# II-2.9: The Comptroller and Auditor General of India reveals gross irregularities in the attribution process of mobile telephone licences and allocation of mobile telephone frequencies.

Tuesday 23 November 2010, by Alex Raiffe, Junior Editor

## MAIN INFORMATION

On November 16, 2010, the Comptroller and Auditor General of India made public a 96-page report (n° 19 of November 2010) in which it revealed gross irregularities suggesting favoritism in procedures for licensing mobile telephone operators and attributing frequencies from the mobile telephone spectrum over a period stretching from April 2003 to October 2009, on behalf of the Ministry of Communications and Information Technology. Following the revelation of this report, the Minister for Telecommunications, Andimuthu Raja, resigned from his post on the suggestion of the Prime Minister of India.

## CONTEXT AND SUMMARY

The Indian mobile telecommunications market is characterized by exponential growth, but also by a regional particularity, which is the coexistence of "Basic Service Operators" (BSO) and regular GSM cellular mobile service providers. BSOs are licenced to provide limited-mobility service over a particular local loop. Therefore, subscribers to a BSO cannot use their mobile phones outside of a particular 'cell'.
BSO service became very popular in India, and the classic GSM operators complained that they had been overcharged for their licences, since the number of subscribers was much less than anticipated.[1]

Therefore, in 2003, the Telecommunications Regulatory Authority of India (TRAI) drew up plans for 'United Access Services Licensing' (USAL), whereby operators can continue to operate under the previous dual-licence regime, or migrate to the new regime.
Migration to the new regime entailed conserving the same allocated spectrum, and was without fee for GSM operators, who had already paid a market price at auction for their licenses, but entailed a fee for BSO operators, based on the difference between the fee paid by the fourth GSM operator and the price the BSO operator had already paid for its BSO license.

It was intended that in a second phase, a Unified Licensing procedure would be implemented, whereby license and spectrum would be attributed at the same time, and licensing fees would be delinked from spectrum pricing.

However, the Ministry's Department of Telecommunications did not fully implement this second phase of reform, and instead implemented a unified licensing procedure, but valued the spectrum prices at their 2001 levels.

The Ministry of Finance and the Prime Minister of India expressed their concerns about this pricing method, the Cabinet instructed the Department of Telecommunications to devise a better procedure for setting spectrum prices, especially through the organization of auctions to better ascertain the market value of this rare resource, but this went unheeded by the Department of Telecommunications.
With the implementation of the USAL reform, the Department of Telecommunications received an unprecedented number of applications. Initially, the Department of Telecommunications had stated that it would not put a cap on the number of applications received, and would process licenses on a first-come-first-serve basis, there was evidence of discrimination and favoritism on behalf of the

Department of Telecommunications, as we will see below.
Indeed, following the beginning of acceptance of licensing requests in 2006, the Department of Telecommunications received an unprecedented number of applications for USAL.

The procedure was supposed to take 30 days for approval upon receipt by the Ministry of a complete application, but average delays were between 232 and 969 days.

Between 2006 and September 23, 2007, 167 applications had been received. While certain of these applications were still unprocessed, the Ministry issued a press release on September 24, 2007, arbitrarily stating that applications would only be accepted until October 1, 2007.
This sudden announcement led to the filing of 408 applications being filed within the 8-day period following the press release.
The Department of Telecommunications, of its own initiative, therefore requested advice from the Ministry of Law and Justice on how to process such a high volume of applications in a fair and legal fashion. The Ministry's opinion was that the issue would have to be addressed on a Cabinet level, but this was not heeded by the Department of Telecommunications.

Rather, the Department of Telecommunications declared that it would only review applications received until September 25, 2007 in order to avoid legal complications.

Yet, the First Come First Serve policy was not respected, either: the Ministry simultaneously issued Letters of Intent to all applicants who had filed between March 2006 and September 25, 2007, giving the applicants one-hour's notice to collect their Letters of Intent from the Ministry.
The Letter of Intent gave the applicant 15 days to fulfill the remaining requirements, notably submission of a Performance Bank Guarantee, and a Financial Bank Guarantee.

Certain candidates appeared at the Ministry to collect their Letters of Intent with the required documentation in hand, already prepared, which is evidence that they had been alerted to the unforeseen requirements beforehand.

These candidates were obviously given priority in spectrum attribution, since they were the first to hand in their documents.
Finally, the Comptroller and Auditor General discovered that 85 out of the 122 licenses issued were issued to companies who did not meet the requirements set out by the Department itself. These companies had omitted facts, submitted falsified or fictitious documents, or incompletely disclosed information.
The final point raised by the Comptroller and Auditor General is that the pricing scheme adopted by the Department of Transportation (using 2001 prices to sell frequencies, rather than adopting a market pricing method) caused a budgetary loss of between an estimated 676,340,000,000 to 1,766,450,000,000 Indian Rupees (11 - 29 billion Euros / $US 15-39 billion) to the Indian Government.

Just prior to the publication of this report, the Minister for Telecommunications, Mr. Andimuthu Raja, resigned upon suggestion of the Prime Minister of India.

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[1] Department of Telecommunications, Government of India, *'Guidelines for Unified Access (Basic & Cellular) Services Licence'*, 11 Nov 2003, available : http://www.dotindia.com/basic/basic...

## BRIEF COMMENTARY

Obviously, the evidence of favoritism and administrative malfeasance on behalf of the Department of Telecommunications of India's Ministry of Communications and Information Technology is serious

and undermines the Indian telecommunication industry's confidence in its regulator.

The fact of the matter is that the 'regulatory authority', the Telecommunications Regulatory Authority of India is merely a consultative body that has no true policy-making role. Its independence is not guaranteed, and its only autonomous function is to serve as a dispute resolution body for the telecommunications industry.

We can only highlight this affair as being a perfect example of why it is so important to have a truly independent regulator to carry out such tasks as spectrum allocation and telecommunications licensing, which are essential tasks in building ex ante market conditions that foster competition, lowering prices and improving quality of service for subscribers.

From one point of view, delegating such regulatory decisions to a ministry can much more easily lead to practices of capture, corruption, and malfeasance than when they are entrusted to an independent regulatory authority, and this for two reasons. Firstly, an independent regulatory authority is directly accountable to the Legislature, whereas a Minister is directly accountable to the Prime Minister. The phenomenon of capture is likely to be less far-reaching in an apolitical regulatory agency than in a cabinet-level post. Furthermore, decisions of a regulatory authority are directly contestable before a judge, and a truly independent agency with legal personality can be directly held liable for its actions. It is much more difficult, if not impossible, to hold a Minister directly responsible for his actions, to request a judge to cancel the decisions taken by a Ministry, and to engage the State's liability for its actions. Of course, such methods of recourse depend greatly on various judicial organizations and legal systems, but it remains a general rule that individual liability is easier to invoke than administrative liability.

From another point of view, it could be argued that even though there is no truly independent telecommunications regulatory authority in India; since there is a sufficiently well informed official body (in this case, the Comptroller and Auditor General of India), able to publish a public report capable of causing the resignation of a Minister, this is potentially sufficient in terms of regulatory accountability.

Indeed, in terms of regulation, this is a perfect demonstration that information is of primary importance, and not just in financial regulation: whenever the sector is informed, it supervises itself, which itself demonstrates the phenomenon of operators' mutual observation.

Thereby, formal statutory powers are not necessary in presence of such supervisory powers, but investors will eventually disregard the sector due to its corruption, and foreign investment will falter. Perhaps India, like China, has sufficient domestic growth to allow this status quo to continue, but other countries cannot afford to continue under such a state of affairs.

It remains to be seen whether India's political class will adopt the far-reaching reform necessary to instate such an independent regulator, on the European or American model, where telecommunications regulation has been ousted from ministerial authority for a number of decades. Otherwise, as we can imagine, investment in the Indian telecommunications sector will decrease as soon as growth declines, due to the opacity and corruption of its regulatory regime.