

**TELECOM DISPUTES SETTLEMENT AND APPELLATE TRIBUNAL
NEW DELHI**

DATED THIS 20TH DAY OF DECEMBER 2002

Petition No. 8 of 2002
(With MA No.24 of 2002)

IN THE MATTER OF:

Bharti Cellular Limited
Petitioner

Vs

Union of India & others
Respondents

AND

Petition No.11 of 2002

Sterling Cellular Limited
Petitioner

Vs

Union of India and others
Respondents

BEFORE: -

**HON'BLE MR. JUSTICE SUHAS C. SEN
CHAIRPERSON**

**MR. R.U.S. PRASAD, MEMBER
MR. P.R. DASGUPTA, MEMBER**

Petition No.8 of 2002

For Petitioner	:	Dr. A.M. Singhvi, Sr. Advocate with Mr. Ramji Srinivasan, Mr. V. Rajkumar, Mr. Hitesh Kumar And Mr. Yogesh Gupta, Advocates.
For Respondent No1 & 2	:	Mr. Navin Chawla, Advocate
For Respondent No.3	:	Mr. V.P. Singh, Mr. Bhaskar Gupta, Mr. Sunil Gupta, Sr. Advocates with Mr. Punit D. Tyagi, Advocate
For Respondent No.4	:	Mr. Kamal Budhiraja and Mr. Anupam Verma, Advocates
For Respondents No.5 & 7	:	Mr. C.S. Vaidyanathan, Sr. Advocate With Mr. Manjul Bajpai, Mr. Kashi Vishweshwar, Ms. Garima and Mr. Praveen Thomas, Advocates
For Respondent No.6	:	Mr. Arun Kathpalia, Mr. Amit

Dhupar and Mr. Samir Sagar
Vasishta, Advocates

Petition No.11 of 2002

For Petitioner : Mr. C.S. Vaidyanathan, Sr. Advocate
With Mr. Manjul Bajpai, Mr. Kashi
Vishweshwar, Ms. Garima and
Mr. Praveen Thomas, Advocates

For Respondent No1 & 2 : Mr. Navin Chawla, Advocate

For Respondent No.3 : Mr. Bhaskar Gupta, Mr. Sunil Gupta, Sr.
Advocates with
Mr. Punit D. Tyagi, Advocate

For Respondent No.4 : Mr. A.N. Haksar, Sr. Advocate
With Kamal Budhiraja and
Mr. Anupam Varma, Advocates

For Respondent No.5 : Dr. A.M. Singhvi, Sr. Advocate with
Mr. Ramji Srinivasan,
Mr. V. Rajkumar, Mr. Hitesh Kumar
And Mr. Yogesh Gupta, Advocates.

For Respondent No.6 : Mr. Arun Kathpalia, Mr. Amit
Dhupar and Mr. Samir Sagar
Vasishta, Advocates

For Respondent No.7 : Mr. C.S. Vaidyanathan, Sr. Advocate
With Mr. Manjul Bajpai, Mr. Kashi
Vishweshwar, Ms. Garima and
Mr. Praveen Thomas, Advocates

For Respondent No.8 : None

Service Area - Local area - Gurgaon telephones - Gurgaon telephone exchanges - Section 2(w) of Indian Telegraph Rules 1951 - Exchange system - Rule 2 (k) of Indian Telegraph Rules 1951 - served by - anomalous position - in the circumstances DoT's decision is set aside and DoT directed to re-examine the issue.

ORDER

This is a Petition (Petition No.8 of 2002) filed by Bharti Cellular Limited under Section 14(a)(i) and Section 14(a) (ii) read with Section 14A(1) and other applicable provisions of the Telecom Regulatory Authority of India Act, 1997. The petitioner has invoked the original jurisdiction of the Tribunal in view of a dispute between the Petitioner as a Licensee and Respondents No. 1 & 2 as Licensor as well as Respondents No. 3 & 4 as a service provider.

A similar petition (Petition No.11 of 2002) has also been filed by Sterling Cellular Limited, New Delhi, under Section 14A(1) read with Section 14(a)(i) and other applicable provisions of the TRAI Act, 1997.

The brief facts of the case are that in the year 1992, the Respondent No.1 viz., UOI/DOT issued a Tender for Cellular Mobile Telephone service in the four Metro areas of Delhi, Bombay, Calcutta and Madras. Annexure – I of the tender document spelt out the area of service for each metro and for Delhi it stipulated 'local area served by Delhi

Telephones, Ghaziabad and Faridabad Telephones, NOIDA and Gurgaon'. The Petitioner also maintains that keeping in view the terms and conditions specified in the tender document, it prepared its business plans for providing service in these areas which included operations in all areas served by Gurgaon Telephones including the Old Town within the Gurgaon Municipality and the areas commonly known as Gurgaon including DLF, Sushant Lok, Palam Vihar, etc. The petitioner further maintains that these business plans were the basis of the petitioner's offer to the UOI, which were accepted by the Respondent No.1, and the Licence Agreement was executed between the Petitioner and the Respondent No.1 on 29.11.1994. The Licence Agreement for Delhi Metro dated 29.11.1994 defined the scope of area of service as under: -

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SCHEDULE OF AREA OF SERVICE

Delhi	<i>Local area served by Delhi Ghaziabad, Faridabad, Noida and Gurgaon Telephones.</i>
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The petitioner maintains that after the Licence Agreement was executed, necessary infrastructure in Delhi and the adjoining satellite towns including the area served by the Gurgaon telephones was set up. Necessary statutory clearances from Respondent No.1 and various departmental agencies of the Respondent No.1 including SACFA/TEC/WPC for deploying the base station controllers and other infrastructure in all these areas were also obtained by the Petitioner. All these steps required huge investment amounting to hundreds of crores of rupees. Subsequently much after the grant of metro licences, the respondent No.1 issued tenders for Cellular Mobile Service for various State Circles (excluding the four Metro cities) on 16.1.1995. The Licence Agreement for the Haryana state Circle was executed between the Respondents No.1 and the 3; and Respondents No.1 and 4 as late as 12.12.1995. Both the Tender and Licence **for Haryana expressly defined the Area of Service as:**

<i>"Haryana Circle except local area served by Faridabad and Gurgaon Telephone Exchanges".</i>
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The Petitioner has maintained that the Agreement excludes from the Area of Service of Respondent No.3, all local areas being served by the Gurgaon Telephone Exchanges and that the Circle Tender and Circle Licence both use the term "Telephone Exchanges" thus, recognizing the existence of several exchanges working under Faridabad and Gurgaon Telephone Systems. Clause 3 of the General Conditions of the Tender also permitted prospective Bidders to seek clarifications in writing on any of the Tender Clause. The respondent No.3 never sought clarification from the concerned Department in respect of the Service Area comprising the Haryana Circle before submitting its bid. But, in a belated manner, the Respondent No.3 sought a clarification of this term in its licence.

The petitioner has maintained that from 1995 onwards it has been providing cellular mobile service in all the areas being served by various Gurgaon Telephone Exchanges and presently they serve over sixty-thousand subscribers commuting between Gurgaon and Delhi and that there are about seventy-thousand subscribers having their billing address at Gurgaon. These arguments have been advanced by petitioner to place the scope of service area of the petitioner beyond any shred of doubt.

The present controversy regarding the 'scope of *service area*' was raised by the Respondent No.3 for the first time by its letter dated 20.7.1999, well over five years after its tender and four years after it had been awarded the licence. The petitioner has maintained that the scope of *service area* as described in the Licence Agreement is "**Local area served by Delhi, Ghaziabad, Faridabad, Noida and Gurgaon Telephones**". The tender for Haryana Telecom Circle, which is a later document,

excludes local areas served by Gurgaon Telephones. The licence for the Haryana Telecom Circle was executed on 12.12.1995. The bidders were specifically advised to seek clarification of the extent of territory available to them as a service area, which the Respondent No.3 (Escotel Mobile Communications Ltd.) did not seek at all until 20.7.1999 when it took up the matter with the DoT. The Escotel licence defined Service Area as "Haryana Circle except local area served by Faridabad and Gurgaon Telephone Exchanges". The circle Tenders and Circle Licences in contrast to the metro tenders as well as metro licences both used the term "Telephone Exchanges" thus recognizing the existence of several exchanges working under Faridabad and Gurgaon Telephone Systems. The petitioner further maintained that there were about 17 exchanges within the Gurgaon SDCA, which were part of the Gurgaon Telephone System even in the year 1993 as is seen from the Official Telephone Directory. The licence of the petitioner did not restrict the area of operation to the areas served by one particular exchange under Gurgaon Telephones.

Another point highlighted by the Petitioner was that the area of service for each Metro Operator as described in **Annexure – I** to the Tender was not limited to the Municipal Limits of each Metro but extended to include the adjoining satellite towns and adjunct areas. The DOT, according to the petitioner, applied the principle of contiguity and homogeneity and recognized the fact that all these satellite towns needed to be served by the Delhi Metro Cellular Operators notwithstanding the fact that some of them may have been geographically located in some other State.

The petitioner also drew attention to the fallaciousness of the argument that the definition of the 'local area' as occurring in Section 2(w) of the Indian Telegraph Rules, 1951, should be extended to the Cellular Licences also. Rule 2(w) as it existed before its amendment in 1998 categorically provided for 'a radial distance of 5 Kms from the telephone exchange', which was subsequently amended w.e.f. 15.8.1998 making the area co-terminus with the SDCA extending to a radial distance of approximately 50 Kms from the telephone exchange instead of 5 Kms. However, according to the petitioner, the tender in respect of Basic licences issued on 16.1.1995 and that to Respondent No.3 on the same date did not have the same definition of 'Local Area'. They have stated that tender for Basic Licence issued on 16.1.1995 defined the 'local area' as "**the area within 5 Kms radial distance from a telephone exchange or such area where the Telecom Authority has declared/declares any area served by an exchange system to be Local Area for the purpose of telephone connection**". The Cellular Licence issued to Escotel for Haryana Circle however, stipulated that they would operate in the area covered by 'Haryana Circle except local area served by Faridabad and Gurgaon Telephone Exchanges'. The argument put forward by the Petitioner is that if the intention of the DOT was to have limited operations to the Local Area definition set out under Rule 2(w), there would have been no reason for them to use and employ the term "**served**" while defining the Service Area in Schedule 'A' of Licence issued to Bharti Cellular Limited for provision of Cellular Mobile Service in Delhi Circle.

The petitioner also referred to the National Capital Region Plan (NCRP) which included Gurgaon as part of the Delhi Metropolitan Area and National Fundamental Plan where the reference Local Area means the entire area identified by STD Code '0124'. This National Fundamental Plan, as per the petitioner, is an authentic contemporaneous Government document and the 1993 additions takes into consideration the impending introduction of Cellular Telephony and the reference to the term 'Local Area' was made with full reference to Cellular Operations as well. The Licence Agreement itself provides that the tender document would form its part. Clause 7 section IV of the Tender Document provides that the system should conform to the Fundamental Plan of DoT thereby clearly highlighting the scope and meaning of 'Local Area' derived from the contractual obligations arising out of Licence Agreement dated 29.11.1994. Thus, as per the arguments advanced, the area served by Gurgaon Telephones and more specifically identified by the Code 0124 should be the local area for the purpose of licence.

The petitioner also maintained that even the MTNL access number to area served by the Gurgaon Telephones is a single code viz., 91 and these are irrespective of Municipal boundaries and include all such areas being served by Gurgaon Telephones. The petitioner also stated that since 1971, various notifications were issued by the Government of Haryana wherein the concept of **Gurgaon Controlled Area** also occurs. These areas are extension of Gurgaon town and fall within the Delhi Metropolitan Area under NCRP. Thus, even the 1974 Guidelines in relation to geographical boundaries must have taken into account the Gurgaon Controlled Area. The petitioner also drew attention to the absurdity of the argument of Respondent No.3 that it is entitled only to 5 Kms radial area from the main Gurgaon Exchange in the old town of Gurgaon. It maintained that the Petitioner is a Metro Operator and has been granted a License to serve areas not only within Delhi but also in the neighboring and contiguous towns.

The petitioner also maintained that the subsequent tenders for Circles cannot override earlier licences issued to Metro Operators since it has performed its obligations under the Contract and continues to do so and is entitled to exercise all its rights under the Contract and also the fact that even before the tenders were invited for Metros and Circles, the Gurgaon Telephones had several Telephone Exchanges operational at various places which further does not justify limiting the meaning of 'Gurgaon Telephones' only to one exchange in the Old Gurgaon Town.

One of the other arguments advanced by the Petitioner was that the Engineering Plan and maps submitted by the Respondent No.3 in terms of Clause 13.3 of its Licence Agreement did not include "Gurgaon" and that for a period of six years it has silently acquiesced in the activities and operations of the Petitioner in this territory as well as the series of approvals given by the DoT and various other Governmental agencies from time to time. Thus the Respondent No.3 was fully aware of the 'areas', which were being served by the Petitioner, and it never considered the area served by Exchanges falling within the Gurgaon Telephone Systems as a part of its 'service area'. Controversy was raised by Respondent No.3 as late as 20.7.1999 when it sought clarification from the Respondent No.1.

The Respondent No.3 in their averment maintained that the expression 'Local Area' has a well defined meaning attached to it in the field of telecommunication and Rule 2(w) of the Indian Telegraph Rules, 1951, as it stood when licences were granted to the Petitioner and Respondent No.5 (Sterling Cellular Ltd.) stood as follows: -

"Local Area means the area within 5 Kilometers radial distance from a telephone exchange or where the Telegraph Authority has declared any area served by an exchange system to be a local area for the purpose of telephone connection".

Respondent No.3 has further maintained that the 'Local Area' for each of the Telephones mentioned in 'Schedule A' of the licence have been defined by notifications issued by the Central Government and this is also supported by the fact that in the new licences given to the Petitioner in Haryana Circle and Respondent No.7 (M/s Birla Tata AT&T Ltd.) in Delhi Circle, the 'service area' has been defined with reference to the old Rule 2(w). Hence under the statutory notifications the 'local area' served by Gurgaon Telephone Exchange is the circular area covered by a radial distance of 5 Kms from the Exchange. It has further been added that the Municipal limits of Gurgaon falls within this circular area and does not extend beyond it at any place.

Respondent No.3 has also questioned the validity of the Petitioner's argument of contiguity in view of the fact that the boundary between the Union Territory of Delhi and Gurgaon extends to approximately 18 Kms and it would be well nigh impossible to fix a point on the said 18 Kms stretch for the purposes of assigning a corridor or passage so as to bring about contiguity between Delhi and Gurgaon.

Respondent No.3 also referred to the 1974 Guidelines which seek to revise the geographical limits of local areas of Telephone Exchange System. These Guidelines, among other things, lay down that the 'local area' of a single exchange telephone system would comprise of all localities which are within a radial distance of 5 Kms from the Exchange. In case the town has an established Municipality or Corporation with well-defined limits and if any localities served by this Municipality/Corporation are beyond 5 Kms of the Exchange, such localities are also to be included in the local area. It has been further maintained by Respondent No.3 that an exchange may serve subscribers beyond its local area but that does not have the effect of expanding the limits of the local area to include the area in which such subscribers are located. Hence, what was given to the applicant was only the concerned local areas of Delhi, Ghaziabad, Faridabad, Noida and Gurgaon and not the areas covering the subscribers beyond such local area.

As regards WPC and SACFA clearances granted to the Petitioner, it was averred that these are technical clearances regarding frequency of operation and the height of tower of Radio site of the network and cannot be taken to effect any change in the geographical limits of the local area. Clause (13) of the WPC clearances was cited in this connection, which lays down as follows: -

"13. The service area and the terms and conditions of this agreement letter/licence do not have the same meaning and connotation as those in licence agreement signed between DoT and Service providers. Applications of the provisions of this agreement letter/licence does not imply the expression of any opinion whatsoever on the part of the WPC Wing of Ministry of Communications concerning jurisdiction of service area of the licence agreement signed between DoT and Service providers."

A Judgment of Delhi High Court, No. OMP – 55 of 1997 and FAO(OS) No.37 of 1998, has also been cited in which the Court had held that WPC and SACFA clearances are by a third agency and not by the Licensor and hence cannot be construed as an express or implied understanding between the licensor and licensee as regards the area of service under the licence.

As regards the argument of acquiescence against the Respondent No.3, it has been argued that the tender for Haryana Telecom Circle was specifically for the whole of the State of Haryana except the two areas namely, local area of Gurgaon and Faridabad Telephones which were specifically excluded and the licence was given to the Respondent No.3 for this area as mentioned in the licence. It has further been maintained by them that they did not by any act or conduct surrender any part of the licenced area and that an unauthorized encroachment by the Petitioner or Respondent No.5 in its area of operation cannot form the foundation for an argument of acquiescence on its part.

It has also been maintained that out of 113 sites for which the Petitioner had obtained SACFA clearances only 5 sites are marginally outside the 5 Kms radius of Gurgaon exchange.

Respondent No.3 also maintained that after obtaining the Licence for Haryana Circle on 12 December 1995, it had approached the Licensor seeking clarification for identification of physical geographical boundaries of cellular service areas of Haryana, UP (West) and Kerala. But, DoT, however, took more than 3 years to issue the clarifications, first on 28th February 2000 and then on 2nd April 2002, regarding the service area of cellular operators in Haryana Circle and Delhi Metro Circle.

Respondent No.3 has also stated that the Engineering Plan submitted by it pursuant to grant of licence was a tentative plan which was required to be submitted within two months of signing of the agreement, primarily, to indicate the plan to cover the District Headquarters as stipulated under Clause 3.2 read with Clause 13.3 of the terms and conditions of the licence. The tentative Engineering Plan submitted by it did not mention Gurgaon and Faridabad for the reason that these District Headquarters are not within their service area under the licence.

The Respondent No.7 (M/s Birla Tata AT&T Ltd.) have been given licence for Cellular Mobile Telephone Service for "Delhi Metro Service Area" on 5th October 2001. In this case the service area has been indicated (Schedule – I) as follows:

- (i) The Service Area for which this license is awarded shall be co-extensive and be the same for the named Service Area as that of existing licences of cellular service. Reorganization of Telecom Circles or change in Local Area, if any, during the interregnum after the grant of the said licences to existing Operators will not have any effect on the Service Area of cellular service licence.
- (ii) The above service area refer to Telecom Service Area Unit (Telecom Circle Service Area or Metro City Service Area) and not the State geographical areas.
- (iii) The definition of local areas with regard to the above service area as applicable to existing licensees of cellular service is as per definition applicable as in the year 1994 & 1995, when these licences were granted to them. This is in accordance with respective Gazette Notification for such local areas wherever issued and as per the statutory definition under Rule 2(w) Indian Telephones Rules, 1951, as it stood during the year 1994/1995 where no specific Gazette Notification has been issued."

They have, however, in their averment maintained that they have been awarded licence for the same service area as in the case of existing licences of Cellular service. They have referred to the Affidavit dated 15.4.2002 filed by Respondent No.1 in Petition No.8 of 2002, in which it has been stated "*It would be improper that as far as new licensees are concerned the area would be different from that as compared to the old licensees*". Respondent No.7 has maintained that it has been placed on the same footing as that of Respondent No.5 (Sterling Cellular Ltd) and the Petitioner (Bharti Cellular Ltd) who are also Licensees for Delhi Metro Service Area. These Licensees are already providing Mobile Telephone Service in the whole of Gurgaon and, therefore, Respondent No.7 have the same right with respect of the area of operation as that of Respondent No.5 and the Petitioner, and is also entitled to commence and provide Mobile Telephone Service in the whole of Gurgaon including the territory in respect of which a dispute has been raised. They have further stated that if they were not allowed to commence and operate its services in the disputed areas of Gurgaon, its business would suffer and would amount to discrimination between the similarly placed Cellular Operators. They have also pointed out that even MTNL have been permitted to provide Cellular Mobile Service in the whole of Gurgaon and that they are also providing the services as a Metro Operator.

Respondent No.7 have also referred to para 3F (ix)(c) of DoT's Reply Affidavit (Petition No.11 of 2002) wherein it has been stated that –

"..... Though, specific comment about the rationale of adding Ghaziabad, Faridabad, Gurgaon and Noida to Delhi Metro license is not available, it appears that these were added at the time to make available the Cellular Service in these important towns in the vicinity of Delhi having a strong community of interest and movement of people on every day basis."

Thus, the strong community of interest and movement of people on every day basis between Delhi and Gurgaon formed the basis of inclusion of Gurgaon in the Metro licenses and this basis remains untouched even today.

In the Petition No.11 of 2002, the Petitioner in their averments has dwelt at length on the interpretation of the definition of 'service area' and an argument was put forth that the language used in the Licences of the Petitioner and the M/s Escotel (Res. No.3 in Petition No.8 of 2002) clearly shows that all the Telephone Exchanges of Gurgaon are included in the Petitioner's licence and that they are expressly excluded from the Escotel's Licence. The Delhi Metro Licence, according to them, included local areas served by Gurgaon Telephones and lays emphasis on the word "Telephones" which is in plural. Similarly, the Haryana Circle (4th para, page 49 of Vol.II – Petition No.8 of 2002) Licence excludes local areas served by Gurgaon Telephone Exchanges and here again the word "Exchanges" is in plural and thus includes all the telephone exchanges and not one telephone exchange. Rule 2(k) of the Indian Telegraph Rules, 1951, has also been referred to in this connection, which reads as follows:

"(k) "Exchange system" means any Departmental Telephone Exchange or Exchanges and any lines connected therewith declared by the Telegraph Authority to be an exchange system".

Here a distinction has been made between words "Telephone Exchange" which means one telephone exchange having one local area that may have a radius of 5 Kms or more and "Telephone Exchanges" which referred to more telephone exchanges in a given area. Further, the Delhi Metro Tender and Licence clearly awards the local area served by Gurgaon Telephones. The emphasis here is not on the local area of Gurgaon but the local areas "served by" Gurgaon Telephones and these have different connotation and carry different meanings. Further, the expression "local area" in telecom parlance has only one and invariable meaning as defined in the Telegraph Rules since the 'local area' in Numbering Plan/National Fundamental Plan is not based on the definition given in the Telegraph Rules. This is also clear from DoT's Notification dated 5th June 1992 declaring the revised local area of Delhi. It has been stipulated therein as follows:

" 1. Delhi telephone system – Local area "of" Delhi telephone System shall cover the area falling under the jurisdiction of Union Territory of Delhi i.e. covering New Delhi Municipal Committee, Municipal Corporation of Delhi and Delhi Cantonment Board provided that the telephone subscribers located outside the boundary of Union territory of Delhi but who are "served" at present from Delhi Telephone System shall continue to pay local tariffs till they are transferred to the adjoining telephone systems".

It has also been argued that in terms of Clause 2.1 of "Schedule C of the licence the Petitioner has submitted details of its installations to DoT which included its installation in Gurgaon also. These details were accepted by DoT. Further, all performance tests were also carried out by DoT and clearances were given by it for Gurgaon also.

It has also been argued that Item 6 in the Schedule of Area of Service in Schedule-I of the Circle Cellular Tender Document issued in January 1995, excluded all local areas served by Gurgaon Telephone Exchanges which was not objected to by Escotel. The latter also did not seek any clarification in the matter under Clause 3 of the Circle Tender. The Petitioner from 1995 onwards has been providing Cellular Mobile Service in all areas served by various Gurgaon Telephone Exchanges and various approvals were also granted by authorities permitting the petitioner to establish its network and continue its operation. The petitioner has also various BTS sites and is incurring an expenditure of more than Rs.35 lakh per annum as monthly lease for these sites and maintenance cost and the Respondent No.3 never raised any issue till about 20 July 1999.

The petitioner has also cited the principle of contiguity and interest of consumers in support of its case. It has also alleged violation of principle of natural

justice as the Notification dated 19th June 1971 relied upon by DoT in its impugned Order dated 2nd April 2002 was never referred to earlier and no opportunity was given to the petitioner to deal with the same. This was disclosed for the first time to them when the Impugned Order dated 2.4.2002 was passed. The Government's intention to give only the area comprising of 5 Kms radius to the Metro Operators is not borne out by any document viz., Tender Document, Clarifications, Licence Agreement, the Committee's Report, etc. The Petitioner was also not provided with a copy of the Committee's Report whose Membership included two officers from the BSNL which is a Circle Operator in Haryana and hence an interested party.

It has also been maintained that the present dispute is barred by 'Limitation' as Escotel was issued licence on 12.12.1995. Even granting the fact that the Escotel had raised the issue in the year 1996, it had not pursued it for three years until it was raised on 20 July 1999.

The dispute is also barred by Clause 2 of the 'Migration Package' since Escotel had accepted the Migration Package on or about 29.7.1999 and the cut off date in the Migration Package was 31.7.1999.

The Petitioner has also highlighted the adverse impact on subscribers in the form of calls becoming costlier, call not maturing if the location of the subscriber is beyond 5 Kms unless the subscribers have roaming facility. Further the petitioner has performed 8 years of uninterrupted operations and has about 4 lakh subscribers with 20,000 registered subscribers with billing address of Gurgaon alone. The petitioner has also raised the issue of equity being in its favour as it has invested crores in infrastructural equipment and leased valuable spaces.

Respondents No.1 & 2 in their arguments has maintained that the term 'Local Area' has the statutory definition and the licences in question are also statutory in nature and the meaning as evident from Rule 2(w) of the Indian Telegraph Rules, 1951, are only to be assigned to the term 'local area'. Even though this Rule was amended on 15.8.1998, the amended definition would not be applicable in the present case as the licences in question were issued in November 1994 and December 1995. In this context, the Respondent No.1 has referred to Notification No. S.O.394(E) dated 5th June 1992, pertaining to Delhi which lays down as follows:

"Now therefore, in exercise of the power conferred by rule 434 (III) (2C) of the said Rules, the Director General Telecommunication, hereby declares that with effect from 16.6.1992, the revised local area of Delhi, Ghaziabad, Faridabad and Bahadurgarh shall be as under:

1. *Delhi Telephone System – Local area of Delhi Telephone System shall cover the area falling under the jurisdiction of Union Territory of Delhi i.e. covering New Delhi Municipal Committee, Municipal Corporation of Delhi and the Delhi Cantonment Board; provided that the telephone subscribers located outside the boundary of Union Territory of Delhi but who are served at present from Delhi Telephone System shall continue to pay local tariffs till they are transferred to the adjoining telephone systems."*

Similarly, in respect of Gurgaon also, Notification S.O.2397 dated 19 June 1971 was referred to which reads as follows: -

"In exercise of powers conferred by clause (w) of Rule 2 of the Indian Telegraph rules, 1951, the Director General of Posts and Telegraphs declare that effective from 15 July, 1971 the local area of following exchanges in the Punjab P&T circle shall cover an area within a radial distance of 5 (five) Kms from the respective telephone exchanges.

1.

11. *Gurgaon*

Further, it was stated that at the relevant time of execution of licence agreement with Petitioner No.1, there was only one telephone exchange within Gurgaon Municipal Area and the local area of this telephone exchange should be taken to be the 5 Kms radial from such telephone exchange extendable to the limit of the municipality.

As regards various clearances granted by WPC Wing including site clearances at the disputed area, it was stated that subsequent conduct of the Parties might not be used as an aid to interpretation of a written contract as it may vitiate the contract itself. The Respondent No.1 has also questioned the undue reliance on the expression "served by" in the licence agreement whereas in the Rules the term 'local area' has been used with the work "of" and therefore, it would mean something different from the statutory definition. In course of their submission, it was stated that while Rule 2(w) used the word "of" as it is defining a term and the licences used the word "served by" as it prescribing the limits.

As regards placing reliance on the argument that the areas beyond the municipal limits of Gurgaon Municipality were also being served from Gurgaon Telephone Exchange, it was stated that even though at a given point of time a telephone exchange may be catering to areas beyond the limits of its "local area" but in such cases as and when a telephone exchange comes up in such areas, the subscribers of such area would shift to such new telephone exchanges.

On the arguments advanced by the Petitioner in Petition No.11 of 2002, Respondent No.1 & 2 have submitted that no representation was received from M/s Sterling Cellular Ltd., against the impugned clarification first issued by them on 28.2.2000. They have added that only Bharti Cellular Ltd., had made a representation and thereafter a Committee was formed by Respondent No.1 to go into this representation. The Committee's Report also records that M/s Sterling Cellular Ltd., had supported the clarification order and did not advance any oral arguments before the Committee. It has also been maintained by Respondent No.1 that the dispute is not barred by 'migration package' as contended by the Petitioner. These impugned orders are in the nature of clarifications of queries raised by one of the licensee and as such this cannot be treated as a dispute between licensees for Haryana Telecom Circle and the Department of Telecommunication. As regards the jurisdiction of the Respondent No.1 to issue the impugned clarification, it has been submitted that these clarifications did not adjudicate upon any dispute between a Licensor and the Licensee and they were in the nature of clarification given by the Department on queries raised to it. They have also questioned the contention of the Petitioner that principle of natural justice has been violated. They have added that the M/s Sterling Cellular Ltd., had not raised any grievance regarding the proposed clarification which was examined at various levels including the Telecom Commission, Minister of Communication, Ministry of Law before they were issued. They have denied the allegation of bias against Members of the Committee advanced by the Petitioner on the ground that no such objections were raised when the Petitioner had appeared before the Committee.

The entire case hinges on an interpretation of the term 'local area' used in the licence of the Petitioner (Bharti Cellular Ltd.) and the extent of applicability of Rule 2(w) (which defines the term 'local area' in the Indian Telegraph Rules, 1951). From the arguments advanced by the Counsels representing the Petitioner in Petition No.8 of 2002 and Petition No.11 of 2002 as well as the Counsels of the Respondents in these two Petitions, it gets clearly established that the Petitioners (Bharti Cellular Ltd., and Sterling Cellular Ltd.) who hold Delhi Metro Cellular licence have been operating in new settlement areas of Gurgaon beyond 5 Kms of Gurgaon Main Telephone Exchange. They have invested huge amount of money in setting up the infrastructure and have sizeable number of subscribers in Gurgaon as well as Delhi Metro on their rolls who avail of Cellular service without going through the route of roaming which involves extra cost. For operating in these areas and rendering such services they have obtained necessary clearances and Respondent No. 1 & 2 are fully aware of this

position. It is also apparent from the arguments advanced as well records that Respondent No.3 (Escotel Mobile Communications) who hold Cellular Licence for Haryana Telecom Circle ('except local area served by Faridabad and Gurgaon Telephone Exchanges') did not include Gurgaon when they submitted their engineering plan and maps in terms of the licence. They also did not seek clarification from the Licensor about the geographical area in Gurgaon which would fall in their jurisdiction until 20.7.1999, even though it has been maintained by them they had raised the issue once in 1996 but, thereafter they could take it up again only in the year 20.7.1999.

Schedule 'A' of Licence Agreement of Bharti Cellular Ltd., (Petitioner in Petition No.8 of 2002) defined the scope of service as "DELHI - Local area served by Delhi, Ghaziabad, Faridabad, Noida and Gurgaon Telephones." The term 'local area' has however, not been defined in the licence agreement for which one has to fall upon the meaning assigned to this term in Rule 2(w) of Indian Telegraph Rules, 1951. However, the expression 'local area served by Delhi, Ghaziabad, Faridabad, Noida and Gurgaon Telephones' occurring in the Schedule 'A' of Bharti Cellular's licence and the expression "local area of" appearing in Rule 2(w) of the Indian Telegraph rules seem to be capable of more than one interpretation particularly, when these expressions get compounded by the expressions 'telephone exchanges' and 'telephones'. It needs to be appreciated that when Rule 2(w) was framed the Cellular Service was nowhere in existence in the country and, therefore, it would not be wrong to assume that this rule intended to determine the service for providing basic telephone service. This assumption gets reinforced from the Reply Affidavit of Respondent No. 1 (Petition No.11 of 2002) wherein it has been stated: -

"..... Though, specific comment about the rationale of adding Ghaziabad, Faridabad, Gurgaon and Noida to Delhi Metro license is not available, it appears that these were added at the time to make available the Cellular Service in these important towns in the vicinity of Delhi having a strong community of interest and movement of people on every day basis."

Hence, it would not be unfair to assume that the changed telecom scenario, particularly, after the introduction of cellular mobile telephone service and realities on the ground may have been one of the factors prompting for amending the definition of the term 'local area' as contained in Rule 2(w) of the Indian Telegraph Rules, 1951, and making the same co-terminus with short-distance charging area (SDCA) on 15.8.1998. While the short-distance charging area corresponds to a geographical limit of about 50 Kms radius, the earlier definition under Rule 2(w) prescribed the limit of 5 Kms radius from the main telephone exchange. Taking a purely technical and legalistic interpretation of the definition of local area as contained in Rule 2(w) in the case of cellular mobile telephone service would imply that the petitioners in Petition No.8 of 2002 and Petition No.11 of 2002, would be entitled to provide cellular mobile service only in a radius of 5 Kms from the Gurgaon Main Telephone Exchange leading to an absurd situation and ignoring the principle of contiguity and community of interest. Respondent No.1 has not given a satisfactory explanation as to why the service area of Delhi Metro Circle was described as "Local Area served by Delhi, Ghaziabad, Faridabad, Noida and Gurgaon Telephones" instead of "Local Area of Delhi, Ghaziabad, Faridabad, Noida and Gurgaon Telephones" which would have put the statutory position of Rule 2(w) of Indian Telegraph Rules firmly in place in such licenses. This is particularly so because the Respondent No.1 took particular care to spell out in clear detail the service areas in the tender for basic services by specifying Local Areas as "the area within 5 Kms radial distance from a telephone exchange or such area where the Telecom Authority has declared/declares any area served by an exchange system to be local area for the purpose of telephone connection". There is also no explanation as to why, approximately around the same time, the Respondent No.1 felt compelled to define precisely the local area in respect of basic services and ignore the same in respect of cellular services if Rule 2(w) of Indian Telegraph Rules was equally applicable in both the cases.

Further, to maintain that the various clearances including SACFA, site, etc., given to the Petitioners would have no relevance to the terms and conditions of the licence itself amount to hair-splitting and stretching the logic too far. If these clearances have no

relevance can one argue that these can be given without there being a licence agreement for operating the main service. The Respondent No.1 has also stated in its affidavit that Gurgaon municipal area was served by a single exchange and that there was another telephone exchange at Sector 18 which was outside the Gurgaon municipal limits and hence not a part of the Gurgaon local area. Yet when the petitioner submitted its business plans and operation clearances to operate within what it thought to be its service area and which was clearly beyond the radial distance of 5 Kms from Gurgaon Telephone exchange, the Respondents No.1 & 2 gave clearances without any demur. Such permissions were not obtained through any sleight of hand or by any clandestine manner; the required permissions were granted by the authority statutorily authorized to give such permissions. There is hardly much merit in the argument that WPC and SACFA clearances are merely technical clearances and have no bearing on the service area. Technical clearances are not given in the air and there are specific site clearances which are involved which have to be necessarily correlated to the service area. No WPC or SACFA clearance can be either sought or granted unless one hold a valid licence under Indian Telegraph Act which inter alia contains a defined service area.

All these facts raise a reasonable doubt as to whether the Respondent No.1 was as clear in its perception about the service area of Delhi Metro Circle Cellular Operators as it is averring now. As already stated earlier, the averment of the Respondent No.1 in this respect is somewhat ambivalent. This ambivalence could partly be due to the fact the Respondent No.1 was trying to tailor the concepts and terminologies of an Act of 1885 to developments which have come almost a century later. However, this Tribunal would not like to hazard any guess in this respect.

Having regard to the anomalous position noted hereinabove, the government should reconsider its decision contained in the letter/communication dated 2nd April 2002 read with clarification order dated 28th February 2000 passed by the Union of India. The Government should once again go into the questions raised in this Petition before us and decide the case afresh within period of 3 months from the date of communication of the order. A suggestion that came up in course of hearing of the case should also be considered by the Government, whether all the four operators i.e. Bharti Cellular Limited, Sterling Cellular Limited, Birla AT&T and Escotel Mobile Communications Ltd., should not be allowed to operate in Gurgaon SDCA which is clearly within Haryana. This may resolve the anomaly and encourage fair competition between all the four contestors.

We accordingly set aside the decision contained in the letter/communication dated 2nd April, 2002 read with the clarification order dated 28th February 2000 passed by the Union of India and direct the Union of India, the licensor to re-examine the contentions of all the four Cellular Operators in the light of what has been stated hereinabove within a period 3 months from the date of communication of this order. All the parties must be heard before any decision is taken.

The Petition 8 of 2002 with MA No.24 of 2002 and Petition No.11 of 2002 are finally disposed of as above.

.....Sd/-.....J
 (SUHAS C. SEN)
 CHAIRPERSON
Sd/-.....
 (R.U.S. PRASAD)
 MEMBER
Sd/-.....
 (P.R. DASGUPTA)
 MEMBER

