Telecommunication Bill 2081 (2024 A.D.)

Introduction

On July 9, 2024, the Ministry of Communication and Information Technology ("Ministry") released a draft of Telecommunication Bill 2081 (2024 A.D.) ("Bill") for public comments.

The Bill has been drafted to amend and consolidate existing laws relating to telecommunications and to make telecommunication services competitive, reliable, secured and easily accessible. The Bill seeks to replace the Telecommunications Act 2052 (1998 A.D.) ("Telecom Act").

Key provisions of the Bill are summarized below:

Scope of the Bill

The Bill defines the term 'telecommunication' to include an act of emission, transmission or reception of a sound, sign, signal, writing, image or secret sign of any nature by wire, radio, optical or other electromagnetic systems. Further 'telecommunication service' has been defined broadly to include all types of services for telecommunication. However, broadcasting service falls outside the scope of the Bill and is regulated under Broadcasting Act which primarily regulates broadcasting of programs through audio or audio-visual means transmitted through satellite, cable or other means of communication.

The Bill doesn't specify whether certain internet-based communication services would fall under 'telecommunication service'. It can be fairly understood that internet-based communication through PC-to-PC or similar device without using national numbering plan or E.164 numbering scheme would not fall under 'telecommunication service'. As such, only those internet-based communication that require using PSTN or PLMN or ISDN would fall under 'telecommunication service'.

Regulatory Agency

The Bill provides for creation of an autonomous agency, Nepal Telecommunication Authority ("NTA") as the regulatory agency for telecommunication sector. All six members of NTA are to be appointed by the Government of Nepal ("GON"). Since NTA is already in existence under Telecom Act, NTA shall continue to operate under the new legislation.

Change in Licensing Regime

Unlike Telecom Act, which provides for various types of licenses, the Bill classifies telecommunication licenses into three categories:

- Unified License: A single license to provide domestic and international telephone, cellular and internet services. Currently under Telecom Act, cellular operators must obtain a separate Cellular Mobile Service License (GSM License) and an Internet with Email License to operate their services.

- General License: A license to provide network, Internet and value-added telecommunication services. Currently under Telecom Act, this license is equivalent to a Network Service Provider License and/or an Internet Service Provider License.

- Telecommunication Infrastructure Service ("TIS") License: A license to provide services consisting of telecommunication infrastructures (non-electronics) which are required to operators, such as, towers, optical fibers, satellites, radio frequencies, equipment, land and buildings, BTS shelters, poles, etc. Currently under Telecom Act, this type of license does not exist.

A GSM License issued under Telecom Act shall *ipso facto* be deemed to fall under 'Unified License' under the Bill. Similarly, an operator holding a Basic Telephone Service License under Telecom Act may obtain a Unified License after fulfilling conditions prescribed for Unified License within one year.

All other types of licenses issued under Telecom Act, which do not fall under the category of Unified License under the Bill, shall be deemed to fall under General License.

Unified License

A Unified License shall be issued on an open competitive bidding basis for which NTA shall make a public announcement inviting applications from interested parties. In the public notice NTA shall provide details about the number of licenses to be issued, required capital, required technical competency and professional skills, details of frequency bandwidth, its quantity and base price which are available for auction.

Before issuing a Unified License, all eligible applicants shall be required to participate in competitive bidding for frequency bandwidth. The highest bidder in the auction shall be provided with frequency bandwidth as well as a Unified License to operate telecommunication services. In case only one applicant is found to be eligible for the license then frequency bandwidth shall be allocated to the applicant at the base rate. A five members special committee, namely, Frequency Policy Determination Committee headed by the Minister for Communication and Information Technology, has been provisioned for formulating policies related to pricing and distribution of frequency.

General License

Unlike a Unified License, a General License shall be issued on first come first serve basis without a need for NTA to make a public announcement. An interested party may submit an application to NTA for a General License. NTA may issue a General License to an applicant who meets the required technical qualifications for the license.

The Bill further aims to provide a General License to an entity other than a license holder which wishes to operate other services using telecommunication network after obtaining prior approval from other concerned agency as well as consent from NTA.

TIS License

Similar to a Unified License, a TIS License shall be issued on an open competitive basis for which NTA shall make a public announcement inviting applications from interested parties. In the public notice NTA shall provide details about the number of licenses to be issued, required capital, required technical competency and professional skills and criteria for evaluation.

NTA shall issue a TIS License to an applicant who is able to obtain the highest score in the evaluation process.

Exceptions to Obtain a License

Exemptions from obtaining a telecommunication license to operate telecommunication services are provided to:

- GON and its agencies
- Diplomatic agencies
- Aircraft operated under international protocol;
- Personal use without connecting to telecommunication system

Conditions of License

Operators must comply with, among others, following conditions:

- Shall provide services without discrimination.
- Shall not engage in anti-competitive activities.
- Shall not cease or disrupt telecommunication services.
- Provide details of directors to NTA within 6 months of obtaining license and within six months of changes thereto.
- Provide KYC details of customers to NTA.

- Pay fees and royalty.
- Comply with NTA's instructions.

Fees and Royalty

Operators are required to pay following fees and royalty:

- Annual Fee: 8 percent of total revenue
- Annual Rural Telecommunication Development Fund (RTDF) Fee: 2 percent of total revenue
- Annual Royalty: 4 percent of total revenue generated from the telecommunication services

'Total Revenue' shall mean the revenue generated by an operator from its customers from telecommunication services and infrastructure services, however, excluding indirect taxes and amount collected from sale of telecommunication equipment.

Term of License and Renewal

The maximum total term of a license shall be 25 years. Initially a license shall be issued for a term not exceeding 10 years. Each renewal shall be for a term not exceeding 5 years conditional upon payment of all dues, fees and to GON and NTA.

Cancellation of License

A license shall be cancelled if an operator fails to operate telecommunication services within two years. Similarly, if an operator holding a Basic Telephone Service License under Telecom Act fails apply for a Unified License or fails to obtain a Unified License within one year after enactment of the Bill as a legislation and fails to renew the Basic Telephone Service License under Telecom Act, then the Basic Telephone Service License shall be cancelled automatically.

Further, NTA may cancel a license upon occurrence of one of the following events where an operator:

- is declared bankruptcy or dissolution.
- fails to operate services within the specified time or fails to develop required infrastructure.
- fails to pay fees, royalty and other dues.
- disrupts or ceases to provide services without NTA's approval.
- repeatedly commits offences under the Bill.
- seeks cancellation of its license.

An appeal against a decision of NTA to cancel a license shall be available at the High Court.

Prohibition on Cross Holding

The Bill imposes prohibition on issuance of a license to an entity which owns one percent or more shares in another operator. However, an operator of a Unified License is also permitted to operate all other services except for TIS.

Public Offering

Companies Act 2063 (2006 A.D.) mandates that a telecom operator company with a paid-up capital exceeding NPR 50 million must be incorporated as a public company. The Bill prescribes that in order for a public company to be eligible for a license, it must set out at least 30 percent of its total issued capital for general public and must allot those shares through public offering. Nonetheless, a private company having paid up capital up to NPR 50 million is not under an obligation to comply with the public offering requirement.

Foreign Direct Investment (FDI) Threshold

A cap of 80 percent of the total paid-up capital of the company is permitted for FDI in a telecommunication company provided that Nepali shareholders' investment shall not be less than NPR one billion. In case of a company having paid-up capital less than NPR 5 billion, FDI portion may go lower than 80 percent and, in some case, FDI portion may be in minority.

Sale of License and Shares

<u>Sale of License</u>:

The Bill allows an operator to sell a telecommunication license after obtaining approval from NTA. Both seller and purchaser must approach NTA for its approval disclosing the terms and conditions for the sale. While granting its approval NTA must be satisfied that the purchaser meets technical, financial and other qualifications otherwise it may decline to grant approval. Sale of 51 percent or more shares of an operator company shall be deemed to be a sale of a license.

Sale of Shares:

Approval of NTA is required for sale, transfer or change in ownership of 5 percent or more shares of an operator. NTA must be notified with the information of the ultimate beneficiary in case shares of an operator are owned by a person or an entity other than the shareholder in record.

Further, approval of NTA is also required for a purchase or sale of shares of a holding company in case investment in shares of an operator has been made through a holding company.

Reobtaining License After 25 Years

An operator, in which holding of foreign investors is more than 50 percent, shall be provided with an opportunity to reobtain the license after the expiry of the validity period of 25 years of its existing license provided that the shareholding ratio of Nepali shareholders must be maintained at least 51 percent. Ownership of assets (land, building, machinery, equipment and infrastructure) of an operator of Unified License, who fails to reobtain a Unified License after the expiry of 25 years, shall be transferred to GON.

Requirement of Approval from NTA

NTA has been provided with broad authority to regulate telecommunication sector as well as operators. Operators are required to obtain approval from NTA for following activities:

- to incorporate a company to apply for a license.
- to issue shares to general public through IPO.
- to issue bonus shares.
- to declare dividends.
- to issue debentures.
- to sell or pledge shares.
- to conduct mergers or acquisitions.
- to amend charter documents.

NTA shall approve IPOs upon condition that shares allotted under IPO shall not be transferable for five years.

Further, operators operating under partnership or joint-venture must obtain NTA's approval prior to making changes to partnership or joint-venture or to enter into agreements with third parties.

Recommendations and Consents from NTA

NTA has been provided with additional authority to grant recommendations for obtaining foreign exchange facility to operators in order:

- to repay foreign loans and interests thereof.
- to repatriate FDI investment.
- to import equipment for telecom services.
- to make payments of fees, charges, etc. to foreign entities.

The Bill further provides that operators must obtain consent from NTA prior to concluding agreements with foreign entities.

Distressed M&A

NTA may allow merger among operators or acquisition of a license in order to continue telecommunication services in cases of:

- cancellation of a license of an operator.
- an operator becomes incapable of operating telecommunication services as a result of insolvency or for any other reasons.

Offences, Punishment and Appeals

Significant changes have been sought to the list of offences introduced by the Bill in comparison to Telecom Act. Major offences and punishments prescribed in the Bill are:

- Non-compliance with any of the provisions listed under the heading "Requirement of Approval from NTA" above shall be punishable with a fine ranging from NPR 2.50 million to NPR 10 million (approx. US$19,000 to US$75,000).
- Non-compliance with some of the competition and anti-trust related provisions or conditions

such as discrimination, cross-subsidy, forced selling, network interconnectivity shall be punishable with a fine ranging from NPR 10 million to NPR 100 million (approx. US$ 75,000 to US$750,000).

NTA is designated as the quasi-judicial body with powers to dispose matters as a court of first instance for most offences under the Bill. Some other serious offences must be brought before a District Court.

Appeals against a decision of NTA or District Court shall lie with High Court.

Comments and Conclusion

The Bill has introduced some new provisions especially with respect to types of licenses and clarity on fees and royalty. Nonetheless, the Bill has borrowed majority of provisions from the existing Telecom Act. We have outlined some major pros and cons with respect to the Bill:

Pros:

- Simplification in types of licenses by classifying them into three (3) categories.
- Issuance of a license (except for a General License) on an open competitive basis to the highest bidder in auction or the applicant who is able to obtain the highest score in the evaluation process.
- Clarity on fees and royalty based on the income of operators.
- Abolition of hefty renewal fee of NPR 20 billion (approx. US$ 150 million) for each five (5) year term.
- Allowing operators an opportunity to reobtain a license upon its expiry after 25 years by reducing foreign shareholding to 49 percent.
- Limitation of cross holding below one percent.

Cons:

- The Bill fails to provide clarity on which internet-based communication service falls under 'telecommunication service'.
- In addition to corporate tax of 30 percent and frequency fee, operators must pay hefty 14 percent annual fees and royalty in total at least 44 percent. Consumers must separately pay Telecommunication Service Fee of 10 percent, Telephone Ownership Fee of 2 percent and VAT of 13 percent, in total 25 percent. Combining both corporate and consumers' side, the total taxes and fees would be exorbitant 69 percent thereby making telecommunication services one of the most heavily taxed sector. No doubt, excessive taxes and fees will impact the growth of telecom sector and making telecommunication services out of reach of people.
- Requirement of public offering of at least 30 percent of issued capital doesn't seem to be practical for operators other than an operator holding a Unified License which is an unnecessary burden for small operators.
- Provision of public offering of at least 30 percent doesn't correlate with the permitted FDI threshold of 80 percent. If the provisions of public offering of at least 30 percent and minimum Nepali investment of NPR one billion are complied with, then the maximum allowable foreign investment would be 70 percent or less which is less favorable that the existing legislative regime.
- NTA is provided with excessive and unnecessary authority to regulate telecommunication sector. Operators are required to obtain approval from NTA for every other action creating a harsh regulatory regime in telecommunication sector.
- Approval of NTA is also mandated for the purchase or sale of shares of a foreign holding company between foreign parties which is contrary to the general principle of law. NTA doesn't have the authority to regulate the corporate affairs of a foreign company.
- Transfer of assets to GON belonging to an operator of Unified License, who fails to reobtain the license after the expiry of 25 years, is applicable only to an operator having FDI making it a clear discrimination based on nationality of investors.
- Various provisions of the Bill have already been prescribed in other sector specific laws, such as, Companies Act, Securities Act, Competition Promotion and Market Protection Act, Foreign Investment and Technology Transfer Act, etc. and powers are granted to other agencies to regulate those matters.

- The Bill aims to abridge the authority of other agencies, such as, Office of the Company Registrar, Securities Board, Department of Industry and courts and provides NTA with the identical authorities thereby creating a parallel agency – a legislative bewilderedness.
- Restriction on shares transfer allotted under IPO for five years is not consistent with prevailing securities and other laws. Such restriction is only reasonable to 'promotor shares' and not to those shares allotted under IPO.

Telecommunication sector has been seen as a highly politicized and problematic sector in Nepal. Experience of foreign investors in telecommunication sector in Nepal in the past has not been pleasant. The need for GON today is to introduce a liberal policy in telecommunication sector in order to attract credible and competent foreign investors. While neighboring countries are introducing telecommunication laws permitting 100 percent FDI and abolishing 'licensing regime' and replacing with simplified 'authorization regime' and further imposing less fees and taxes, GON is introducing harsh provisions in the Bill aiming to tightly regulate the telecommunication sector. If the Bill becomes a legislation in its current form, this will not only discourage foreign investment in telecommunication sector but also hamper the overall growth of telecommunication sector in Nepal.

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