

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED THE 7TH FEBRUARY, 2002

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PETITION NO.17 OF 2001

Bharti Telenet Limited
.....Petitioner

Versus

Union of India & Anr.
.....Respondents

BEFORE:-

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

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

For the Petitioner
Senior Advocate

Advocate for

Advocate

For the Respondents
Advocate with

Advocate

Mr.C.A.Sundaram,

with Mr.Sumeet Meta,

Mr.Sandeep Sethi,

Mr.Maninder Singh,

Mr.Ankur Talwar,

[Migration Package - Clause (ix) Notional extension of six months of Effective Date - Petitioner having already availed of 7 months extension - held not entitled to additional 6 months extension of Effective Date]

ORDER

This petition by Bharti Telenet Limited is without any merit and
must be dismissed.

Under the National Telecom Policy 1994, bids were invited by the
Government from the private sector to operate Basic Telephony Services

within the various telecom circles created in the country. License had to be obtained from the Government to provide this service. Bharti Telenet Limited (hereinafter described as Bharti) applied for and obtained license to operate the Basic Telephony Services in the State of Madhya Pradesh on 28.2.1997. Under the scheme of the license as it stood at that time, only Department of Telecommunication, apart from Bharti was entitled to operate and offer Basic Services within the State of Madhya Pradesh. Under the Agreement, the license was for a period of 15 years. Total amount payable as license fee by Bharti was Rs.654.50 crores. Licence fee was payable annually. The Agreement provided, " For the purpose of charging the licence fee for the first year, the year shall be reckoned as 12 months beginning with the effective date. Hence payments of licence fee shall be due on the anniversary dates of the effective date."

Therefore the first year's license fee has to be calculated on this basis of the effective date of the licence. Which should be the effective date of the petitioner's licence is the question raised in this case.

Condition 1 of the license as set out in Schedule "B" is "*the licensee shall instal, run Applicable Systems and offer the service so as to meet the targets committed by LICENSEE for the twelve months, within the commissioning period of 12 month from the effective date. Effective date is 28th February, 1997.*"

However, an amendment to the licence agreement of the petitioners was effected by the Government by changing this effective date of licence to 30.9.1997 from 28.2.1997 as it stood originally. This meant that Bharti's liability to pay licence fee for the first year was the period commencing from 30.9.1997 even when it had obtained its licence and was actually working in terms of that licence from 28.2.1997. Bharti, however, is trying to take advantage of the later development by which the effective date of some licence holders was extended by 6 months pursuant to a migration package evolved by the Government of India.

It is not in dispute that Bharti started setting up its "Applicable Systems" immediately after obtaining license on 28.2.1997 and consequently had a headstart over others in respect of commencement of services and roll-out obligations. The deferment of the effective date of licence to 30.9.1997 meant that it was absolved from payment of any licence fee for the period 28.2.1997 to 30.9.1997. But Bharti wants more.

Counsel for the Bharti has drawn our attention to Clause 13(ii) of the License Agreement wherein it has been provided that the licensor reserved the right to modify at any time the terms and conditions of the license covered under schedules A, Band C of the license. But such modification would only be done if in the opinion of the licensor, it was necessary or expedient to do so (i) in the interest of general public as decided by the Government of India or (ii) for the proper conduct of Telegraphs or (iii) on security considerations". It is only in the contingencies mentioned in the letter, modification of the terms and conditions of the licence can be modified by the Government. The Government did not reserve to itself any general power of modification of the terms of the licence. Bharti cannot claim that the licensor should change a condition of the licence for its individual benefit.

As the licensees found it difficult to pay the licence fees in terms of the license agreements a migration package was offered to them by the Government. Licensees were given an option to change over to a

Revenue Sharing Regime instead of the Fixed Fee Regime of the licensees. It was stipulated that:

w(ii).....

The Entry Fee chargeable will be the licence fee dues payable by existing licensees upto 31.7.1999, calculated upon notional extension of effective date as in para (ix) below, as per the conditions of existing license.

... ..

... ..

(ix) For the purpose of calculation of outstanding licence fee upto 31/7/1999 the effective date of all the licences of Cellular Telecom Circles and Basic Telephone Services will be notionally extended by a period of 6 months. This does not apply to metro cellular licences. This is with the further condition that where extension of effective date has been given earlier due to whatever circumstances, further extension will be given after deducting the period of extension already given *subject to the total extension period not exceeding 6 months*. In cases where extension of period of more than 6 months has already been given, there will be no further change.

There is no ambiguity in the wording or the purport of sub-clause (ix). It is first declared that for the purpose of calculation of outstanding licence fee upto 31.7.1999, the effective date of the licensee's will be notionally extended by a period of 6 months. However, where more than six months extension of the effective date has already been given, "due to whatever reasons" further extension of effective date by further a period of 6 months will not be given. In the cases of eligible licensees, the period of extension already given will be deducted from the notional extension of six months given under sub-clause (ix) so that the total extension of period does not exceed 6 months. It has clearly been stated in sub-clause (ix) that "in cases where extension of period of more than 6 months has already been given, there will be no further change". In case of Bharti, extension of effective date from 28.2.1997 to 30.9.1997 has already been given, which means it has enjoyed the benefit of an extended period of 7 months. Sub-clause (ix) does not in any way permit Bharti to enjoy any further extension of 6 months for fixation of its effective date.

As Bharti had already enjoyed an extension of 7 months of the effective date of its licence (From 28.2.1997 to 30.9.1997) the question of any further extension of the effective date of its licence cannot arise. However undeterred by the clear words of Clause 13(ix), Counsel for Bharti has contended that in the light of later developments, the effective date of the license of Bharti should be re-fixed by adding another six months as it was done in the case of some other licence holders. In support of this contention, our attention was drawn to a letter dated 19.2.1997 written by Arvind Chawla, Director (B8-11) on behalf of Department of Telecommunication to Bharti, in which Department of Communication assured Bharti "*whatever changes/amendments are agreed to in the terms and conditions of the licence/interconnect agreements to be signed with other LOI holders, the same shall apply mutatis mutandis to M/s Bharti Telenet Limited also and it will not be put to any arbitrary or unreasonable disadvantage.*" .

Assuming that the letter dated 19.2.1997 written on behalf of the Department of Telecommunication can override the terms of the

migration package evolved by the Government, we fail to see how Bharti can take advantage of this letter. It has also to be borne in mind that Bharti had unconditionally accepted the migration package in writing. The aim of the letter was that Bharti will not be put to any "arbitrary or unreasonable disadvantage". Far from any "arbitrary or unreasonable disadvantage" suffered by it, Bharti has enjoyed enormous advantages over other licence holders. By extension of the effective dates of licence from 28.2.1997 to 30.9.1997, it has enjoyed the benefit of not having to pay any licence fee for that period. The extended period has given it a much longer timeframe to fulfill its obligations relating to commencement of services and roll-out; and it has thereby obtained a headstart on the other licence holders. Moreover, whereas Bharti has enjoyed 7 months of extended period free of any licence fee, the other licence holders can expect to get similar benefit for six months only at the most. We fail to see how Bharti has been put to any "arbitrary or unreasonable disadvantage" by the provisions of sub-clause (ix). If Bharti's contention is accepted, it will have 13 months of free user of the licence period as against 6 months the most by the others. This argument of arbitrary disadvantage advanced on behalf of Bharti has to be rejected straightaway.

The case of the petitioner is that pursuant to the migration package evolved by the Government from fixed license fee regime to revenue sharing regime the respondent calculated outstanding license fee upto 31.7.1999 on the basis of the effective date of license of each licence holder. In the case of the petitioner, the discrimination was that the petitioner was not given the benefit of this extension, which was given to the others. It is conceded that the petitioner has been granted a concession of seven months by an amendment. But the petitioner contends that it has been denied the benefit of the further extension of the effective date of the license, which has been given to other license holders. The waiver contemplated under the migration package and the concession given to the petitioner by an amendment of the license agreement are two different things. In other words, the benefit enjoyed by the petitioner earlier was waiver of licence fee, what is now being given to the licence holder is a concession. This is only a play upon words. In effect the petitioner has already been relieved from the burden of paying licence fee from 28.2.1997 to 30.9.1997, it now wants the relief to be extended by another six months. In other words, the petitioner wants 13 months holiday from the levy of the licence fee as against only six months given to the other licensees. This is not equitable vis-a-vis the other licence holders and clearly contrary to the clear words of sub-clause (ix).

Lastly, in support of its contention, the petitioner has solemnly argued that the Government obtained the opinion of the Attorney General of India, which was in favour of the petitioner. This opinion has been disregarded by the Department of Telecommunication. It has unlawfully demanded payment of entry fee on the basis of calculation of licence fee w.e.f. 30.9.1997. The petitioner is not liable to pay from 30.9.1997 but from 30.4.1999, which should be the effective date after the grant of set off under the Migration Package. The petitioner has also demanded the refund of the license fee already paid by treating the effective date as 30.9.1997.

In the counter affidavit filed on behalf of the respondent, dates of signing of license agreement and other licence holders as well as their effective dates have been set out as under :-

SI.	Name of the	Service Area	Date of	Effective
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No.	Company		signing of licence. Agreement	date of Licence
1	HFCL Infotel Ltd.	Punjab	07.11.97	130.09.97
2	Tata Teleservices Ltd.	Andhra Pradesh	04.11.97	30.09.97
3	Reliance Telecom Ltd.	Gujarat	18.03.97	30.09.97
4	Hughes Telecom(India) Ltd.	Maharashtra	30.09.97	30.09.97
5	Bharti Telenet Ltd.	Madhya Pradesh	28.02.97	30.09.97

It has been pointed out on behalf of the respondent that the Petitioner Bharti Telenet and Reliance Telecom were similarly circumstanced. In their cases, by earlier amendments of the licenses the effective date had been changed to 30.9.1997 (from 18.3.1997 in the case of Reliance and to 28.2.1997 in the case of Bharti Telenet). Both Reliance and Bharti have enjoyed the extended period of effective date from the date of signing of the licence agreements. Further extension of six months has been denied to both; however only Bharti is claiming that its effective date should be calculated by a further extension of 6 months which will confer upon them enormous unlawful and unwarranted benefit. A copy of the opinion given by the Attorney General of India on this issue has been handed over in the court, which is totally contrary to the outrageous contention made by the Counsel for the petitioner. The Attorney General has given his opinion on 31.1.2000. Since so much emphasis was placed on the opinion of the Attorney General, we shall set up the material part of this opinion in the judgement: -

"The substance of the matter is that the effective dates of licences were extended in the case of Bharti and RTPL. What is crucial is the factum of extension and not the reasons therefor. Having secured extension of the effective dates of the licences it is not open to the operators to plead for further extension on the basis of the migration package.

Moreover the notional extension of effective date by six months across the board was expressly conditioned, viz. "that where extension of effective date has been given earlier due to Whatever circumstances. further extension will be given after deducting the period of extension already given subject to the total extension period not exceeding six months. In cases where extension of period of more than six months has already been given, there will be no further change" (emphasis added). The migration package has to be accepted in its entirety. It is not open to Bharti and RTPL to pick and choose from the migration package.

Another factor which should be borne in mind is that Bharti and RTPL signed the licence agreements on 28th February, 1997 and 18th March, 1997 respectively. The effective date of these two licensees was also fixed as 30th September 1997. These two licences, therefore, got a head start of seven months and more than six months respectively over other for rolling out their

network without paying licence fee for the period. I am informed that Bharti, in fact, commissioned the service in June 1998, well before the specified period of twelve months from the effective date.

In my opinion it is necessary to follow the rule of extension of effective date of 'a licence by six months uniformly. Making exceptions and introducing qualifications to the general rule will lead to complications and litigations.

Having regard to the circumstances and in the context of the conditional extension of effective date in the migration package, government's decision not to further extend the effective date cannot be regarded as putting Bharti or RTPL to "any arbitrary or unreasonable disadvantage" in terms of the DoT's letter dated 24th February, 1997 to RTPL. In my opinion Bharti and RTPL are not entitled to further extension of six months in the effective dates of their licences.

We agree and uphold the opinion expressed by the Attorney General of India. The Counsel for the petitioner has very irresponsibly argued that the Attorney General's opinion lends support to his case and the Government, due of malafide reason, has disregarded this opinion.

This sort of misleading representation should not come from the bar. An appropriate order has to be passed to deter anybody from trying to mislead the court by making reckless allegations.

We are of the view that the application is without any merit and is hereby dismissed. In the facts of the case the petitioner must pay costs to the respondents. Costs assessed as ten thousand rupees and must be paid within four weeks' time. The petition is disposed of as above.

.....Sd/-.....J
(SUHAS C.SEN)
CHAIRPERSON

.....Sd/-.....
(R.U.S.PRASAD)
MEMBER

.....Sd/-.....
(P.R.DASGUPTA)
MEMBER