

CHAPTER-II

DEPARTMENT OF TELECOMMUNICATIONS

2.1 Set-off of non-refundable one-time entry fee

Set-off of non-refundable one-time entry fee of ₹ 5476.30 crore paid by the Unitech group of companies, M/s. Videocon Telecommunication Limited (VTL), M/s. Idea Cellular Limited (ICL) and M/s. Sistema Shyam Teleservices Ltd (SSTL) to obtain UAS licenses in January 2008, which were declared illegal and quashed by the Hon'ble Supreme Court of India in February 2012, against the auction price payable for spectrum in 1800 MHz/800 MHz held in November 2012 / March 2013 deprived the Government of the revenue to that extent.

Hon'ble Supreme Court in February 2012 held that “the exercise undertaken by the officers of the DoT between September 2007 and March 2008 under the leadership of the then Minister of Communication & Information Technology was wholly arbitrary, capricious and contrary to public interest. The material produced before the Court shows that the then MoC&IT wanted to favour some companies at the cost of the Public Exchequer”. It was directed by the Court that “the licenses granted to the private respondents on or after 10 January 2008 pursuant to two press releases issued on 10 January 2008 and subsequent allocation of spectrum to the licensees are declared illegal and quashed”.

Consequent to the judgment of Hon'ble Supreme Court, 122 UAS licenses granted to nine Telecom Service Providers¹ (TSPs), which includes 22 licenses of Unitech group, 21 licenses of M/s Videocon Telecommunication Limited (VTL), nine licenses of M/s Idea Cellular Ltd (ICL) and 21 licenses of M/s Sistema Shyam Teleservices Ltd (SSTL) during 2008 and subsequent allocation of spectrum to the licensees were declared illegal and quashed.

Hon'ble Supreme Court also levied cost on six Respondents stating that “Respondent Nos² 2, 3 and 9 who have been benefited at the cost of Public Exchequer by a wholly arbitrary and unconstitutional action taken by the DoT for grant of UAS Licences and allocation of spectrum in 2G band and who offloaded their stakes for many thousand crores in the name of fresh infusion of equity or transfer of equity shall pay cost of ₹ 5 crore each. Respondent Nos³ 4, 6, 7 and 10 shall pay cost of ₹ 50 lakh each because they too had been benefited by the wholly arbitrary and unconstitutional exercise undertaken by the DoT for grant of

¹ M/s Allianz Infratech (P) Ltd, M/s Etisalat DB Telecom Pvt Ltd, M/s Idea Cellular Ltd, M/s Loop Telecom Ltd, M/s S Tel Pvt. Ltd, M/s Sistema Shyam TeleServices Ltd, M/s Tata Teleservices Ltd, M/s Unitech Wireless Pvt. Ltd, M/s Videocon Telecommunications Ltd

² M/s Etisalat DB Telecom Private Ltd, M/s Unitech wireless group & M/s Tata Teleservices Ltd

³ M/s Loop Telecom Pvt Ltd, M/s S Tel Ltd, M/s Allianz Infratech (P) Ltd & M/s Sistema Shyam Tele Services Ltd

UAS Licences and allocation of spectrum in 2G band.” Hon’ble Supreme Court had further directed that TRAI shall make fresh recommendations for allocation of 2G spectrum in 22 service areas by auction, as was done for allocation of 3G spectrum. They also directed that “the Central Government shall consider the recommendations of TRAI and take appropriate decision within next one month and fresh licenses be granted by auction.”

Accordingly, DoT sought recommendations of the TRAI and based on their recommendations (April 2012), a Notice Inviting Applications (NIA) was issued on 28 September 2012 for auction of spectrum in 1800 MHz and 800 MHz bands. Clause 3.2 (i) of the NIA stipulated that the companies / licensees whose licenses were slated to be quashed as per the directions of the Supreme Court would be treated as ‘New Entrant’ and would be required to fulfil the conditions stipulated both for bidding and for obtaining a Unified Licence (Access Service) as per the DoT guidelines. DoT in Queries and Responses issued on 18 September 2012, in connection with the proposed allocation of spectrum in the 1800 MHz and 800 MHz bands by auction had indicated that the entry fee paid by the Licensees whose licenses were cancelled by the Hon’ble Supreme Court would not be adjusted against auction payment due.

Audit observed that, one of the quashed licensee (M/s VTL) submitted representation (05 October 2012) to DoT for adjustment of one-time entry fee paid by them in 2008 against auction price as they claimed that their license was cancelled for no fault of theirs. Based on the request of the licensee, a note for Empowered Group of Ministers (EGoM) meeting was prepared by DoT on 06 October 2012 and was placed before EGoM meeting held on 08 October 2012. The minutes of the meeting were circulated on 10 October 2012, wherein it was conveyed that “the EGoM, however, on the principle of equal restitution, recommended that only a set-off may be allowed against the Earnest Money Deposit (EMD) and the payment due in the event of spectrum being won in this auction. The total amount of such set-off shall be limited to the total entry fee paid by the entity for all its licenses which have been quashed by the Supreme Court. No interest will be due on this amount.”

Further, DoT clarified (12 October 2012) in the Queries and Responses to NIA that if the license was quashed by the Hon’ble Supreme Court for no reason attributable to a licensee, a set-off would be allowed on the principle of equal restitution against the EMD and payment due in the event of spectrum being won in the proposed auction. It was however found that as per the letter dated 12 October 2012 of Minister of Information and Broadcasting (one of the members of the EGoM), no final decision was taken in this regard in the meeting of 08 October 2012. The aforesaid issue was again deliberated and finally approved in the EGoM meeting of 18 October 2012.

Scrutiny of records of DoT during March-April 2013 pertaining to auction of 2G spectrum in 1800 MHz / 800 MHz band held in November 2012 / March 2013 revealed that five bidders (M/s VTL, M/s ICL, M/s TCSPL, M/s Bharti Airtel and M/s Vodafone) participated in the auction for spectrum in 1800 MHz held in November 2012 and one bidder (M/s SSTL) participated in the auction for spectrum in 800 MHz held in March 2013. Of these six bidders, three bidders – M/s VTL (21 Licenses), M/s ICL (9 licenses) and SSTL (21 Licenses) were those TSPs whose licenses were cancelled by Hon'ble Supreme Court. While M/s Bharti Airtel and M/s Vodafone were existing operators, M/s Telewings Communications Services Pvt Ltd (TCSPL) was a new entrant.

It was seen in audit that M/s VTL, M/s ICL, M/s TCSPL⁴ and M/s SSTL were allowed set-off of entry fee of ₹ 5476.30 crore⁵ against the auction fee payable in November 2012 / March 2013. Audit has following observations:

- The entry fee paid by the licensees was one-time entry fee and was non-refundable as per terms and conditions of UAS licence. Further, the Attorney General of India in his response to the legal opinion sought by DoT's query "Whether entry fee paid by licensees needs to be refunded as demands are being made by the licensees?", stated (August 2012) that the question of refund of entry fee paid by the licensees does not arise at this stage.
- NIA stipulated that the companies/licensees whose licenses were slated to be quashed as per the directions of the Supreme Court would be treated as 'New Entrant'. This meant that they had to deposit the full auction fee without any linkage to entry fee paid for their quashed licences.
- Further the Hon'ble Supreme Court had not made any distinction amongst the licensees while quashing the 122 licenses of the nine operators. But DoT on the plea of the operators that their licenses were cancelled for no fault of theirs, created two categories of quashed licensees-licensees whose licenses were cancelled due to their fault and licensees whose licenses were quashed without their fault and allowed set-off on the principle of equal restitution.
- DoT also did not do any due-diligence to ascertain whether the conduct of these companies was actually flawless and there were no reasons attributable to them for cancellation of their licenses. Audit scrutiny revealed that requests for set-off of quashed licensees were accepted without any verification of the grounds submitted by them especially when the licences had been cancelled on the directions of the Hon'ble Supreme Court.

⁴ M/s TCSPL was a Company incorporated in India, by Telenor in February 2012 after the Hon'ble Supreme Court Judgment. Earlier Telenor had acquired 67 per cent interest in Unitech group of Companies in 2008 whose licenses had also been quashed.

⁵ M/s Videocon – ₹ 1506.82 crore, M/s Idea – ₹ 684.59 crore, M/s TCSPL – ₹ 1658.57 crore and M/s SSTL – ₹ 1626.32 crore.

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- ✓ It was also pointed out by the Comptroller and Auditor General of India in his Performance Audit Report No.19 of 2010-11, that VTL and Unitech were ab-initio ineligible to obtain the UAS licenses.
- ✓ As regards M/s. SSTL, the Attorney General in his legal opinion had stated⁶ (August 2012) that SSTL was ineligible on the date of application as the Company did not have the requisite network.

The note to EGoM prepared on 06 October 2012 did not include the above facts regarding VTL and SSTL.

- M/s. TCSPL requested (October 2012) DoT for allowing set-off of the one-time entry fee of ₹ 1658.57 crore paid by M/s. Unitech in 2008 for obtaining 22 UAS licences which was cancelled by the Hon'ble Supreme Court. On 23 February 2013, a decision had been taken by the DoT that no set-off of the non-refundable entry fee was permissible to TCSPL on the grounds that set-off would be permitted only to the quashed license holder participating in the auction and since M/s TCSPL was not a quashed license holder, set-off of entry fee paid by Unitech (quashed license holder) against the payment due from TCSPL (participating entity), was not as per approval of EGoM. On 05 March 2013, TCSPL again requested DoT that though they were separate entity, DoT should set-off the one-time entry fee paid by the Unitech group against the payment due from them. On the same date (i.e. on 05 March 2013) a note for the EGoM was prepared and the same was approved in the meeting of the EGoM held on 06 March 2013.
 - Audit observed that the 'supplementary note' to EGoM prepared on 05 March 2013 did not include the facts regarding suppression of vital information at the time of submission of their application, submission of false certificate and misrepresentation of facts, etc. by Unitech group though these were brought out by the C&AG in Report No. 19 of 2010-11 and also the decision taken by the DoT that no set-off of the non-refundable entry fee was permissible to TCSPL. Further, TCSPL was incorporated on 24 February 2012 only, well after the decision of Hon'ble Supreme Court of India (02 February 2012) on cancellation of UAS licenses.

On this being pointed out, the DoT replied (October 2013) that,

- The CAG cannot comment on and object to the matter of policy.

⁶ In connection with a complaint received from Centre for Public Interest Litigation & Ors in the form of IA No. 27 of 2011 in Civil Appeal No. 10660 of 2010 before the Hon'ble Supreme Court.

- As regards the criminal liability of the M/s Unitech Wireless, the matter is still pending before the various courts, without establishing the same there is no legal basis for taking civil action. Besides, in the operative part of its order, the Hon'ble Supreme Court did not make any such distinction between operators while allowing the operators to continue operations as well as to participate in the auction of spectrum process.
- Set-off allowed was not in the nature of refund of entry fee and not allowed to any of the quashed license holders that did not participate and win spectrum in auction.
- The decision to allow set-off was taken by the EGoM in the light of the various representations and submissions by the stakeholders and guided by the principle of equal restitution.
- Set-off was taken as full up-front payment and no set-off was allowed to be carried forward against future instalments.
- The request of the Telenor Group was not acceded to by the DoT in accordance with the then extant policy/guidelines on the issue and therefore it was decided by the competent authority to refer the matter to EGoM and the decision to allow set-off was an administrative decision taken by the EGoM on 06 March 2013.
- As regards the observations of the CAG in its Performance Audit Report No. 19 of 2010-11 regarding the "Issue of UAS license to ineligible applicant" show-cause notice was issued to VTL for termination of its 21 UAS licenses. The matter was examined in consultation with Ministry of Corporate Affairs and Ministry of Law & Justice from time to time and decision in the matter on the eligibility of company on date of application, is still pending.
- In March 2014, DoT while reiterating again its previous stand stated that the issues involved in the draft audit paras were referred to the EGoM in January 2014, which had since directed the DoT to apprise the facts and rationale of the decision of the Government to the C&AG. It further stated that the set-off was considered and allowed by the EGoM in view of the fact that entry fee paid by the TSPs was for a period of 20 years. While on one hand, the TSPs could be expected to have paid a pro-rata amount for the period of operation of the license (2008-12), on the other hand there could be a claim for refund with interest for the pro-rata amount for the balance period. DoT also stated once again that all these decisions involved issues of policy and legality, which were beyond the mandate of the audit.

The replies of the DoT are not acceptable as

- Audit has not questioned the policy of the Government per-se. Audit has commented on the incompleteness and inadequacy of information submitted to EGoM.
- Decision on Show-cause Notices issued by DoT to VTL and Unitech group relating to their eligibility as on date of submission of application for UAS licenses was pending with DoT at the time of submission of note to the EGoM for set-off. This fact was also not brought to the notice of EGoM by DoT in its note. Further, despite DoT's awareness regarding pendency of the matters pertaining to criminal liability of the M/s Unitech Wireless before the various courts, DoT neither brought it to the notice of EGoM in its note nor waited till finalization of these matters and allowed set-off of one time entry fee paid by M/s Unitech against the auction price payable by M/s TCSPL.
- Since TCSPL was a separate legal entity and a new company incorporated (24 February 2012) after the Hon'ble Supreme Court judgment (02 February 2012), it was not eligible for set-off against payment made by another legal entity. DoT had not initially allowed the proposal of set-off on this ground, but subsequently referred the request for set-off to EGoM, which was approved by EGoM on 06 March 2013.
- Since the one-time entry fee paid by the operators was non-refundable as per the license agreement, the question of the claim for refund with interest for the pro-rata amount for the balance period as stated by the DoT does not arise.
- Even the revenue of ₹ 7741.65 crore⁷ earned by these companies from the quashed licences since 2008 was not considered by DoT while preparing the note for EGoM for set-off of non-refundable entry fee. In this way the licensees appear to have been rewarded for losing their licenses, as for the period of operation of the license (2008-12), no entry fee was levied on the licensees due to set-off allowed.

Thus, set-off of the non-refundable entry fee of ₹ 5476.30 crore, paid by licensees whose license was declared illegal and quashed by the Hon'ble Supreme Court, against the auction price payable for spectrum in 1800 MHz/800 MHz held in November 2012 / March 2013 was inappropriate and deprived the Government of the revenue to that extent.

⁷ M/s Unitech- ₹ 3859.89 crore + M/s SSSL- ₹ 1833.43 crore + M/s ICL- ₹ 1292.33 crore + M/s VTL- ₹ 756 crore =Total- ₹ 7741.65 crore

2.2 Loss of revenue due to non-auctioning of spectrum in 3.3-3.4 GHz band

Telecom Regulatory Authority of India (TRAI) recommended (2006) that the operators who have spectrum assignments in the 3.3-3.4 GHz band should be given a choice to migrate to circle based service area and the operators should pay an upfront one-time spectrum acquisition fee which would be at par with the auction price of BWA spectrum in 2.3 GHz band. Despite recommendation by TRAI in September 2006 and July 2008, DoT continued the extension/ allocation of BWA spectrum in 3.3 GHz band and had not auctioned spectrum in 3.3 GHz even after five years of the auction of the BWA spectrum in 2010. Non-auction of BWA spectrum in 3.3 GHz band resulted in loss of revenue to the Government.

In order to maintain the level playing field among all operators for BWA services, TRAI recommended (September 2006) that “the operators who have spectrum assignments in the 3.3-3.4 GHz band should be given a choice to migrate to circle based service area. In doing so, these operators will be required to accept a fresh set of conditions relating to rollout and annual spectrum charges, pay an upfront one-time spectrum acquisition fee, and begin operations at circle level”.

TRAI in its recommendations (July 2008) on Allocation and Pricing for 2.3-2.4 GHz, 2.5-2.6 GHz & 3.3-3.6 GHz bands, reiterated that all the service providers having spectrum in 3.3-3.4 GHz band should be asked to immediately migrate to Circle level operation. Authority also felt that Spectrum in 3.3-3.6 GHz band can be better utilized to accelerate the growth of fixed broadband through encouragement of emerging wireless technologies specially in the rural areas which was the need of the hour and recommended that

- “In the 3.3 GHz band, there are already 6-7 service providers. These service providers are paying spectrum charges based on MCW⁸ formula. As per WPC unit of DoT, 49+49 MHz spectrum has been allotted in 3.3-3.4 GHz band. However, after migration to circle level, there will be a number of service areas where spectrum shall be available for auctioning to the new entrants. For these service areas, the spectrum will be auctioned. In order to keep level playing field, the existing service providers shall also have to pay the highest bid price obtained during auction in these service areas”.
- Further, it was mentioned that “the Authority had given its recommendation (September 2006) on spectrum allocation for BWA, with the idea that immediate deployment of broadband wireless networks using the spectrum in the 3.3-3.6

⁸ MCW – Microwave formula for determining the rates for microwave carriers allotted.

GHz band will give the required fillip to the aim of reducing the digital divide. However, more than 20 months have passed since these recommendations were given and they are yet to be implemented. In the meantime, technological advancement and increased focus on the BWA technologies had resulted in increase in potential use of this band for various applications including triple play⁹. This band has also been included in the mobile WiMAX certificate profiles for future testing (Band class 4 and 5)¹⁰. Therefore in future, both fixed and mobile broadband and other services will become available in the band. In view of the foregoing, the Authority now do not feel any justification to treat 3.3-3.4 GHz band differently from the 2.3 and 2.5 GHz band, as far as fixing a reserve price for the auction is concerned.”

Scrutiny of records of the Department of Telecommunications revealed (November 2014) that:-

- DoT had allocated spectrum in the 3.3 GHz band to the service providers in metros and cities without charging any upfront one-time spectrum charges which were renewed annually.
- DoT issued (August 2008) guidelines to auction the spectrum in 2.5 GHz band and also deliberated that spectrum in 2.3–2.4 GHz and 3.3 -3.4 GHz band would be auctioned if and when they became available. Two PSUs (BSNL and MTNL) were administratively allocated spectrum in 2.5 GHz band in 2008 and were told that they will have to pay the auction discovered price for 2.3 GHz band. The spectrum in 2.3 GHz band was auctioned in 2010 for BWA services as per TRAI’s recommendations. The PSUs paid the auction determined price for spectrum in 2.5 GHz band on the basis of the price for spectrum in 2.3 GHz band in June 2010. However, till date neither the service providers having spectrum in 3.3-3.4 GHz band were asked to migrate to Circle level operations, nor any action was taken for auction of spectrum in 3.3-3.4 GHz band and hence undue favour was extended to the service providers to whom this spectrum was allocated.
- Continued administrative allocation of spectrum in 3.3 GHz band year after year to commercial operators without charging one-time spectrum charges and without going in for auction despite recommendations of TRAI in 2006 and again in 2008 resulted in undue benefit to the service providers and loss to the public exchequer. Since there was no auction, Audit could not determine the exact loss to the public exchequer. However, based on the reserve price determined in 2010 for the BWA spectrum in 2.3 GHz band which was also recommended for 3.3 – 3.4 GHz by TRAI (2008), the loss due to non-auctioning

⁹ In telecom, triple play is one in which voice, video and data are all provided in single access subscription

¹⁰ Source “WiMAX Forum™ Mobile System Profile 4 Release 1.0 Approved Specification (Revision 1.2.2: 2006- 11-17)”

was ₹ 1014 crore¹¹ for the period from 01 September 2010 to 01 September 2015 as shown below:

Sl. No.	Name of the operator	When allotted	No. of SAs where the TSPs hold the 3.3 GHz spectrum	Spectrum allocated (in 3.3 GHz band)	No. of LSAs where operator acquired 20 Mhz BWA spectrum in 2 GHz band through auction	Proportionate cost of BWA for five years (₹ in crore)
1	Bharti Airtel (168 cities)	April 2005 to July 2009	22	2X6 MHz (in 165 cities) & 2 X 1.75 MHz (in 3 cities)	8	228.50
2	Aircel (80 cities)	October 2004 to April 2010	16	2X6 MHz	8	228.75
3	RCIL (12 cities)	October 2004 to February 2010	8	6 MHz	-	177.00
4	TCL (396 cities)	October 2004 to March 2008	22	6 MHz	-	131.25
5	Track Online (4 cities)	March 2004 to September 2005	4	2 X 1.75 MHz	-	28.00
6	Tulip (121 cities)	March 2008	19	2X6 MHz	-	220.50
Total						1014.00

(Details are indicated in Annexure-I to VI)

On this being pointed out by audit it was replied (April 2015) by DoT that-

- A committee was constituted under chairmanship of Wireless Adviser to examine the TRAI recommendations. As per the committee recommendations (June 2007), the 3.3-3.4 GHz band was not yet globally harmonized for BWA applications. Hence it was recommended that the allocation of BWA spectrum should start with 2.5 GHz band and thereafter, other service providers can be considered for alternate spectrum allotment in 2.3 GHz band, 3.3-3.4 GHz band and 3.4-3.6 GHz band(after compatibility is established). Based on the committee report, proposal for Telecom Commission was prepared and the same was approved by Telecom Commission on 29 June 2007.
- Guidelines for auction of spectrum was issued (August 2008) for including 2.3/2.5 GHz band and spectrum in 3.3-3.5 GHz was not considered for auction. NIA was published in February 2010 after due diligence and BWA spectrum in 2.3 GHz band was auctioned during 2010.

¹¹ a. Loss was calculated on the basis of reserve price fixed for allocation of BWA spectrum (2.3 GHz) for which auction was conducted in the year 2010 since TRAI did not feel any justification to treat 3.3-3.4 GHz band differently from the 2.3 and 2.5 GHz band, as far as fixing a reserve price for the auction is concerned as mentioned by TRAI in 2008.

b. Spectrum from auction is normally given for 20 years. If the loss is calculated for 20 years on reserve price, it would amount to ₹ 4056 crore. (1014 * 4 = 4056)

The reply is not acceptable since

- The contention of DoT regarding lack of global harmonisation of 3.3 – 3.4 GHz band is not relevant. International Telecommunication Union¹² (ITU) in October 2007 had decided to include 3.4 – 3.6 GHz band for International Mobile Telecommunication (IMT) applications. In the same decision, 2.3-2.4 GHz band was also included by ITU for IMT applications, which was subsequently auctioned in 2010. Further, by 2010 spectrum in 3.3 to 3.6 GHz had become the most heavily allocated band for BWA services in European and Asian Pacific countries¹³.
- The reason cited by DoT for not auctioning spectrum in 2.3 – 2.4 GHz and 3.3-3.4 GHz band while approving (August 2008) auction of spectrum in 2.5 GHz band, was that the spectrum in the above bands would be auctioned as and when it became available. However, spectrum (3.3 – 3.4 GHz band) was effectively available to DoT since 2008 itself, as allocation of this spectrum was on annual basis only which was being renewed by DoT every year without contemplating the auction of this spectrum.

Thus continued allocation/extension of spectrum in 3.3 GHz band year after year to the operators administratively, without any one-time charge resulted in significant loss to public exchequer.

This para was issued to the Ministry in June 2015. Reply is awaited (November 2015).

2.3 Irregular expenditure on opening of Regional Offices by TRAI

Telecom Regulatory Authority of India (TRAI) opened Regional Offices across the country by overlooking the directions by the Central Government, opinions of its own Legal Division and Ministry of Law, Justice and Corporate Affairs and incurred an irregular expenditure of ₹ 14.12 crore during 2012-14.

Telecom Regulatory Authority of India (TRAI) was established by TRAI Act, 1997 (hereinafter called “Act”) to regulate telecom services including fixation/revision of tariffs for telecom services which were earlier vested in the Central Government. The Act was subsequently amended vide the TRAI (Amendment) Act, 2000.

¹² ITU is an agency of the United Nations (UN) whose purpose is to coordinate telecommunication operations and services throughout the world

¹³ Source: Book on Wimax Networks – Techno Economic Vision and Challenges by Ramjee Prasad and Ferneddo J. Velez.

Under the Act, TRAI may by notifications, make regulations consistent with the Act and rules made there under to carry out the purposes of the Act (Sec.36)¹⁴ and such regulations are required to be laid before both Houses of Parliament within a period of time as specified in Section 37 of the Act. TRAI is also empowered to appoint officers and such other employees as it considers necessary for the efficient discharge of its functions under the Act (Sec.10 (1)). Besides, the Act also empowers the Central Government to make rules for carrying out the purposes of the Act (Sec.35 (1)), issue directions from time to time, to the Authority on questions of Policy which have binding effect on the Authority (Sec.25 (1& 2)) and prescribing salary and allowances and other conditions of service of officers and other employees of Authority (Section 10(2)). The administrative expenses including the salaries, allowances and pension payable to or in respect of Officers and other employees of the Authority are met from the grants-in-aid received from the Central Government (Sec. 21 and 22).

In its 344th meeting held in August 2011, TRAI approved the proposal for opening of Regional Offices (ROs) in ten different locations¹⁵ across the country. Approval for opening of one more RO at Delhi was accorded in its 357th meeting held in April 2012. In its 360th Meeting (May 2012), TRAI modified its earlier approval and decided that the ROs would be operated on “Pilot Project basis” under “Plan Funds” of TRAI as a part of Capacity Building Projects of TRAI for a period of two years i.e. 2012-13 and 2013-14. It was also decided that the case was to be pursued to get necessary sanctions under ‘Non Plan’ Funds in future.

The executive order for opening of all the eleven offices prescribing the role and functions¹⁶ of the ROs was issued in June 2012, whereby 11 posts of Advisor, 22 posts of Joint Advisor/Dy Advisor, 22 posts of Senior Research Officer and 11 posts of Assistant were also created by TRAI for running those offices. TRAI deployed 26 officers/officials (9 Advisors, 11 Sr. Research Officer and 6 Assistants) in those ROs and incurred expenditure of ₹ 14.12 crore up to March 2014 as shown in **Annexure-VII**.

It was observed by the Audit that TRAI Act does not empower TRAI to open ROs and create posts on its own. Even, TRAI’s own Legal Division, when consulted regarding opening of ROs, had opined in February 2011 that in the absence of specific provisions in the TRAI Act, it might not be possible for the Authority to open ROs across the country on its own.

14 Under Sec.36, TRAI notified TRAI (Officers and Staff Appointment) Regulations 2001 on 15 February 2001 which was laid in Parliament in December 2002.

15 Bhopal, Bengaluru, Chandigarh, Guwahati, Hyderabad, Jaipur, Kolkata, Lucknow, Mumbai and Patna.

16 Ensuring compliance of tariff related guidelines & effective monitoring of retail tariff, proper coordination with service providers with regard to regulatory and marketing aspects, monitoring of quality of service and handling of consumer grievances, organising OHD/CAG meetings of the TRAI, coordination and monitoring of audit and survey by independent agencies appointed by TRAI, development of Consumer Advocacy Groups (CAGs) up to District/Block level & close interaction with CAGs, organising consumer education workshops, close interaction with TERM cell of DoT, monitoring of implementation of MNP and UCC etc.

Further, on Budget Estimates of TRAI (under “Non-Plan”) for the year 2012-13 to meet the additional expenditure for the opening of ROs, Department of Telecommunications (DoT) insisted (November 2011) for approval of the Central Government for creation of posts for ROs and asked the TRAI to supply the copies of approval accorded by DoT / Ministry of Finance (MoF) thereof. DoT reiterated (May 2012) that the posts for proposed ROs could be created only with the approval of MoF and Union Cabinet. DoT also asked TRAI to furnish a self-contained proposal with justification for seeking concurrence of Ministry of Finance (MoF) for creation of the proposed posts for ROs of TRAI. Later, in all the sanction orders issued for release of funds under “Non-Plan” during 2012-13, DoT had also specifically stated that funds were released subject to the condition that funds for establishment expenses in respect of regional offices of TRAI were not included in the release. However, when their demand for allotment of funds under “Non-Plan” was not acceded to by DoT, TRAI issued executive orders in June 2012 for opening of eleven ROs and creation of temporary posts by providing for the expenditure to be met from “Plan Funds” of TRAI as a part of Capacity Building Projects of TRAI, brushing aside all these objections raised by the DoT.

It was further noticed that in the following earlier occasions also, Ministries of Government of India had categorically opined that, TRAI was not empowered to create posts on its own volition.

1. In January 2000, MoF communicated to DoT that in view of the direct budgetary and policy implications, creation of posts etc., should be made subject to the approval of the MoF.
2. In July 2001, Ministry of Law, Justice & Corporate Affairs opined to DoT that the creation of posts would lie with the Central Government and the word “appointment” did not include creation of posts by TRAI under Sec.10 of TRAI Act.

This was communicated by DoT to TRAI in July 2001 with request to make required amendments to the proposed TRAI (Officers and Staff Appointment) Regulation 2001.

3. In April 2004, MoF clarified to DoT that, in view of the ban on creation of posts, concurrence of the MoF in such matters would be necessary and this policy was applicable to all the regulatory bodies.

Further, the decision to operate Regional Offices as a part of Capacity Building was not appropriate as the Capacity Building Project intended for skill development and strengthening and developing training institutes and no way included running establishment of Regional Offices. It was also evident from the fact that initially, TRAI decided to operate ROs from funds under Non Plan. The decision was also in contravention of Delegation of Financial

Powers Rules (Rule10), which prohibits re-appropriation of funds from Plan heads to Non Plan heads without concurrence of the Ministry of Finance.

However, overriding provisions of the Act, instructions and clarifications given by the Central Government as well as opinion of its own Legal Division, the Authority went ahead and opened the Regional Offices across the country and created posts to man those offices on its own without obtaining approval from the Central Government.

On this being pointed by the Audit, the Authority stated (June 2015) that;

- 1) Regional Offices were running as a pilot project and did not form part of TRAI's regular establishment. The ROs were not to be made regular offices was corroborated by the fact that Authority on review of performance of Pilot Project decided to close five¹⁷ out of 11 Regional Offices and abolish 30 temporary posts created therein w.e.f 31 March 2014. The tenure of the remaining six¹⁸ offices was extended up to 31 March 2016 and the position / performance would again be assessed before taking any decision about the need for their continuance or otherwise. Further, prior to opening of offices, the expert legal opinion was obtained (July 2011) from Shri Harin P. Rawal, Additional Solicitor General of India (ASGI) who opined that in absence of any statutory provisions contained in the Act, it was legally permissible for the TRAI to open its Regional Offices across the country.

Reply of the TRAI is not acceptable as:

- Mere absence of specific prohibiting provisions did not empower TRAI to open Regional Offices on its own. Even, its own Legal Division was of the opinion (February 2011) that the objective of opening regional offices could be realized through an appropriate amendment in the TRAI Act. Further, powers of the Central Government to issue directions to the TRAI on Policy matters (Section 25) would also require approval of the Central Government before opening of ROs and incurring expenditure towards the same out of the grants-in-aid received from Consolidated Fund of India.
- The intention of TRAI to make the regional offices as a part of its general establishment was evident from the fact that initially, funds for establishment of the same were requested under "Non-Plan". As also evident from the opinion of the Principal Advisor (F&EA) of TRAI (September 2013), the main reason for closure of few regional offices was non-availability of sufficient funds from DoT. Thus it is quite clear that pilot projects of opening of ROs were intended to eventually turn them into regular ROs, otherwise, it would be a useless and wasteful exercise / expenditure.

¹⁷ Chandigarh, Guwahati, Lucknow, Mumbai and Patna.

¹⁸ Bengaluru, Bhopal, Delhi, Hyderabad, Jaipur and Kolkata.

- 2) (i) Prior to amendment in TRAI Act in the year 2000, Authority had been creating posts as it considered necessary. Further, by Amendment Act 2000, only Section 10 (2) has been amended and Section 10(1) has been kept unchanged and thus powers of the TRAI to create posts have not been taken from the Authority.
- (ii) Under Section 36 of the Act, TRAI has notified the TRAI (Officers and Staff Appointment) Regulation 2001, wherein it is stipulated that the Authority may decide from time to time as regards the number of grades and strength of the posts, as it may deem necessary. This regulation was laid before both the Houses of Parliament in December 2002. On getting communication from DoT (July 2001) for amendment to the Regulation, TRAI obtained opinion of Shri A. S. Anand, former Chief justice of India in December 2001 who opined that powers to create posts must be treated as included in the powers of the TRAI for appointment under Section 10(1) of the Act. Subsequently, a letter dated 13 February 2002 was also written by the then Chairman of the Authority to the then Honb'le MoC&IT to review the issue and lay the regulation in Parliament without insisting upon the amendment. Thereafter the Regulation was laid before Parliament as communicated by DoT in February 2003. Since, no further communication in this regard was received from the DoT, this led to a general belief that the position clarified vide letter dated 13 February 2002 by the TRAI was acceptable to the DoT.

Reply of the TRAI is not acceptable as:

- "Appointment" and "Creation of Post" imply different meanings. As per interpretation of Sec. 10(1) by Department of Legal Affairs, the word "appointment" does not include creation of posts.
 - As regards laying of TRAI (Officers and Staff Appointment) Regulations 2001 in Parliament in its original form, Audit observed that since TRAI had not agreed to make amendment to TRAI (Officers and Staff Appointment) Regulation 2001 pertaining to creation of posts, DoT laid the Regulation in its original form in Parliament without the amendment. Hence TRAI was not empowered to create posts. DoT's subsequent communications to TRAI in November 2011 and May 2012 on budget proposals of the TRAI also establish that DoT did not agree for TRAI having powers to create posts.
- 3) Process of filling of the posts created in regional offices was completed and some officers had joined prior to receiving reference from the DoT in May 2012. Again, since officers of DoT were relieved by the DoT itself for joining new posts in regional offices, it implied that creation of posts had requisite

approval of the Government. However, on getting communication from DoT in May 2012, a detailed justification for creation of posts for Regional Offices was sent to DoT in June 2012 and thereafter no further response in the matter was received from DoT.

Reply of the TRAI is not acceptable as order for opening Regional offices was issued by the TRAI in June 2012 and Regional offices started functioning at the end of 2012, whereas, DoT had raised objections on budget proposals for Regional Offices in November 2011 itself. DoT in its communication dated May 2012, had also specifically stated that filling up of posts in Regional Offices might be taken only after approval of the MoF for creation of those posts. In such circumstances, TRAI went on with the filling up of temporary posts created by it in ROs in violation of all instructions of Central Government.

Ministry in their reply while agreeing (August 2015) to the contention of audit stated that the claim of TRAI was not justified as per TRAI Act and related rules / instructions issued by the Government of India on the matter.

Thus, the TRAI, ignoring directions of the Central Government, opinion of its own Legal Division and Ministry of Law, Justice and Company Affairs opened Regional Offices across the country and incurred an unauthorised expenditure of ₹ 14.12 crore till March 2014. The expenditure will be incurred in future also till the ROs are functioning.