

# Telecom Hotline

November 21, 2018

## A THRUST FOR DIGITAL CONNECTED INDIA: THE NATIONAL DIGITAL COMMUNICATIONS POLICY, 2018

The National Telecom Policy ("NTP") is the Department of Telecommunications ("DoT") policy document setting out its vision and regulatory intent with respect to the telecom sector typically over a long time-frame (5-8 years). The NTP is essentially a non-binding document which is intended to guide the decision-making process of the DoT so as to ensure that its actions are directed towards achieving stated objectives.

Given that the NTPs is meant to be a long term document (the NTP 2012 envisaged goals all the way up to 2020), the DoT had commenced discussions and preparations for a new NTP, since 2017.<sup>1</sup> These discussions came to a fruition in the form of a Draft National Digital Communications Policy, 2018 ("Draft Policy") to which the DoT invited public comments / suggestions from stakeholders. Following response from the public and deliberations with stakeholders the DoT released the much awaited National Digital Communication Policy, 2018 ("NDCP 2018") after making some changes to the Draft Policy.

The NDCP 2018 appears to be a forward looking statement of intent by the DoT to push for modern digital communication services through a "*transparent, accountable and forward-looking regulatory structure*". Interestingly, the preamble to the NDCP 2018 seems to recognize the oft touted grouse of the industry, i.e. the DoT treats the telecom sector as a "cash cow" of sorts to raise revenues through sale of spectrum with high reserve prices therefore with a possible attempt to address this the preamble specifically includes the following statement which incidentally was not present in the Draft Policy "*Accordingly, this policy aims for universal coverage rather than revenue maximization.*"

Specifically in terms of a regulatory approach, the NDCP 2018 aims to *inter alia* (i) reduce (a) regulatory burden, (b) barriers that hamper investment, (c) give an impetus to innovation; and (ii), promote consumer interest in the digital communications and infrastructure space. This appears to align with the Government's larger aim of '*ease of doing business*'.

In terms of upcoming technologies, the NDCP 2018 also seeks to create roadmap to enable adoption of new and emerging technologies such as 5G, artificial intelligence, robotics, Internet of Things ("IoT") and cloud computing.

## OBJECTIVES:

NDCP 2018 has articulated its objectives in the following manner:

- **Connect India** – This aims to create a robust digital communication infrastructure by promoting optical fibre connectivity, deployment of public Wi-Fi hotspots, making available and optimal pricing of spectrum, etc.
- **Propel India** – This seeks to enable next generation technologies and services by taking several steps towards facilitating the deployment of these technologies. Such steps include *inter alia* improving regulatory processes as those as the Wireless Planning Cell, promoting research and development, incentivizing domestic technologies and manufacturing.
- **Secure India** – This aims to "*ensure the security and safety of digital communications through a comprehensive data security regime*" through steps such as addressing security issues relating to encryption and security clearances, building capacity for security testing and promoting consumer sovereignty through adherence to net neutrality.

## SIGNIFICANT CHANGES BETWEEN NDCP 2018 AND THE DRAFT POLICY

| Particulars  | Draft Policy  | NDCP 2018   |
|--|---|---|
| IP-PSTN (Packet-Switched Telecommunications Network) | There is no reference to IP-PSTN in the Draft Policy.<br><br>Under the existing license conditions interconnectivity between traditional voice PSTN and Internet Protocol (IP) traffic is prohibited. | Recognising the growing importance of Voice over Internet Protocol (VoIP), the possibility of switching between IP traffic and Public Switched Telephone Network (PSTN) has been specifically envisaged in the NDCP 2018. |
| Regulatory regime for satellite communication        | Draft Policy envisaged the expansion of permissible high throughput satellite communication services within the framework of the pre-existing Unified Licensing regime.                               | The NDCP 2018 has now reference to an 'appropriate licensing regime' for the expansion of high throughput satellite services instead of referring to Unified License regime. It appears that the DoT                      |

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**NDCP 2018** retain the power to introduce an entirely new licensing framework for such services as opposed to permitting this only under the heavily regulated and somewhat onerous Unified License. It remains to be seen whether relevant changes will also be made to the existing SATCOM Policy to facilitate an appropriate licensing regime.

Import licensing requirements of Wireless Planning and Co-ordination ("WPC") Wings

The Draft Policy makes no reference to liberalising import licensing requirements.

The WPC is the national regulatory nodal agency of the DoT and is responsible for planning, regulating and managing radio frequency spectrum, as well as issuing wireless licenses for equipment operating on such spectrum. The import of wireless telecom equipment into India typically requires a license from the WPC.

As part of improving ease of doing business for digital communications, the NDCP 2018 recommends simplification of import requirements of WPC.

Recent media reports on this subject indicated that the DoT was considering as recently as September to transfer the application process for the WPC online.<sup>2</sup> This appears to have been operationalised as on the date of publication of this hotline.<sup>3</sup>

Cloud Computing

In order to establish India as a global hub for cloud computing, Draft Policy recommended enabling light touch licensing regime for proliferation of cloud based systems.

In addition to the light touch licensing regime, NDCP 2018 also aims to facilitate cloud service providers to establish captive fibre networks which will provide the necessary fillip to the construction of data centre infrastructure in India.

Application Service Providers

The Draft Policy had proposed a regulatory framework for 'application service providers'. The scope and nature of the 'application services' sought to be regulated was however not particularly described or discussed.

The NDCP 2018 has significantly dropped this point initiative and currently does not mention anything specific around the establishment of regulatory framework for application service providers. Whether this deletion amounts to a change in thinking of the DoT or has only been deleted as a temporary measure is not entirely clear at this stage.

## REGULATORY AND POLICY CHANGES SUGGESTED:

The NDCP 2018 has stated its intention to make several regulatory, legal and policy changes with aim of facilitating the evolution of India's telecom ecosystem to a next generation digital communication ecosystem. Some of the key proposed changes have been laid down below:

### 1. Amendments to existing legislations:

- The NDCP proposes to amend the archaic and dated Indian Telegraph Act, 1885 ("ITA"), along with other relevant legislations with the intention to facilitate convergence between IT, Telecom and broadcasting.
- Currently equipment and devices such as servers, cables, power supply units etc., used for provisioning of telecom services have to be certified indicating compliance with the relevant standards of the Bureau of Indian Standards ("BIS"). Further, certain telecom equipment also needs certification from the Telecom Engineering Centre ("TEC"). Therefore, in some cases there may be some overlap. To develop security standards for equipment and devices, NDCP 2018 also seeks to harmonise the legal and regulatory framework applicable to such equipment and devices, such as Bureau of Indian Standard Act, 2016, Electronics & Information Technology Goods (Requirements for Compulsory Registration) Order, 2012, ITA, etc.

2. **Spectrum:** A large chunk of the capital expenditure of telecom service providers is utilized towards building fibre backhaul networks. Spectrum has been internationally accepted as a scarce, finite resource which is susceptible to degradation in case of inefficient utilization.<sup>4</sup> Therefore fibre is required to efficiently utilise spectrum. Some studies have shown that using wireless backhaul technologies such as microwave point to point links, or E-band links can have lower operating costs than pure leased fiber networks.<sup>5</sup> Therefore, ensuring adequate wireless backhaul connectivity as a complement to fiber backhaul is critical for ensuring universal access to broadband. Given the difficulty of ensuring universal fiber connectivity for backhaul, fiber must go hand in hand with wireless backhaul spectrum, especially in rural areas as this would greatly improve the efficiency and quality of voice and data services. Echoing the Recommendations of the Telecom Regulatory Authority of India ("TRAI") in this regard<sup>6</sup>, the NDCP 2018 now contemplates the effective utilization of high capacity backhaul spectrum in E-Band (71-76/81-86 GHz) and V-Band (57-64MHz). However, the NDCP 2018 does not specify whether the utilization of spectrum will be through auction or administrative allocation of the spectrum. Currently there appears to be a debate amongst governmental departments as to whether administrative allocation of spectrum is even possible,

ever since the Supreme Court of India ruled that auction can be the only mode of allocation of a natural resource like spectrum. News reports now suggest that the DoT had solicited the views of the Attorney General of India if administrative allocation of E-Band and V-Band spectrum is indeed possible<sup>7,8</sup>.

Apart from this, NDCP 2018 also seeks to facilitate the allocation of spectrum at affordable prices for research and development and experimentation purposes. This should greatly help in promoting innovation in new wireless communication technologies in India.

3. *Net Neutrality*: In line with the Draft Policy, NDCP 2018 recommend amendment to the license agreements to ensure explicit restriction on any discrimination based on content, along with necessary exclusions and exceptions. It is pertinent to note that, the DoT has already issued amendments to the terms of various license agreements to make this a binding obligations on telecom service providers to ensure the non-discriminatory treatment of data.
4. *IP-PSTN Interconnectivity*: For the first time, the NDCP has recognized the potential for interconnectivity between Internet Protocol (IP) traffic and traditional voice PSTN (Public Switched Telephone Networking) traffic. Traditionally, the DoT has always prohibited the interconnectivity between PSTN and IP traffic. Reports suggest the reasons for this approach by the DoT were mainly two-fold. The first was national security – As voice traffic flowed over IP networks, it may not have been possible for the DoT to engage in lawful interception of the voice traffic with the ease that was possible with PSTN networks. The second reason was that with voice traffic freely being transmitted over the cheaper Internet Protocol, it would lead to the loss of revenue from PSTN voice calls, or lead to lower revenues from license fees for the government and thus lead to 'toll bypass. The change in this position by the DoT is encouraging as it will lead to the deployment of new voice technologies.
5. *Fibre First*: Realizing that spectrum is a scarce resource, the DoT seems to recognize that ensuring connectivity in all parts of India requires significant investments in fibre optic infrastructure. Under the NDCP, it is seeking to implement a 'Fibre First' initiative to take fibre connectivity to homes and to enterprises. Crucial to this, is the need to ensure 'Right of Way' ("**RoW**") for the construction of fibre networks. Due to lack of clarity and implementation of the current Indian Telegraph Right of Way Rules, 2016 by several states and local authorities, the NDCP 2018 proposes to create a collaborative institutional mechanism between centre, state and local bodies for Common RoW and also require the compulsory installation of in-building fiber solutions by seeking necessary amendments to the National Building Code (NBC) through the Bureau of Indian Standards.
6. *Satellite Communication*: The NDCP 2018 appears to have agreed to a long standing demand of the industry, i.e. a review of the 20 year old SATCOM Policy which does not meet the current needs of digital communications in India. Additionally, for promoting satellite communication systems the NDCP 2018 also interestingly proposes 'appropriate licensing mechanisms' for high throughput satellite systems and a review of existing licensing and regulatory conditions. While the language of the NDCP 2018 does not explicitly say so, the reference to a 'licensing' mechanism could finally provide for the necessary push to for private players to enter into the satellite communication space in India.
7. *Review of License Fee*: A constant complaint among telecom service providers in India is the high license fee burden which currently includes all avenues of revenue (telecom and non-telecom) and multiple levies. The NDCP 2018 seeks to review the license fee (including licence fee on fixed line revenues), spectrum usage charges and the definition of adjusted gross revenue ("**AGR**").

AGR<sup>9</sup> is that portion of a telecom service providers revenue on which license fees are payable to the DoT. It is pertinent to note that issues related to ambiguity in the definition of AGR are being litigated at various forums in India including a litigation at the Supreme Court on whether or not non – telecom revenue (for example lease rental etc.) earned by a licensee should be covered under AGR or not. A review of the existing definition of AGR by the authority would provide much needed clarity and remove any ambiguity and possibly exempt non-licensed services from the ambit of AGR. NDCP 2018 also seeks to review the concept of pass-through charges to align the same in line with principles of input line credit, thereby avoiding any double incidence of levies which has just been implemented in relation to Virtual Network Operators. Review of the definition of AGR may also provide some relief to the debt burden telecom industry and free up capital for investment in next generation digital communication technologies.

8. *Promoting Public-Wi-Fi*: After the success of TRAI's pilot project Wi-Fi Access Network Interface ("**WANI**"), the NDCP 2018 seeks to promote Open Public Wi-Fi access through Wi-Fi/Public Data Office Aggregators and Public Data Offices. While the Draft NDCP specifically referred to a 'light touch' licensing regime for public WiFi, the final NDCP 2018 does not state anything on these lines. The TRAI however, conducted its Public Open Wi-Fi Pilot early this year after seeking the permission of the DoT. In this trial, Public Data Office Aggregators ("**PDOA**") provided public WiFi services in certain public locations through local Public Data Offices. Unlicensed players also participated in this trial as PDOAs. However, given the publicly stated concern of incumbent telecom operators on the potential security concerns of permitting such services<sup>10</sup>, it remains to be seen how the aforesaid 'light touch' licensing regime will be finally implemented.
9. *Wireless Planning and Co-ordination*: To facilitate ease of doing business, NDCP 2018 has suggested simplifying import licence requirements of WPC Wing and reorganisation of the WPC Wing. The requirement for import licenses and delay in procuring such licenses for import of telecommunication equipment has been a major thorn affecting the rapid proliferation of new technologies in India as the processes of the WPC in grant of such licenses is often time consuming and in some cases not forthcoming at all. The NDCP also seeks to ease the process of grant of experimental licenses, which are used for research and development of new communication technologies. 'Regulatory sandboxes' are also being proposed. Both these initiatives should help in the research and development of new wireless technologies in the country.
10. *Policy framework for 'Over the Top' ("**OTT**") Services*: NDCP 2018 seeks to develop a policy framework for OTT services to promote innovation and creation of network infrastructure. Whilst the DoT has earlier raised concerns about the lack of regulation of OTT services<sup>11</sup>, given that they ride on top of the internet they continue to be regulated by the Information Technology Act, 2000. Therefore, it will be important to see the specifics of how the

government ultimately determines or legislates the basis for regulatory oversight of OTT services as the ITA, being the core legislation governing telecom services in India does not specifically envisage the governance of the applications for which the messages are sent over 'telegraph networks' and only contemplates the regulation of the network (or the data pipes). The TRAI has also recently started a fresh consultation to discuss the potential regulation of OTT services.<sup>12</sup>

11. **Telecom Ombudsman:** Today as per the TRAI Act, 1997 only a group of aggrieved consumers and not individual / singular consumers are entitled to approach the TRAI with respect to any dispute with the service provider. Thus in order to ensure effective grievance redressal and quality of services, and to protect individual consumer interests, NDCP 2018 seeks to establish a Telecom Ombudsman and a web based compliant redressal system. There have already been reports of the DoT seeking to implement the Telecom Ombudsman system within the framework of the TRAI.<sup>13</sup> This would be a positive change for telecom consumers as it would allow them to directly take telecom consumer disputes to the relevant sector regulator for redressal.
12. **Incentivising the use of renewable technologies:** The Telecom industry is reckoned to be one of the largest consumers of diesel in India to power generators that supply electricity to telecom towers in areas where regular electricity is not available. For this reason, the DoT had in 2012 mandated a minimum use of renewable energy to power telecom towers<sup>14</sup>. Now, in order to further reduce diesel consumption in an age of rising crude oil prices and to enable sustainable energy consumption in telecom industry, NDCP 2018 seeks to promote and incentivise solar and green energy solution deployment for telecom towers to develop a green sustainable industry. Further, the NDCP 2018 also encourages the utilisation of small cell fuel batteries, lithium-ion batteries or other similar technologies for this purpose.
13. **Security and Privacy** – NDCP 2018 seeks to establish a comprehensive data protection regime and assure security for digital communication and for this purpose seeks to:
  - amend various licenses and terms and conditions, to incorporate privacy and data protection provisions;
  - address security issue related to physical infrastructure;
  - establishment of comprehensive security certification regime;
  - formulating policy on encryption and data retention, by harmonising the regulatory regime pertaining to cryptography;
  - facilitate establishment of a Central Equipment Identity Registry for addressing security theft and other concerns; and
  - establishing a Security Incident Management and Response System for digital communication sector.

It is pertinent to note that the Ministry of Electronics and Information Technology had already set up a Committee of Experts on Data Protection which has now released the draft Personal Data Protection Bill, 2018 which also covers aspects of data security from a technology agnostic and horizontal perspective (covering both private and state parties). You can see our analysis of the Personal Data Protection Bill, 2018 ("**PDP Bill**") [here](#). The PDP Bill is meant to be a single overarching, horizontal law covering all aspects of data privacy in the country and hence any move to create a separate set of data privacy principles or regulations for the telecom sector may overlap with the PDP Bill and create multiplicity in data privacy regulations for telecom service operators.

## ANALYSIS:

The DoT has recognized the overarching trend of convergence – or the trend of the merging of different modes of communication such as voice, data, broadcasting and media into a single mode through data (internet). This has reflected not only in the mere renaming of the NTP as the 'National Digital Communication Policy, but also impending renaming of the TRAI to the Digital Communications Regulatory Authority of India ("**DCRAI**")<sup>15</sup> and the renaming of the Telecom Commission (the highest decision making body of the DoT) to the Digital Communications Commission<sup>16</sup>. As the cable and broadcasting regulator, the new DCRAI could possibly symbolize the convergence of telecom with broadcasting in an age of increased convergence

While it is heartening to see the NDCP suggest the removal and relaxation of regulatory barriers that may hamper investment, innovation, consumer interest and security, just like previous NTPs it is woefully short on specifics, timelines and steps for implementation. The NDCP 2018 also does not address some of the chief financial sustainability concerns of the telecom sector today, such as high spectrum prices and the extremely high discretionary powers of the DoT to impose penalties of upto INR 50 crores (approx. USD 7 million). The NDCP has also failed to recognise that a re-look is necessary at some of the older regulatory frameworks currently being enforced by the DoT such as the regime for Audiotex/Call Conferencing services for which the TRAI has already issued recommendations suggesting an overhaul of the current licensing regime.

Overall, NDCP 2018 seeks to lead India to a realm of new 'Digital First' world and aims to facilitate the implementation of technologies such as 5G, IoT, M2M, etc. in India. That said, the DoT does appear to be off to a good start given that some of the measures proposed by the NDCP are already being implemented such as the removal of import license requirements for certain low power wireless equipment (wireless chargers)<sup>17</sup> and the issuance of the National Frequency Allocation Plan – 2018.<sup>18</sup>

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<sup>1</sup> <https://www.thehindubusinessline.com/info-tech/new-telecom-policy-in-works-manoj-sinha/article9752521.ece>

<sup>2</sup> <https://economictimes.indiatimes.com/industry/telecom/telecom-news/dot-mulls-online-allocation-of-wireless-licence-to-facilitate-ease-of-doing-business/articleshow/66021908.cms>

<sup>3</sup> <http://www.wpc.dot.gov.in/FolderInformation/ApplyOnline.asp>

<sup>4</sup> Para 64 of the judgment by the Supreme Court in WP No. 423/2010 and 10/2010

<sup>5</sup> <http://cbln.com/sites/all/files/userfiles/files/CB-002070-DC-LATEST.pdf>

- <sup>6</sup> Recommendations on Allocation and Pricing of Microwave Access (MWA) and Microwave Backbone (MWB) RF carriers by Telecom Regulatory Authority of India dated 29<sup>th</sup> August 2014 and available at <https://traf.gov.in/sites/default/files/MW%20Reco%20Final29082014.pdf>
- <sup>7</sup> <https://telecom.economictimes.indiatimes.com/news/dot-to-look-legal-view-if-e-v-bands-not-auctioned/63980667>
- <sup>8</sup> <https://economictimes.indiatimes.com/news/economy/policy/dot-unlikely-to-auction-spectrum-in-e-v-bands/articleshow/63945777.cms>
- <sup>9</sup> As per the terms of the Unified Licence, telecom service providers are required to pay 8% of their adjusted gross revenue (AGR) as license fee. For wireless operators, additional spectrum usage charge (SUC) also applies.
- The gross revenue has been defined to include all revenues accruing to the licensee on account of goods supplied, services provided, leasing/hiring of infrastructure, use of its resources by others, application fees, installation charges, call charges, late fees, sale proceeds of instruments (or any terminal equipment including accessories), fees on account of annual maintenance contract, income from value added services, supplementary services, access or interconnection charges, etc. and any other miscellaneous item including interest, dividend etc. without any set-off of related item of expense etc. AGR includes the gross revenue but excludes (i) charges of pass through nature to other telecom service providers for interconnection of network; (ii) service tax and sales tax paid to the government.
- <sup>10</sup> <https://www.financialexpress.com/industry/trais-public-wifi-model-telecom-call-it-a-national-security-threat/1236074>
- <sup>11</sup> [https://traf.gov.in/sites/default/files/LetterSecyDOT\\_28112017.pdf](https://traf.gov.in/sites/default/files/LetterSecyDOT_28112017.pdf)
- <sup>12</sup> <https://traf.gov.in/sites/default/files/CPOTT12112018.pdf>
- <sup>13</sup> [https://www.business-standard.com/article/economy-policy/dot-seeks-legal-opinion-on-ombudsman-creation-under-telecom-regulator-118100200677\\_1.html](https://www.business-standard.com/article/economy-policy/dot-seeks-legal-opinion-on-ombudsman-creation-under-telecom-regulator-118100200677_1.html)
- <sup>14</sup> <http://www.dot.gov.in/sites/default/files/CSIII%20NLD%204%201%2012.pdf?download=1>
- <sup>15</sup> <https://telecom.economictimes.indiatimes.com/news/traf-to-be-renamed-as-digital-communications-regulatory-authority-of-india-manoj-sinha/65971515>
- <sup>16</sup> <http://pib.nic.in/newsite/PrintRelease.aspx?relid=183711>
- <sup>17</sup> <http://wpc.dot.gov.in/WriteReadData/userfiles/GSR%20996%20dt%205th%20October,%202018.pdf>
- <sup>18</sup> <http://wpc.dot.gov.in/WriteReadData/userfiles/NFAP%202018.pdf>
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