 23 February 2006, except explicitly deletes the Terms of Reference related to spectrum pricing (Annexure – VI).

Various licenses were granted in this period post the unilateral change in UASL allotment policy as noted above (by the Hon'ble MoCIT) with spectrum provided at 2001 rates. As per

Cabinet decision of 2003, it is presumed that all such licenses being issued at 2001 prices had the sanction of the Finance Minister, as the pricing of spectrum was also a revenue issue and therefore required the Finance Ministry's consent.

Shri A. Raja then took over as MoCIT in End-May 2007.

On 6 June 2007, the then Finance Secretary, after discussions with the then Finance Minister, P. Chidambaram, wrote to D.S. Mathur, Secretary, Department of Telecommunications (DoT), asking him to reconsider the matter of including spectrum pricing in the Terms of Reference for the GoM yet again. He states that “*this matter has been discussed at the level of the Finance Minister. It is our view that for optimum utilisation of spectrum, a sound policy on spectrum pricing is necessary*”. The methodology to be followed for spectrum pricing would logically follow the vacation of spectrum, which is the main task of the GoM. “*I, therefore, request you to reconsider the matter and include spectrum pricing in the ToR for GoM*”. (D.O. No. 3/11/2003-Inf dated 06 June, 2007 by Dr. Subbarao, Secretary, DEA, MoF). (Annexure – VII)

On 15 June 2007, D.S. Mathur, Secretary, DoT replied to Dr. Subbarao, Secretary, DEA, Finance Ministry, reminding him of the discussion that has occurred between the Telecom Minister and the Prime Minister between January and February 2006 as well as the revised draft sent by Shri Dayanidhi Maran to the Prime Minister on 16 November 2006. He cites the resultant ToR issued by the Cabinet Secretary on 7 December 2006 and states, “*This matter is discussed in a meeting with MoCIT (A. Raja) at this time*”. *And it was felt that the ToR may now remain as they were issued in December last year*”. (Annexure – VIII)

There was no further communication between the MoF and the DoT on the matter of ToRs related to the GoM.

On 13th April 2007 the Telecom Ministry sent a specific reference (to TRAI) no. 16-3/2004-BS-II seeking a change in the “present policy” (existing at that time). The reference was made to specifically “review its policy” (Annexure – IX). On 28 August 2007 the TRAI, after considering inputs of all concerned parties, announced its recommendations on multiple issues, in a single consolidated document, *inter alia* dealing with the issues of no-cap, M&A rules and roll-out obligations. (Annexure – X)

On 24 September 2007 Shri A Raja put out a 2-line press release announcing the cut-off date of 01 October 2007 for processing of applications. (Annexure – XI)

On 19 October 2007 the DoT issued a Press Release, announcing *inter alia* its acceptance of the TRAI recommendations dated August 28, 2007. The Report is however silent on an important set of deviations made in the announced policy from the relevant TRAI

Recommendations i.e. in respect to the M&A rules and roll-out obligations etc. (Annexure – XII)

On 19 October 2007, the TRAI, Chairman, N. Misra wrote to caution the DoT to not deviate from TRAI's recommendations without following due process and to consult them before implementing the recommendations etc. (Annexure – XIII)

On 25 October 2007 D.S. Mathur (Secretary, DoT) / Manju Madhawan (Member, T) made an internal memo, recommending three options including auctions/indexation for 2G spectrum instead of first come first served. (Annexure – XIV)

By 26 October 2007, 575 applications for new UAS licenses were received.

On 27 October 2007, DoT sent a reference to the Law Ministry for an opinion (Annexure – XV). The Law Ministry replied on 1 November 2007 with a direction that the matter be sent to an EGoM, a course of action that the Hon'bleMoCIT overruled. (Annexure – XVI)

On 2 November 2007, Shri A Raja wrote to the Prime Minister, informing him:

- i) That the DoT is following TRAI's recommendations on no cap.
- ii) That 575 applications have been received till 01 October 2007.
- iii) That the Law Minister has rejected DoT's demand for a legal opinion and instead directed them to an EGoM. This "*suggestion of the Law Ministry is totally out of context.*"
- iv) That the DoT will follow the First Come, First Served (FCFS) process.
- v) That cut-off date will be moved up from 01 October 2007 to 25 September 2007, i.e. when the news item on announcement of the cut-off date appeared.
- vi) That procedure for processing remaining applications will be decided later if any spectrum is left.
- vii) That the DoT is not deviating from existing procedure.

(Annexure – XVII)

On 2 November 2007 the Prime Minister wrote back, cautioning Shri A Raja and directing him to:

- (i) Examine issues relating to allocation of GSM spectrum to CDMA operators, enhancement of subscriber-linked criteria and processing of large number of applications received for fresh licenses against the backdrop of inadequate spectrum to cater to overall demand.

- (ii) He reminded him of the TRAI's recommendations that require an early decision and summarized the key issues in an 'annexed note', seeking urgent consideration of the Minister to ensure fairness and transparency and most importantly directing him to let him know of the position "*before any further action is taken*".

(Annexure – XVIII)

On 2 November 2007 Shri A Raja wrote a second letter in response to the Prime Minister's letter stating:

- i) The issue of auction was considered by TRAI and the Telecom Commission and has not been recommended.
- ii) It will be unfair, discriminatory, arbitrary and capricious to auction spectrum to new applicants.
- iii) Only 60 – 65 MHz of spectrum is left. 30 – 40 MHz has been allocated. Therefore there is enough scope for allotment of spectrum to a few operators after meeting the needs of existing operators and licensees.

(Annexure – XIX)

On 22 November 2007 the Finance Secretary, Dr. Subbarao wrote to the Secretary, DoT, questioning as to how spectrum was being awarded at prices discovered in 2001 – of Rs. 1600 crores for pan India allocation. He also directs immediate halt of all grant of UAS licenses/spectrum (Annexure – XX).

On 29 November 2007, DoT Secretary wrote to the Finance Secretary, Shri Subbarao, explaining that the decision is being taken consistent with the Cabinet decision of 2003 (Annexure – XXI).

On 26 December 2007, Shri A Raja vide a letter of the same date informed the Prime Minister about the following:

- i) That he was going to follow modified First Come, First Serve process.
- ii) That he'd had a discussion with the then head of GoM on spectrum, Shri Pranab Mukherjee, as well as an agreement with the Solicitor General of India, Shri Ghulam Vahanvati.
- iii) That Tatas would also be given spectrum under dual technology as per existing policy.
- iv) That he was going to proceed immediately.

(Annexure – XXII)

This letter was acknowledged by the Prime Minister on 3 January 2008 (Annexure –XXIII).

Pulok Chatterjee, Secretary, PMO, wrote a note on spectrum issues to the Prime Minister on 31 December 2007 (Annexure – XXIV).

Pulok Chatterjee thereafter wrote a comprehensive note on norms and methods to be adopted by DoT (for allocation of spectrum) on 6 January 2008 (Annexure – XXV).

Additional Secretary (Economic Affairs) thereafter wrote a concept paper on revising entry fee and auctioning spectrum on 9 January 2008 (Annexure – XXVI).

Press release(s) on first come first served / LoI processing was issued on 10 January 2008 (Annexure - XXVII).

On 10 January 2008 UAS licenses were allotted to 121 operators in 2008 at 2001 prices.

An additional 35 dual technology operators also bought spectrum in 2007-2008 at 2001 prices.

The Prime Minister on 11<sup>th</sup> January, 2008 suggests that the note of Pulak Chatterjee be modified taking into account that LOI's have been issued on 10<sup>th</sup> January, 2008 (Annexure – XXVIII).

Pulok Chatterjee thereafter prepared a Note of 15 January 2008, reiterating the points in the 6<sup>th</sup> January Note. Crucially, a noting in the file dated 23<sup>rd</sup> January states “*PM wants this informally shared with the Deptt and does not want a formal communication & wants PMO to be kept at arms length pl*”. (Annexure – XXIX)

The Finance Minister then prepared a note to the Prime Minister on Spectrum Charges dated 15 January 2008 accepting the entry price for the LoI's and cross-over/dual technology license and auction route for the future. (Annexure – XXX)

A meeting was held between the MoCIT and the Finance Minister on 30<sup>th</sup> January, 2008. The gist of the discussions as recorded by Secretary, Finance indicates that FM agreed that “*we are not seeking to revisit the current regimes for entry fee or for revenue share*”. To be noted that at this time, only LoI's had been placed so the Government could still cancel the LoI's or change the entry fee.

UAS licenses were signed between 27<sup>th</sup> February and 7<sup>th</sup> March 2008, after which entry prices could not be changed without legal consequences.

On 22 April 2008 new M&A guidelines allowing acquisitions were announced. (Annexure – XXXI)

Thereafter, an Office Memorandum on Allocation and Pricing of 2G Spectrum dated March 25, 2011 was prepared by Dr. PGS Rao, Dy. Dir. Infrastructure and Investment Division, Dept. of Economic Affairs, which was seen by the then Finance Minister. (Annexure – XXXII)

From the aforesaid, the conspiracy to ensure that spectrum was allocated at 2001 rates without any indexation or auction in order to ensure private windfall gains is apparent. The fact that 7 years had passed since the 2001 rates for spectrum were determined would at the very least have necessitated a need for appropriate indexation (taking into account inflation, number of subscribers having increased by 75 times from the 2001 base), if not consideration of the state of the industry and the changed economic and market conditions. It apparent that indexation / auction should have been the only equitable and legal method of spectrum allocation.

The Report seeks to use TRAI's Recommendations of 28 August 2007 as the basis for not revising the 2001 entry fee. It is clear that the Government was well aware that TRAI's recommendations were only of an advisory nature and not binding on the government. In any case, as will be shown later on in this Note, the government violated other crucial recommendations of TRAI, without referring the matter back to TRAI as it is bound to do under the TRAI Act, following which it could overrule TRAI's recommendations. On the issue of entry fee, or any other policy matter, the government cannot use TRAI recommendations as the excuse. As noted in the Supreme Court decision in the *Centre for Public Interest Litigation Case*.

*“the entire approach adopted by TRAI was lopsided and contrary to the decision taken by the Council of Ministers and its recommendations became a handle for the then the Minister of C&IT and the officers of the DoT who virtually gifted away the important national asset at throw away prices by willfully ignoring the concerns raised from various quarters including the Prime Minister, Ministry of Finance and also some of its own officers.”*

*“...we have no hesitation to record a finding that the recommendations made by TRAI were flawed in many respects and implementation thereof by the DoT resulted in gross violation of the objective of NPT 1999 and the decision taken by the Council of Ministers on 31.10.2003.”*

*“We may also mention that even though in its recommendations dated 28.8.2007, TRAI had not specifically recommended that entry fee be fixed at 2001 rates, but paragraph 2.73 and other related paragraphs of its recommendations state that it has decided not to recommend the standard option for pricing of spectrum in 2G bands keeping in view the level playing field for the new entrants. It is impossible to approve the decision taken by the DoT to act upon those recommendations.”*

*“The recommendations made by TRAI on 28.8.2007 were not placed before the full Telecom Commission which, among others, would have included the Finance Secretary. The notice of the meeting of the Telecom Commission was not given to any of the non permanent members despite the fact that the recommendations made by TRAI for allocation of spectrum in 2G bands had serious financial implications... Therefore, it was absolutely necessary for the DoT to take the opinion of the Finance Ministry as per the requirement of the Government of India (Transaction of Business) Rules, 1961.”*

*“In view of the approval by the Council of Ministers of the recommendations made by the Group of Ministers in 2003, the DoT had to discuss the issue of spectrum pricing with the Ministry of Finance. Therefore, the DoT was under an obligation to involve the Ministry of Finance before any decision could be taken in the context of paragraphs 2.78 and 2.79 of TRAI’s recommendations.”*

It appears clear from the record that various officials within the Government had, prior to 2008, questioned the equity and logic behind continued use of a First Come First Serve policy of allocation of licenses and spectrum, without appropriate auction / benchmarking of the spectrum. Sufficient documentation exists as given above to show that advise had been tendered to those at the highest levels of Government to not allow spectrum to be allocated on a first come first served basis at 2001 prices – all of which was ignored. Further, it may be remembered that spectrum pricing was removed from the ToR of the GoM. The aforesaid is made abundantly clear from a cursory examination of the following documents:

- (i) TRAI’s DOs dated 15<sup>th</sup> October 2007, 19<sup>th</sup> October 2007 and 14<sup>th</sup> January 2008; (Annexures – XXXIII, XXXIV, XXXV respectively)
- (ii) An internal meeting held with senior officers of the DoT with MOC&IT in which multiple alternatives including auctions were discussed;
- (iii) Internal note authored by the then Secretary, DoT. DS Mathur and Member Finance Manju Madhawan who held that bidding / auctions may be adopted since “award of new licenses for UASL has to be transparent and must withstand any legal scrutiny at a later date”;
- (iv) Law Minister Shri Bhardwaj’s specific advice on 1<sup>st</sup> November 2007 to have the entire 2G spectrum allocation matter to be “considered by an EGoM and in that process legal opinion of AG be obtained”;
- (v) PMO letter dated 2<sup>nd</sup> November 2007 in which he not only reminded the MoCIT about a Union Cabinet decision of 1999 / policy regarding allocation of licenses being linked to availability of spectrum, but also further recommended consideration of two options – auction or revision of entry fee which is currently (at that time) benchmarked on old spectrum auction (2001) figures.

- (vi) Finance Secretary's letter dated 22<sup>nd</sup> November 2007, questioning "It is not clear how the rate of Rs. 1600 crores, determined as far back as 2001, has been applied for license given in 2007 without any indexation". Also instructing the DoT to "All further action to implement the above licenses may please be stayed".
- (vii) Additional Secretary (Economic Affairs) concept paper on revising entry fee and auctioning spectrum on 9 January 2008

Even after the LoI's were issued, as detailed in the Office Memorandum on Allocation and Pricing of 2G Spectrum, Dr. PGS Rao, Dy. Dir. Infrastructure and Investment Division, Dept. of Economic Affairs dated 25<sup>th</sup> March, 2011, the LOI's could have been cancelled and the nation would have been saved of a huge loss. This was not done though the Prime Minister and the Finance Minister were fully aware of illegal actions of the MoCIT, Shri A. Raja.

At the very least, there was a conspiracy within the Ministry of Communications & IT and acquiescence thereof at the highest levels of government to ensure that the price of spectrum allocated in 2007-2008 was kept artificially low by a failure to either appropriately index the spectrum to account for passage of time and a change in market conditions, inflation etc. as well as by failing to utilize the auction route for allocation which would have automatically pegged the prices at appropriate market rates (as shown in the 3G auctions).

### 3.2 Presumptive Loss on account of allocation of UAS licenses and spectrum in 2007-08:

The Report has sought to question the CAG calculations of the presumptive loss. It has sought to argue that presumptive loss is not an auditing term and that any presumptive loss calculations are not called for as telecommunication is an infrastructure sector and therefore should not be seen as a tool for revenue generation. It has also questioned the method adopted by the CAG in each of the presumptive loss calculations. However, while questioning such presumptive loss calculations, the Report refuses to address the central question – if a license was worth Rs. 1658 crore in 2001, what would it be worth in 2008? Even a simple consideration that a rupee in 2001 and 2008 are not the same and the fact that there were only 4 million mobile subscribers in 2001 against 300 million mobile subscribers in 2008 would have necessitated a change in entry price – something the Report refuses to consider.

The Report questions the Comptroller & Auditor General of India (CAG) for using an estimation of market prices if the spectrum had been auctioned as the basis of the presumptive loss. There are two ways of examining the loss to the exchequer – one an econometric method by which we compute the value of a license based on the time value of money and increase of subscriber base and therefore revenue/MHz of spectrum. The other method is to determine the market price – what the market would have paid based on certain known facts.

The CAG estimated the market price in different ways – by the offer of S Tel for a pan-India license, the sale of equity by Unitech, and Tata Teleservices and by comparing it to the 3G auction price. This gave the figures of Rs. 57,600 crore to 1.76 lakh crore -- depending on the method adopted. The reason that CAG did not differentiate between 2010 and 2008 prices is quite simple – the market prices in 2007 and early 2008 would have been higher than 2010 as the financial crash took place later and the markets had not fully recovered even in 2010.

CAG's argument was that an estimation of market price is a better indicator of the value of the license and not an econometric model. TRAI, in its *Recommendations on Spectrum Management and Licensing Framework* dated 11th May, 2010 after comparing various methods, also finally suggested using the 3G license fee price for fixing all future license fees. The reason given was the same as CAG – this is the price discovered through a market mechanism and is a better indicator of price. (Annexure – XXXVI)

In its 11<sup>th</sup> May 2010 recommendations, clauses 3.80 to 3.82, TRAI has discussed this in great details. It has analysed why the efficiency of the 2G and 3G spectrum is not very different and has shown that 2G spectrum should really be regarded as 2.75G with current technologies in terms of efficiency. It has also pointed out that it is not just efficiency of the spectrum but also the size of the market and supply-demand position that determines the price of the spectrum. Obviously, the existing voice market is much the larger market and will be a major determinant in deciding the price of the spectrum. Taking all this into account, TRAI's recommendations were: “*The Authority, therefore, recommends that the 3G prices be adopted as the 'Current price' of spectrum in the 1800 MHz band.*” (Clause 3.82, page 189, Recommendations on Spectrum Management and Licensing Framework dated 11th May, 2010).

It may be noted that it is not possible to obviously go back in time to 2007-2008 and recreate the conditions available then to find out what the market price would have been. Therefore, both TRAI and CAG adopted the 3G auction price for all spectrum as a basis for calculating the cost of the spectrum. Obviously, the market conditions today are different from that of 2007-2008, with the crash in EU and the Indian economy slowing up; current conditions cannot be used to justify low prices in 2008.

If the Report did not agree with the CAG calculations, it could still have adopted an econometric model for calculating loss. Though CAG did not do this, TRAI has done this exercise. In its *Recommendations on Spectrum Management and Licensing Framework* dated 11th May, 2010, TRAI estimated the price of license in 2009 using just the time value of money. With a standard discounted cash flow, TRAI calculated that based on a 15% discounting rate, the 2001 price of Rs. 1658 crore would have been worth Rs. 5074 crore. Taking the Adjusted

Growth Rate per MHz, TRAI also computed a figure of Rs. 8,285 crore for the 2G license or 5 times the amount that the Government collected. The loss then would come to Rs. 36,000 crore by this method. If indeed the Report felt that this was a better method to compute loss to the exchequer, why did Committee not suggest using these figures for computing the loss? Why claim that there has been no undervaluation of the spectrum at all by finding faults with all the methods CAG used?

3.3 *Failure to appropriately deal with TRAI Recommendations of August 27, 2007—change in merger and acquisition policy pertaining to telecom companies leading to windfall profits to private parties:*

The second aspect of the scam carried out while the UPA government was in power, involved the inconsistent and arbitrary treatment to TRAI recommendations (of August 27, 2007) in order to ensure that while no auction / indexation of spectrum was carried out (and spectrum could therefore be sold at lower than market value rates) and further to ensure that the terms and conditions of the license agreements were modified to remove all obligations on the licensees (such as lock-in provisions and roll out conditions) and make it easier for select parties to sell their shares at high prices without making any further investments.

It has been argued that that 2G spectrum was allocated at low rates in order to keep the end prices to the consumer low. However this does not hold water as the Government of India also illegally modified the M&A guidelines, allowing for sale of equity in telecom companies and thereby allowing various private individuals to make windfall gains. This means that though the national exchequer did not receive the market price of 2G spectrum, the sale of equity in the companies receiving the license / 2G spectrum was nothing but private sale of spectrum at current market price.

This was therefore only converting what should have been an open, transparent public auction (of the kind concluded on 3G spectrum) into a privately held auction by beneficiaries of the largesse. This also explains why Swan and Unitech were able to get 5-6 times the value of the spectrum from only a part of their equity sale. (Rs.9,400 crores and Rs.11,600 crores for SWAN and Unitech respectively).

The crucial document in this regard is the set of recommendations submitted by TRAI to the DoT on 28 August, 2007 (also referred to previously in this Note in the context). In these recommendations (which are required to be read as a whole), TRAI advised the government *inter alia*:

- (i) that there was no need to carry out auction for 2G spectrum which could be allocated in accordance with extant policy viz. First Come First Serve etc., but that in future all spectrum should be auctioned;

- (ii) that while there was no need to carry out an auction for 2G spectrum, in order to ensure that the end user benefited from the low rates at which spectrum was being provided, that lock-in conditions must be retained in the license agreement and that roll-out obligations must be met and that in this respect merger and acquisition rules pertaining to telecom companies should not be changed;
- (iii) that there was no need to cap the access service providers in a region.

In its aforesaid Recommendations, TRAI specifically cautioned against the possibility of windfall gains to private telecom companies in the event M&A rules pertaining to such companies were to be changed (and if no indexation/auction of spectrum were to be carried out). TRAI also specifically recommended that “*Any proposal for permission of mergers and acquisitions should not be entertained till rollout obligation is met*” – this would mean a prohibition against M&A for 1 year in metros and 3 years in circles. In the same set of recommendations, TRAI, after careful consideration and to make sure that operators actually invested in the infrastructure based on the licenses / 2G spectrum that they received, recommended that the rollout obligations prescribed in the UAS licenses should remain unchanged. This would have ensured 90% service areas within metros covered within 1 year of the effective date of the license and 50% of district headquarters covered within 3 years of effective date of the license.

The then MoCIT, Shri A Raja, unilaterally and without referring the Recommendations back to the TRAI for reconsideration (which the Government is entitled to do under the provisions of the TRAI Act), sanctioned the issuance of a DoT press release on 19 October 2007. The Report is silent on an important set of deviations from TRAI Recommendations in this Press Release i.e. in respect of the roll out conditions, lock in conditions and merger and acquisition policy and in fact merely mentions (paragraph 10.36) that the MoCIT approved the recommendations with “*certain changes*”.

It is reiterated that the Government was under no obligation to follow the TRAI recommendations but having decided to do so should have either followed them in totality rather than cherry picking specific recommendations; or in the alternative, and what was clearly the better policy option (as recognised by the Supreme Court in the *Centre for Public Interest Litigation case*) should have been to send the relevant recommendations back to the TRAI for reconsideration.

Instead, the Hon’ble MoCIT, Shri A. Raja unilaterally amended:

- (i) The rollout obligations in the UAS licenses, without referring the matter back to the TRAI – first, in the press release of 19<sup>th</sup> October 2007 and later through a specific notification dated 10<sup>th</sup> February 2009 (Annexure – XL). The rollout obligation was changed and linked to the date of spectrum allocation rather than the original recommendations linking it to the effective date of the license;

- (ii) the M&A guidelines first in his press release dated 19<sup>th</sup> October 2007 and later through formal guidelines announced on 22<sup>nd</sup> April 2008. In both of these, the Government of India prohibited mergers in the same service area but surreptitiously allowed for acquisitions before the rollout obligations had been met. The fact that the M&A guidelines had been unilaterally amended had also been accepted by the Ministry of Communications in its response to Parliamentary Question No. 2940 on 22<sup>nd</sup> April 2010 (Annexure – XLI).

These actions are a clear violation of the TRAI recommendations, carried out illegally and done without reference to TRAI and therefore constitute a specific violation of the TRAI Act (Section 11, fifth Proviso).

Disturbed by the fact that the DoT had taken unilateral action and disregarded the Recommendations of TRAI, the Chairman of TRAI, Shri N Misra through his letter dated 19 October 2007, wrote to caution to the DoT to not deviate from TRAI's recommendations without following due process, to consult them before implementing the recommendations and to read the TRAI Recommendations as a whole and not cherry pick specific recommendations to follow etc. It appears that this letter was completely ignored by the DoT and the MoCIT.

The change in M&A policy when taken in the proper context as documented above, clearly shows the conspiracy in attempting to ensure that those private individuals with political patronage could make windfall gains by re-selling undervalued spectrum at market rates (as pointed out above, by selling shareholdings in the companies that had acquired the undervalued spectrum).

In summary, all the violations of the TRAI recommendations of August 28, 2007 detailed above allowed Telecom Minister A Raja to select a handful of companies to whom spectrum was given at 2001 prices under the garb of no cap, followed by an allowance to sell equity (be acquired) by changing the M&A guidelines and its link to rollout obligations. So not only were the licenses / spectrum given at throwaway prices but the companies were able to sell to make windfall profits without making any infrastructure investments – in violation of TRAI's recommendations and by consequence mandatory provisions of the TRAI Act.

#### 3.4 Failure to examine issues pertaining to Intra-Circle Roaming:

The Report has failed to examine another crucial aspect of the sale and allocation of telecom licenses and spectrum by completely neglecting the matter of “intra-circle” roaming and more specifically how the Hon'ble MoCIT Shri A. Raja permitted “intra-circle” roaming and changes in roll-out guidelines that allowed a select few of the new licensees to start acquiring

subscribers without putting in any capital investments as was called for in the original roll-out plan.

It is clear from various documents publicly available that the Department of Telecommunications, under the stewardship of Shri A Raja permitted and encouraged state owned companies (such as BSNL) to invest heavily in infrastructure development. The DoT followed this up with arbitrarily and with mala fide intent (and in disregard of TRAI Recommendations) changing the conditions of the UAS licenses and permitted intra-circle roaming (and the sharing of infrastructure) to ensure that private companies could make windfall gains at the cost of public companies by not having to invest in infrastructure or meet roll out conditions.

In its recommendations on the “Review of license terms and conditions and capping of the number of access providers” dated 28 August 2007, TRAI recommended that in future all spectrum bands (special reference to 3G bands) other than bands used for the 2G services, should be auctioned. In addition, in its earlier recommendations on the specific subject of allocation and pricing of the 3G spectrum dated 27 September 2006 the TRAI had specifically recommended bidding as the preferred method for award of spectrum in order to ensure efficient utilization of the scarce resource. In its recommendation dated 11 April 2007 on the subject of infrastructure sharing the TRAI notes:

*“3.2.5.(i) The licence conditions of UASL/CMSP should be suitably amended to allow active infrastructure sharing limited to antenna, feeder cable, Node B, Radio Access network (RAN) and transmission system only. Sharing of the allocated spectrum is not permitted.”*

On 1 April 2008 the DoT issued guidelines allowing the sharing of active infrastructure between service providers, expressly prohibiting the sharing of allocated spectrum. Thereafter on 12 June 2008 an Order was issued by the DoT amending the UASL and permitting mutual commercial agreements between telecom companies for the purposes of intra-service area roaming facilities, effectively allowing spectrum sharing.

In view of the aforesaid Order, on 15 July 2008 TRAI through the letter of its Chairman, Shri Nripendra Misra, made certain recommendations to the DoT which are worthy of note. The TRAI *inter alia* made its displeasure known that the terms of the UAS licenses had been amended without seeking TRAI recommendations in this regard (in violation of Section 11(1)(a)(ii) of the TRAI Act, 1997 and should not be used to dilute roll-out obligations.

Despite the TRAI's fears that roll out conditions would not be met or would be avoided through the infrastructure sharing route, DoT modified the terms of the UAS licenses to permit the same and thereafter failed to heed TRAI's warnings regarding compliance with roll out conditions as mentioned in TRAI's letter dated July 15, 2008.

Public sector telecom companies such as BSNL that had invested heavily in infrastructure were thereafter forced by MoCIT to enter into heavily one-sided agreements with private sector companies thereby allowing private telecom companies to piggy back on public sector infrastructure to expand their subscriber base while all the while avoiding the necessary investments (mandated through roll out obligations in the UAS licenses).

For instance, the Hon'ble Special Judge, Shri OP Saini, in his Order dated 4 February 2012 notes that "*At other times too, accused, as Union Minister of Communications and Information Technology, had blatantly favoured Swan Telecom (P) Limited. This is evidenced, for example, from a most unusual deal struck between the said company and the state-owned BSNL, as follows:- (I) The "intra-circle roaming deal" signed between the company and BSNL on September 13, 2008, was literally silent when it comes to money. According to the MoU, Swan Telecom could use spectrum, communication towers and the entire network of BSNL free of cost. (II) Though the BSNL management suggested charging 52 paise per call, this clause was mysteriously absent in the MoU. BSNL was forced to sign this deal just 10 days before the sale of Swan's shares to Etisalat. It is not clear why an amount was not specified in the MoU and in the absence of a consideration what is the position of the Agreement entered into between the Company and BSNL. The arrangement helped swell Swan's coffers without the company investing a single rupee.*"

It appears that the Hon'ble MoCIT may indeed have forced through this agreement in the face of opposition internally (within the DoT) as well as from BSNL, as is shown from the immediate transfer of senior officials in WPC Wing (Joint Wireless Adviser RJS Kushwaha and Deputy Wireless Adviser D Jha) for objecting to Swan's proposals to BSNL and DoT.

The Report is entirely silent about how various private companies such as Swan Telecom were permitted to carry out business without fulfilling any actions in public interest (as originally mandated by the UAS licenses) through meeting roll out conditions etc. and that too after having received spectrum at throwaway prices. The arbitrary change in policy to permit sharing of infrastructure, the concomitant commercial agreements sanctioned by the DoT permitting inter-circle roaming, as well as the practical implications thereof have not been examined by the JPC. The JPC has therefore failed to appreciate the full scope of the numerous irregularities and illegalities committed by the Hon'ble MoCIT in its Report.

3.5 *Failure to examine the issue of disinvestment of stock in various private telecommunications companies and the role of the Hon'ble MoCIT and the Hon'ble Finance Minister therein:*

As mentioned above, Shri A Raja became the MoCIT on 16 May 2007. It is evident that he began to conspire to assist certain friendly companies through illegal and arbitrary decision making right from this point onwards.

The details of Shri Raja's insistence on using 2001 spectrum prices and modification of FCFS procedure, for the issuance of LOI's in January 2008 despite strong opposition from sections of the bureaucracy (and silent consent of the Hon'ble Prime Minister and Hon'ble Finance Minister) are well documented and also noted above. As also mentioned above, the DoT thereafter allotted spectrum and licenses (including additional spectrum to existing players) in March/April 2008. As mentioned previously, a questionable Order was issued on 22 April 2008 to facilitate mergers of telecom companies.

The Report has in addition to the points noted previously, failed to examine that this Order of 22 April 2008 directly assisted Unitech, apparently one of Shri A Raja's favoured companies (and that had applied for licenses in different names - Unitech Infrastructure, Unitech Builders and Estates, Aska Projects, Nahan Properties, Hudson Properties, Volga Properties, Adonis Projects and Azare Properties. Later Unitech Group formed eight companies – Unitech Wireless (Tamil Nadu), Unitech Wireless (North), Unitech Wireless (South), Unitech Wireless (Kolkata), Unitech Wireless (Delhi), Unitech Wireless (East), Unitech Wireless (Mumbai), Unitech Wireless (West)), to merge all their licenses and helped to waive the mandatory three year lock-in-period in selling of their shares.

Soon thereafter, in September-October 2008, Swan Telecom, another of Shri A Raja's favourite companies (which had applied for and been a beneficiary of the irregularly distributed licenses and spectrum) offloaded 45 per cent of its shares to UAE based Etisalat for Rs.4500 Cr. (note that Swan had bought its license for Rs.1530Cr). Unitech meanwhile offloaded 60 per cent of its shares to Norway based Telenor for Rs.6200Cr. (Unitech received its license for Rs. 1621 cr). These "sale's" were disguised in the form of mergers (for instance of Swan Telecom (P) Limited and Etisalat).

As per Shri Raja, the Finance Minister P Chidambaram was fully aware of the controversial sale of equity of Swan and Unitech to foreign companies.

In his letter to the Telecom Secretary dated 5 November 2008, Shri A Raja states:

*“Since some misleading articles either out of lack of knowledge or vested motivation, are written in the media about the issuance of new licenses and spectrum allocation more specifically in case of M/s Swan Telecom and M/s Unitech Telecom as these companies allegedly got unlawful enrichment, the matter was discussed with Hon'ble Prime Minister and Hon'ble Finance Minister as I observed in a press conference at Chennai...In the meeting Hon'ble Finance Minister clarified that dilution of shares to attract foreign investment for*

*business expansion did not amount to sale of license and as such these companies did their share as per the corporate law”.*

To be noted that the consent of the Finance Ministry was required for the selling of shares to Etalisat and Telenor. Though the Finance Minister was fully aware that this was a sale disguised as a merger, he still permitted this to happen, thereby violating his own recommendation, in his letter to the Prime Minister dated 15 January 2008, that if sale of license or spectrum took place, then the Government must also get its share.

The Report has failed to examine this aspect of the matter and appropriately assign responsibility for this failure of the government to prevent arbitrary and mala fide manipulation of policies to permit windfall gains to private parties.

### 3.6 The role of the Hon’ble Prime Minister and the then Finance Minister in the 2G scam:

#### 3.6.1. The role of the Hon’ble Prime Minister:

It is clear from documents and other evidence on record / available before the Committee that the Hon’ble Prime Minister, Dr. Manmohan Singh, was at the very least aware of the 2G spectrum scam dating all the way back to 2006 when Shri Dayanidhi Maran was the Hon’ble MoCIT and thereafter during the tenure of Shri A. Raja as MoCIT.

The facts showing that the Prime Minister did indeed have knowledge of the misdeeds of Shri A. Raja in particular may be summarized under three broad headings:

- (i) The Prime Minister knew of the TRAI Recommendations dated August 28, 2007, and of the cherry-picking of recommendations by Shri A Raja, which permitted a mangling of extant spectrum allocation, licensing and merger and acquisition policies and allowed windfall gain to private telecom companies;
- (ii) The Prime Minister was kept informed of each illegality committed by Shri A Raja (and as recognized in the Report) in the allocation of the numerous UASL and dual technology licenses in the period 2007-2008 but failed to take action to prevent the scam (part of which could in fact have been remedied even post the issuance of LoIs in January 2008);
- (iii) The Prime Minister was aware of and consented to the change in terms of reference of the Group of Ministers constituted in 2006 (upon the insistence of Shri Dayanidhi Maran, the then MoCIT).

As mentioned previously, TRAI submitted its Recommendations on capping of access service providers, continuation of First Come First Serve policy with retention of lock-in and roll out obligations etc., on 28 August 2007. The Recommendations were modified by the Hon'ble MoCIT Shri A Raja (as detailed previously) and announced via DoT Press Release dated October 19, 2007. The fact that the Recommendations of TRAI were not followed holistically or in spirit is clear from the letter of the Chairman of TRAI dated October 19, 2007.

It is clear that the Prime Minister was well aware of the contents of the TRAI Recommendations and was aware that the appropriate method of dealing with spectrum was to ensure it was indexed / auctioned appropriately. This is further proved by the Prime Ministers letter of 2<sup>nd</sup> November 2007.

The documents on record also clearly show that Shri A. Raja informed the Prime Minister of all his actions in detail. There is no evidence to show (as claimed by the Report in paragraph 10.45 thereof) that the Prime Minister was misled or not informed of the decisions of Shri A. Raja. The procedure followed by Shri A Raja for allocation of the licenses in the period 2007-08 was exactly as he informed the Prime Minister in writing.

In this context it is useful to refer to the correspondence exchanged between the Prime Minister and the Hon'ble MoCIT, Shri A Raja.

On 2 November 2007, Shri A Raja wrote to Prime Minister, informing him:

- i) That the DoT is following TRAI's recommendations on no cap on service providers.
- ii) That 575 applications have been received till 01 October 2007.
- iii) That the Law Minister has rejected DoT's demand for a legal opinion and instead directed them to an EGoM. This "*suggestion of the Law Ministry is totally out of context.*"
- iv) That the DoT will follow the First Come, First Served (FCFS) process.
- v) That cut-off date will be moved up from 01 October 2007 to 25 September 2007.
- vi) That procedure for processing remaining applications will be decided later if any spectrum is left.
- vii) That the DoT is not deviating from existing procedure.

On 2 November 2007 the Prime Minister wrote back, cautioning Shri A Raja and directing him to:

- i) Examine issues relating to allocation of GSM spectrum to CDMA operators, enhancement of subscriber-linked criteria and processing of large number of

applications received for fresh licenses against the backdrop of inadequate spectrum to cater to overall demand.

- ii) He reminded him of the TRAI's recommendations that require an early decision and summarized the key issues in an 'annexed note', seeking urgent consideration of the Minister to ensure fairness and transparency and most importantly directing him to let him know of the position "*before any further action is taken*".

On 2 November 2007 Shri A Raja wrote a second letter in response to the Prime Minister's letter stating:

- i) The issue of auction was considered by TRAI and the Telecom Commission and has not been recommended.
- ii) It will be unfair, discriminatory, arbitrary and capricious to auction spectrum to new applicants.
- iii) Only 60 – 65 MHz of spectrum is left. 30 – 40 MHz has been allocated. Therefore there is enough scope for allotment of spectrum to a few operators after meeting the needs of existing operators and licensees.

On 26 December 2007, Shri A Raja vide a letter of the same date informed the PM about the following:

- i) That he was going to follow *modified* First Come, First Serve process.
- ii) That he'd had a discussion with the then head of GoM on spectrum, Shri Pranab Mukherjee, as well as an agreement with the Solicitor General of India, Shri Ghulam Vahanvati.
- iii) That Tatas would also be given spectrum under dual technology as per existing policy.
- iv) That he was going to proceed immediately.

This letter was acknowledged by the Prime Minister on 03 January 2008.

From the narration of facts presented above, it is clear that the Hon'ble Prime Minister was aware of and through his inaction directly contributed to the actions of the Hon'ble MoCIT, Shri A Raja – which actions are documented and condemned in the Report. The Report merely assigns responsibility to the Hon'ble MoCIT and completely exonerates the Prime Minister from his responsibility in the matter.

The Prime Minister is therefore complicit in the advancement of cut-off date, rejection of the Law Minister's request to refer the matter to an EGoM, refusal to submit to auctions, and pretence of implementing the TRAI's no cap recommendation while knowing full well

that there is not enough spectrum available to accommodate 575 applications. These facts have been completely brushed under the carpet by the Report.

The fact that the Hon'ble Prime Minister knew about the illegal acts of the Hon'ble MoCIT, Shri A Raja is clear from the following:

- i) Illegal advancement of cut-off date – vide Shri A Raja's letter to the Prime Minister dated 2<sup>nd</sup> November 2007.
- ii) Refusal to send the matter to an EGoM – as recommended by the Minister of Law and Justice vide Shri A Raja's letter dated 2<sup>nd</sup> November 2007.
- iii) Claiming to follow no cap but in fact, only processing a few of the 575 applications received (in violation of the TRAI Act) vide Shri A Raja's letter to the Prime Minister dated 2<sup>nd</sup> November 2007.
- iv) Refusing auctions as an option – the second letter of 2<sup>nd</sup> November 2007 from Shri A Raja to the Prime Minister.
- v) Manipulation of the FCFS from 'date of application' to 'date of compliance of LoI/date of payment' – letter of Shri A Raja to the Prime Minister on 26<sup>th</sup> December 2007.

Further, as is recognized by the Report (paragraph 6.56) Shri Pulok Chatterjee, the then Secretary in the Prime Minister's Office submitted a note to the Prime Minister on spectrum related issues on December 31, 2007 viz. before the LOI's were issued by Shri A Raja in January 2008. Thereafter, a comprehensive note was submitted by Shri Pulok Chatterjee on January 6, 2008 suggesting norms and methodology to be adopted by the DoT on spectrum related issues.

On January 9, 2008, the Additional Secretary (Economic Affairs) wrote a concept paper on revising entry fee and auctioning spectrum.

It was only after all of this that on 10 January 2008 UAS licenses were allotted to 121 operators in 2008 at 2001 prices. The Press release(s) in respect of this (first come first served / LoI processing) was issued on 10 January 2008. It is clear therefore that the Prime Minister could have and indeed should have intervened in what was clearly an arbitrary and *mala fide* exercise of power by the Hon'ble MoCIT (in issuing the mentioned LOIs at 2001 rates without carrying out appropriate auction / indexation, and manipulating the first-come-first-served criteria).

Thereafter, on 11<sup>th</sup> January, 2008, the Prime Minister appears to have suggested that the note authored by Shri Pulak Chatterjee be modified taking into account the fact that LOI's have already been issued on 10<sup>th</sup> January, 2008.

Shri Pulok Chatterjee thereafter prepared a fresh Note on 15 January 2008, reiterating the points in his 6<sup>th</sup> January Note.

At this time, only LoI's had been placed so the Government could still cancel the LoI's or change the entry fee. The UAS licenses were signed between February 27<sup>th</sup> and March 7<sup>th</sup> 2008, after which entry prices could not be changed without legal consequences.

These aforesaid narration of facts and documentation, clearly indicate that the Prime Minister's Office and by implication, the Prime Minister were well aware of the proper way to go about allocation of spectrum which was contrary to the position taken by Shri A Raja (and disclosed to the Prime Minister) and yet failed to take any action to stop the arbitrary and illegal issuance of LOIs and spectrum in 2008. In fact the documentation clearly shows that the conditions pertaining to issues such as entry fee etc. could have been modified in accordance with the proper procedure (auction) till such time as the LoIs were converted into the final licenses.

It is clear from the documents and evidence on record that Shri A. Raja informed the Prime Minister of all the illegal acts that he was committing and did so in writing directly to the Prime Minister and in advance of the scam of 10<sup>th</sup> January 2008 as shown by the two letters dated 2<sup>nd</sup> November 2007 and 26<sup>th</sup> December 2007. Shri A. Raja did exactly as he told the Prime Minister - he illegally advanced the cut-off date, he changed the definition of FCFS, and he only processed a handful of applications by shunning auctions and giving away spectrum in 2008 at 2001 prices. The press releases of 10<sup>th</sup> January 2008 are exactly consistent with Shri A. Raja's letters of 2<sup>nd</sup> November 2007 and 26<sup>th</sup> December 2007. Further, the Prime Minister was well aware of the need to revise the prices for spectrum allocation but took no steps to ensure that appropriate policy mechanisms were followed.

The letters of 11<sup>th</sup> January 2008 and 15<sup>th</sup> June 2008 (Annexure – XLII) noting show that the Prime Minister knew about the scam and wanted to distance himself from the matter. As recorded in paragraph 6.56 of the Report a noting in the Prime Minister's office file dated January 23, 2008 indicated that the "PM wants this informally shared with the Dept. Does not want a formal communication and wants PMO to be at arms length pl." (in reference to the note prepared by Shri Pulok Chatterjee dated January 15, 2008). It is clear therefore that the Prime Minister despite being aware of the problems with the procedures followed by the DoT as well as the correct method of going about the allocation of UAS licenses failed to take any action (including as recommended by various officials of the Government of India including in the Prime Minister's Office such as Shri Pulok Chatterjee).

In addition, there is also evidence that the Prime Minister had, after discussions with Shri Dayanidhi Maran in January/February 2006, instructed the Cabinet Secretary to issue a

Terms of Reference on 23<sup>rd</sup> February 2006 – which included spectrum pricing. Further, Shri Dayanidhi Maran, flatly refused to accept the ToRs, submitted two drafts (28 February 06 and 16 November 2006), and modified the Terms of Reference after ‘the Prime Minister’s approval’ – as has been stated in the new Terms of Reference dated 07 December 2006.

3.6.2. The role of the Hon’ble Finance Minister:

Shri P. Chidambaram, the then Hon’ble Finance Minister, was fully aware that the price at which 2G spectrum, linked with UAS licenses, being sold at 2001 prices was a gross undervaluation. Evidence that he wanted the price to be revised is available at multiple points throughout the 2G spectrum scam. As per Cabinet decision of 2003, the FM and MoCIT had to agree on the license fee/spectrum price as it has revenue implications.

In this context it is also worth noting the Order of the Special Judge, CBI, Shri OP Saini, dated 4 February 2012 (Annexure – XLV) wherein the Hon’ble Court has noted that “*In the end, Mr. P Chidambaram was party to only two decisions, that is, keeping the spectrum prices at 2001 level and dilution of equity by two companies. These two acts are not per se criminal.*” It may be noted that the JPC’s task is to examine the political responsibility for the 2G scam. While Shri P Chidambaram may not be party to a criminal conspiracy, he was a party to the decisions that resulted in a huge loss to the state exchequer and windfall profits to a few select parties. The aforesaid decision merely clarifies that while Shri P Chidambaram had a direct role in ensuring that spectrum was sold at artificially low rates to certain companies, whose shareholding was subsequently diluted leading to considerable and unwarranted private gain, he did not do so as part of a criminal conspiracy.

Evidence of Shri P. Chidambaram’s knowledge of 2G spectrum being undervalued and that it should be auctioned/indexed higher is as follows

- i) Chidambaram was a member of the GoM wherein in Shri D. Maran’s time itself, the ToRs were changed from 22<sup>nd</sup> February 2006 to 7<sup>th</sup> December 2006 by removing spectrum pricing as a listed part of the ToRs for GoM on spectrum. This was clearly done in full view of the members who were on the GoM which included Shri P. Chidambaram.
- ii) The Finance Secretary, Dr. Subbarao’s letter to D.S. Mathur, Secretary, DoT dated 6<sup>th</sup> June 2007, asking DoT to reconsider, including spectrum pricing, the ToRs for the GoM on spectrum headed by Shri Pranab Mukherjee. D.S. Mathur, refused to do so under MoCIT’s instructions in a letter dated 15<sup>th</sup> June 2007.
- iii) On 20<sup>th</sup> November 2007, the Finance Secretary, Dr. Subbarao wrote a second letter, this time firmly objecting to giving away spectrum in 2007 at Rs. 1600 crores determined as far back as 2001 without any indexation, let alone current valuation. It also asked for any further action to award licenses may be stayed. While the letter mentioned dual technology or cross-over licenses, it obviously also applied to all new

- licenses being given at 2001 prices. The Secretary, DoT, DS Mathur refused to increase or index the price of 2G spectrum citing Cabinet decision of 2003.
- iv) Additional Secretary (Economic Affairs) put up on 9th January 2008 a comprehensive note on spectrum allocation and licensing policy. It recommended a revision of the entry fee (fixed in 2003 based on price discovered in 2001).
  - v) The above position paper was used by the Finance Minister, Shri P. Chidambaram as the basis of his note of 15th January, 2008 to the Prime Minister where auction was recommended for future allocation of spectrum (beyond the start-up spectrum, with the spectrum allocation in the past to be treated as a closed chapter. This means that Finance Minister was now agreeing to the undervaluation of the license and spectrum that MoCIT had done by virtue of LoI's being issued on 10th January 2008.
  - vi) A full telecom meeting took place on 15th January, 2008. MoF representative who attended the meeting did not raise the issue of revision in entry fee.
  - vii) A meeting was held between the Finance Minister and the Minister of Communications and Information and Technology on 30 January, 2008. The gist of discussion of the meeting as recorded by the Finance Secretary on 30 January 2008 makes clear that FM said that for now we are not seeking to revisit the current regimes for entry fee or for revenue share (Annexure – III).
  - viii) As DoT had awarded only LoI's on 10th January, 2008, it was possible for FM not to agree to action of DoT. Without his consent, the undervaluation of the license and spectrum fees could not have happened. He could have expressed his disagreement with MoCIT and as per Business Rules of the Government, raised it to the Cabinet for a resolution of their differences. Till the LoI's are converted into licenses, no equities had yet been created and the Government had the option to cancel the LoI's. The conditions pertaining to issues such as entry fee etc. could have been modified in accordance with the proper procedure till such time as the LoIs were converted into the final licenses.
  - ix) By agreeing to treat the award of LoI's and the consequent undervaluation of the license and spectrum fees as a closed chapter, the FM in effect acquiesced in the scam being perpetrated by Shri A. Raja, the then MoCIT.
  - x) At this stage, the FM was well aware that there was a possibility of companies that had secured the licenses and spectrum at throw away prices, could sell the same. Both in the Note to the PM and in the discussions with MoCIT on 30th January, 2008 the issue of sale of license or spectrum are discussed. Yet Shri P.Chidambaram, the then FM took no step to stop the sale of shares of Unitech and Swan to Telenor and Etisalat.
  - xi) Further, the FM was well aware of the need to revise the prices for spectrum allocation but took no steps to ensure that appropriate policy mechanisms were followed, and thus failed in his duty to protect the revenues of the Government.

Further, it may be kept in mind (as mentioned above) that despite the LOIs having been illegally allocated in January 2008, the Finance Minister was likely aware, being one of the most eminent lawyers of the country, that the LoI's could be cancelled before the formal grant of licenses. Yet, he failed to take any action in this respect.

In addition the aforesaid, it was the duty of the Hon'ble Finance Minister to ensure that his Ministry provided an input into the pricing of spectrum given the financial and revenue implications for the government of India. The Report glosses over the fact that no such formal consent was obtained from the Finance Ministry for fixing of entry and spectrum fees at 2001 levels in 2008. The questions however remains as to why he Hon'ble Finance Minister did not not push for adherence to the Government of India (Transaction of Business) Rule-4, which makes concurrence between the relevant ministries mandatory (regardless of any Cabinet note). The Hon'ble Finance Minister could and ought to have invoked the Government of India (Transaction of Business) Rule-7, which specifies in the second schedule that in cases which involves financial implications on which the Finance Minister desires a decision of the Cabinet and if a difference of opinion arises between two or more ministries and a Cabinet decision is desired, the matter shall be brought before the Cabinet. There is therefore clearly a dereliction of duty by the Hon'ble Finance Minister.

The Hon'ble Finance Minister was also aware that the sale of Swan and Unitech Shareholding following the allocation of spectrum would result in windfall gains to private parties (as also cautions by the TRAI's recommendations of 28 August 2007 and his own Note to the Prime Minister dated 15 January 2008). The fact that the Finance Minister failed to recommend revisiting the entry fees even in his letter of 15 January 2008 and meeting with the MoCIT on 30 January 2008, despite being aware that the auction route was the most equitable method of spectrum allocation also deserves to be examined in detail.

The Hon'ble Finance Minister also failed to exercise due diligence and protect the interests of the public in failing to stop the provision of loans and other financial assistance to companies that were found ineligible for award of licenses. Essentially, through his oversight / negligence, the Finance Minister permitted companies with virtually no paid up share capital and minimum worth to raise huge loans from public sector banks on the back of merely the award letters (of LoI) – in fact in instances such as that of Swan, loans were fully disbursed prior to license / spectrum being allocated.

It is public knowledge that public sector banks liberally funded many telecom companies involved in the 2G scam even when the CBI was probing criminal conspiracy in allotment of licenses to these firms. Records available at the Registrar of Companies show that public sector banks provided loans worth more than RS 26,000 crore to 5 companies involved in the 2G scandal. It may be noted that the Department of Telecom is a party to most of these loans – and therefore it raises disturbing questions of how and why these loans were disbursed so eagerly by public sector financial institutions (and at what has proved to be at a considerable cost to the exchequer following cancellation of licenses by the Hon'ble Supreme Court. The Report fails to bring out the role of the Hon'ble MoCIT, Shri A Raja and Hon'ble Finance Minister, Shri P Chidambaram in assisting companies to secure loans only on the basis of telecom licenses thereby leading to losses to public sector banks.

3.7 Failure to adhere to appropriate Constitutional, Legal and Ethical standards:

The Report has failed to take into account established constitutional and jurisprudential principles in arriving at its conclusions.

The Report has failed to apply the principle of collective responsibility of the Cabinet in arriving at its conclusions and findings. It is settled principle in terms of our constitutional structure that the government follows a cabinet form of governance wherein all are equally responsible for decisions of the government. The principle of collective responsibility can in fact be said to be the hallmark of a cabinet system of government. Given the documentation on record as well as the principle quoted above, it is clear that the various illegal acts leading to the 2G scam, took place with the full knowledge and under the noses of the entire cabinet, which aspect of the matter the Report has failed to examine.

Further, the Report has failed to understand that an offence can equally be an offence of omission as opposed to an offence of commission. This principle is of particular importance where officials holding high positions in the government are involved as their duties and responsibilities lie largely in ensuring that appropriate policy is formulated and implemented - in accordance with administrative norms, due process, within the bounds of the law and that ultimately any government decision is made with the interests of the public in mind.

The Report is scathing in its comments on the Hon'ble MoCIT, Shri A. Raja who indeed carried out numerous illegal acts of commission but fails to examine why, despite having knowledge of the appropriate method of allocating spectrum / licenses, the Prime Minister failed to take any concrete steps to either stop the issuance of the LoIs in January 2008 or even thereafter failed to take remedial measures in the period before the licenses were actually signed. It is made clear from the letter of the Hon'ble Finance Minister to the Prime Minister dated 25 March 2011 that the option of cancelling the LoIs to allow for proper license terms and conditions to be inserted (and to remedy the issue of fees charged) was very much possible, even after the LoI's had been issued and before the signing of the agreements. Nonetheless, the Hon'ble Prime Minister failed to take any action, despite being made aware of the need to index / carry out an auction as is made clear from the facts narrated previously. The fact that the Prime Minister was well aware of the illegal actions of the Hon'ble MoCIT, Shri A Raja is also clear from the record (and as explained hereinabove) – yet he failed to take any preventive or curative action – thereby committing an offence of omission. A similar case can be made out for the Hon'ble Finance Minister.

In addition to the above, it must be kept in mind that the role of the JPC is not to function as a court or judicial authority in assigning criminal responsibility. The role of the JPC is to assign political responsibility and check that policy decisions are taken in accordance with due procedure and keeping in mind the nations / publics interests. It must be kept in mind

that the threshold of proof required before the JPC is not necessarily the same as in a criminal inquiry where there must be proof of commission of a crime, beyond reasonable doubt – there is no similar evidentiary principle applicable to the JPC. The JPC therefore cannot use the fact that there is or was a criminal trial or inquiry as a reason to not examine a matter to its fullest ability. Similarly, for civil actions (such as PILs), it may be noted that civil courts are excluded from examining / commenting on matters of policy – which the JPC can and is required to do in terms of its mandate.

## SUMMARY OF MY DISSENT NOTE

*Sitaram Yechury*

The Joint Parliamentary Committee (JPC) set up to examine matters relating to “Allocation and Pricing of Telecom Licenses and Spectrum from 1998 to 2009”. The Chairman of the JPC has circulated a Draft Report to the Committee that has selectively quoted from evidence presented before it, ignored crucial documents and verbal evidence and has failed to bring out the basic elements of the 2G scam of 2007-2008. It has also failed to bring out the collective failure of the Cabinet in stopping the 2G spectrum scam, and specifically the roles of the Prime Minister and the Finance Minister.

Enclosed are a series of questions that need to be answered by the Prime Minister and the Finance Minister before a proper investigation can be completed. There were serious procedural irregularities in the functioning of the JPC. Despite repeated requests by the undersigned and other members of the Committee, it failed to call material witnesses – the Prime Minister and the Finance Minister -- and denied Shri A. Raja an opportunity to appear before the Committee and therefore denied the Committee an opportunity to cross examine him.

Therefore the undersigned is unable to accept and agree with the substance of the Report as well as the conclusions reached and is submitting a Dissent Note.

### *Substantive Shortcomings in the Report*

The Report has tries to cover-up the significant undervaluation of UASL licenses and spectrum – both for 35 cross-over licenses and new 122 licenses -- issued during the period 2007-2008. Instead, it tries to first find fault with CAG’s methods of calculating possible presumptive loss, and then makes the completely illogical jump of concluding that as the CAG’s methods of calculation are faulty, that therefore there was no loss. If indeed the Report found CAG’s methods faulty, what prevented it from adopting another method of computing the loss?

However, while questioning such presumptive loss calculations, the Report refuses to address the central question – if a license was worth Rs. 1658 crore in 2001, what would it be worth in 2008? It defies all reason to argue that the exchequer did not suffer any loss, particularly when the value of rupee in 2008 was not the same as the value of the rupee in 2001 and the subscriber base in 2008 was 75 times that of 2001.

The Report fails to adequately analyse and apportion blame for the failure of the Government to follow the ‘auction route’ or indexation for apportionment of spectrum at a huge loss to the state exchequer, when it was clear that not only was this possible and preferable to a First Come First Serve Policy for allocating spectrum at 2001 price but had also been discussed in Government as shown in numerous documents examined by the JPC.

The Report claims that the pegging of spectrum at low rates in 2008 was done in order to ensure low telecom rates for the end user. The Report fails to examine whether this was actually the case, and if so, why was there a change in the lock-in conditions -- rollout norms and in the merger and acquisition policy? These changes meant that there was effectively no lock-in for the parties securing

cheap licenses and spectrum, enabling these parties to conduct private auction of the spectrum instead of a public auction. Instead of low license fees benefiting the subscribers, it resulted in windfall profits for a few select companies such as SWAN and Unitech.

The Report also fails to fully examine how the arbitrary changes in cut-off dates, FCFS procedures were explicitly designed to help a few select parties to jump queues and acquire licenses and spectrum.

The Report also fails to bring out the role of Shri A. Raja in changing the rules to allow “intra-circle” roaming, allowing parties securing licenses to by-pass roll-out obligations; instead, they could piggy back on existing operators and their infrastructure. Shri Raja also forced BSNL to provide such intra circle roaming facilities to SWAN and other private parties (on unfavourable terms for the government owned telecom company), thereby helping them to acquire subscribers without making any investments and enhance their market value.

The Report also fails to examine the role of Shri A. Raja and the Finance Minister, Shri P. Chidambaram in helping private parties secure huge loans from public sector banks, merely on the basis of securing the allocation letters / LoIs thereby causing a further loss to the exchequer.

The Report concludes that the Prime Minister was misled by Shri A. Raja, without even asking the Prime Minister on what count was he misled. Shri A. Raja in his letter dated 26<sup>th</sup>, December, 2007 to the Prime Minister has stated all the steps he would take for the issuance of the licenses. Why did the Prime Minister not – as Head of the Cabinet – exercise his authority to stop the scam, when it is clear from his letters that he was fully aware of the various elements of the scam? Even after the LoI's had been issued on 10<sup>th</sup> January, 2008, why did he not ask them to be cancelled, as licenses had still not been issued?

Similarly, though the Report concedes that the Finance Ministry and the Finance Minister had given his consent to the entry and the start-up spectrum fees being pegged in 2008 to 2001 value, it fails to hold him also responsible for this huge loss to the exchequer. The issue for the JPC is not whether the FM was a party to the scam, but whether he played his due role as the custodian of the nation's revenue. This, the FM unfortunately failed to do. The Report also fails to examine the role of the FM in providing huge loans to the private parties from public sector banks merely on the basis of the licenses and his role in letting SWAN and Unitech sell their licenses disguised as sale of shares.

At the very least, there was a conspiracy within the Ministry of Communications & IT and acquiescence thereof at the highest levels of government to ensure that the price of spectrum allocated in 2007-2008 was kept artificially low and allowing companies securing licenses through the bogus first-come-first-served route to garner huge windfall profits.

The Report fails to apply appropriate constitutional, legal and ethical yardsticks to determine and allocate responsibility, for instance in failing to recognize the constitutional principle of collective responsibility of the Cabinet or failing to recognise that an offence can be committed both by commission as well as acts of omission.

The Report has therefore failed to examine the matter holistically and in the proper perspective – for instance it is clear, based on the documents on record and evidence presented before the Committee, that the 2G scam was carried out to benefit certain private companies – the Report therefore fails to examine the crux of the matter. The Report also fails to consider events occurring post 2008 that are relevant to the period in question and establish the overall pattern of events. The

Report appears to merely be an exercise in damage limitation with an attempt to ensure that an appropriate scapegoat is sacrificed to placate public opinion, while those at highest levels of the Government are absolved of all liability.

### **The Need for Answers from the Hon'ble Prime Minister on Certain Questions before the JPC**

The Draft Report prepared by the Chairman of the JPC, Shri P.C. Chacko states in Section 10.45 the following:

In view of the above, the Committee are inclined to conclude that the Prime Minister was misled about the procedure decided to be followed by the Department of Telecommunications in respect of issuance of UAS licences. Further, the assurance given

by the Minister of Communications and Information Technology in all his correspondence with the Prime Minister to maintain full transparency in following established rules and procedures of the Department stood belied.

Shri A.Raja in his letter to Shri Chacko has stated that he had kept the Hon'ble PM informed at each step of the process and through personal meetings as well as during cabinet meetings. The Draft Report also shows that indeed he wrote 3 letters to the PM prior to the 10<sup>th</sup> January, 2008 when the LoI's for the 120 licenses were issued. The Draft Report also states that the PM asked the PMO to prepare a Note on Shri Raja's letter dated 26<sup>th</sup> December, 2007 wherein he details the various steps he was proposing to take.

Taking the above into account, it is not possible for JPC to come to any conclusion about the veracity of Shri Raja's claim or the statement in the Draft Report that the PM was misled without the PM answering the following:

1. Is it true that Shri Raja had met him personally in the first week of January, 2008 as stated in his letter to brief the Hon'ble PM about the procedure he was going to follow? In his submission, Shri Raja states, "Thereafter I met the Hon'ble PM in the first week of January 2008 and this issue was again discussed and he agreed with the proposed course of action of the DoT."
2. If this meeting did take place, did the Hon'ble PM agree with Shri Raja on the proposed course of action as Shri Raja claims?
3. On what specific count can we hold that Shri Raja misled the Hon'ble PM?
  - a. Is it about not auctioning/indexing license fees of 2001 for 2008?
  - b. Is it about the change in First-come-first-served policy regarding grant of license by which the date of fulfilling LoI first was to be used for grant of licenses and not the date of application
  - c. Is it about securing the consent of the Solicitor General to the procedure that was to be followed as stated by Shri Raja in his 26<sup>th</sup> December, 2007 letter?
4. On what count did Shri Raja not maintain transparency regarding procedures which Shri Raja was following in his communications with the Hon'ble PM as stated in the Draft Report
5. Even if the above is true – that Shri Raja misled the PM and did not maintain transparency as claimed by the Draft Report, the following issues still remain, which the Hon'ble PM needs to answer:
  - a. Even after LoI's were issued on 10<sup>th</sup> January, 2008, since the licenses had not been issued, the Government could have cancelled the LoI's and followed a proper procedure. Why did the Hon'ble PM not take action as he had himself asked that the Note prepared by Pulok Chatterjee, Secretary PM, dated 6<sup>th</sup> January, 2008 be modified to take into account the status after issuing of the LoI's?
  - b. The Hon'ble PM in October 29, 2011 had stated – in his meeting with TV editors – that the Finance Ministry and the DoT had agreed on keeping 2001 prices for entry and spectrum fees for 2008. Was this agreement between Finance Ministry and DOT reached before 10<sup>th</sup> January, 2008 or afterwards?
  - c. On what basis did the Hon'ble PM drop the suggestion for auctioning of the licenses he himself had made to Shri Raja in his letter dated 2<sup>nd</sup> November, 2008?

Keeping in mind the high office he occupies, the Hon'ble PM can give answers to the JPC orally or in writing. Without answers from the Hon'ble PM on the above, it is difficult to understand how the JPC can come to any conclusion regarding the Hon'ble PM being misled by Shri Raja.

### **The Need for Answers from the Hon'ble Finance Minister on Certain Questions before the JPC**

The Draft Report prepared by Shri P.C. Chacko has made a number of observations regarding the Finance Ministry, and therefore of the Finance Minister's handling of the 2G license issues. It is not possible for JPC to come to any conclusion about the role of the Hon'ble Finance Minister without answers to the following questions.

Specifically, the Draft Report mentions in Section 10.43 the following:

The Ministry of Finance have informed the Committee that no communication was sent by the Department of Economic Affairs in response to the letter dated 29 November, 2007 from the Department of Telecommunications. From the sequence of events, the Committee gather the impression that the Ministry of Finance was in agreement with the position explained by the Department of Telecommunications in respect of cross-over fee charged for allowing usage of Dual Spectrum Technology by the existing licensees.

Does the Finance Minister agree with the Draft Report that by not responding to the position as explained by DoT regarding license fees, the Ministry of Finance had in effect given its consent? Why did the Finance Ministry not press the issue of entry and spectrum fee being pegged to 2001 prices in 2008, especially as the DoT had referred to the Cabinet note where it was mandatory to have such an agreement between the Finance Ministry and the DoT as per Section 2.1.2 (3)?

As a formal consent is required from the Finance Ministry to fixing of license fees, did the Finance Ministry give such consent?

Shri A. Raja in his letter to Shri Chacko has also stated that his actions regarding license fees was with the concurrence of the Finance Ministry and the Finance Minister, whom he had met during the first week of January, 2008. Is it true that such a meeting took place and if so, is it correct that the Hon'ble FM had given his consent to license fee being kept at the 2001 level for the 2008 issuing of licenses?

Why did the Hon'ble FM agree – as can be seen from his note to the PM on 15<sup>th</sup> January, 2008 – to treat the matter of entry and spectrum fees for LoI's issued on 10<sup>th</sup> January, 2008 as a closed matter?

Why did the Hon'ble agree on 30<sup>th</sup> January, 2008 in his meeting with Shri A. Raja to treat the entry and spectrum fees for LoI's issued on 10<sup>th</sup> January, 2008 as a closed matter? As one of the most eminent lawyers of the country, the Hon'ble FM was undoubtedly aware that LoI's could be cancelled before the formal grant of licenses and therefore his consent was essential for the entry and spectrum fees being kept at 2001 levels in 2008. Why then did he not take action in asking for LoI's to be cancelled?

Why did the Hon'ble FM not push for the Government of India (Transaction of Business) Rule-4, which makes such concurrence mandatory regardless of the Cabinet note?

Why did the Hon'ble FM not push for the Government of India (Transaction of Business) Rule-7, which specifies in the second schedule that in cases which involves financial implications on which the Finance Minister desires a decision of the Cabinet and if a difference of opinion arises between

two or more ministries and a Cabinet decision is desired, the matter shall be brought before the Cabinet?

Keeping in mind the high office he occupies, the Hon'ble FM can give answers to the JPC orally or in writing. Without answers from the Hon'ble FM on the above, it is difficult to understand how the JPC can come to any conclusion regarding the role of the Finance Ministry or the Hon'ble FM.

**JOINT PARLIAMENTARY COMMITTEE ON EXAMINING MATTERS  
“RELATING TO ALLOCATION AND PRICING  
OF TELECOM LICENSES AND SPECTRUM”.**

