

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

DATED 3rd MARCH, 2004

PETITION No.6 OF 2001

BPL Cellular Ltd
BPL Innovision Centre
No.4, Richmond Road, Bangalore
Petitioner

...

Vs

1. Union of India, through:
Secretary, Department of Telecommunications,
Ministry of Communication,
Sanchar Bhawan, New Delhi
2. Assistant Director General (VAS-1)
Department of Telecommunication,
Ministry of Communications
Sanchar Bhawan,
New Delhi.
3. Aircel Ltd.
Sterling Tower, 237, Anna Salai
Tegnapet, Chennai
...Respondents

BEFORE:

**HON'BLE MR. JUSTICE D.P. WADHWA,
CHAIRPERSON**

For Petitioner	:	Mr. Goolam E. Vahanvati, Senior Advocate with Mr. Manjul Bajpai, Mr. Gopal Jain, Ms. Rameeza Hakim, Ms. Meghna Mishra and Ms. Sujata Singh, Mr. Balakrishnan, Ms. Reetu and Ms. Mrinalini, Advocates
For Respondent Nos. 1&2	:	Mr. R.D. Agrawala, Senior Advocate with Mr. Sameer Agarwal, Advocate
For Respondent No. 3-Aircel Limited		Mr. Jaideep Gupta, Senior Advocate with Mr. Anirudh Das and Mr. Kirat Singh Nagra, Advocates

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Petition u/s 14 (a) of (i)- Petitioner was offered ‘ migration package’ to cellular and basic operators in Tamil Nadu Circle under NTP 99 – Petitioner put in a disadvantaged position vis-à-vis the competitor due to difference in entry fee – Recommendation letter to DOT rejected vide letter dated 22.08.2000 – Held - Petitioner had first mover advantage – Migration was free will of the petitioner and without reservation – petition dismissed with costs.

ORDER

This petition under Section 14(a)(i) of Telecom Regulatory Authority of India Act, 1997(as amended) was filed by the petitioner, a service provider, on or about 15.02.2001.

Petitioner is one of the two cellular mobile service providers in the Tamil Nadu Circle. At the relevant time there were to be two such service providers under the scheme of the Central Government (Union of India) and were to be issued license under Section 4 of the Indian Telegraph Act, 1885. Second operator was M/s. Aircel Ltd. who was subsequently impleaded as third respondent. Originally when the complaint was filed there were two respondents namely the Union of India, through the Secretary, Department of Telecommunications and the Assistant Director General (VAS-I) in the Department of Telecommunications. (Henceforth, both these respondents will be described as DOT). Complaint of the petitioner is that after the ‘migration package’, as hereinafter described, was offered to all the cellular and basic operators of India, level playing field of the petitioner vis-a-vis Aircel Ltd. , the third respondent, has been disturbed, putting the petitioner at a disadvantageous position. Petitioner has, therefore, prayed as follows :

‘The Petitioner, therefore, most humbly prays that this Hon’ble Tribunal may be pleased to :-

- (a) pass an order directing the Respondent to ensuring level playing field conditions to the Petitioner vis-a-vis the other operator i.e. Aircel Limited, in Tamil Nadu Circle by either refunding the excess entry fee paid by the petitioner in comparison to Aircel Limited or by waiving petitioners future license fee obligation until the said difference in the entry fee is evened out.
- (b) Pass an order striking down the letter dated 22nd August, 2000 of the Dot rejecting the Petitioner’s plea for a level playing field in Tamil Nadu Circle.

- (c) Pass such other or further orders as this Hon'ble Tribunal may deem fit and proper in facts of the case.

And for this act of kindness the petitioner, as in duty bound shall ever pray'.

DOT invited tenders on 16.1.1995 from the prospective bidders for providing cellular mobile telephone service in various Telecom Territorial Circles in India including Tamil Nadu Telecom Circle with which we are concerned. Under the policy only two bidders were to be awarded licenses based on the bid process for each service area. It is not necessary for us to refer to various provisions of the Notice Inviting Tender except to note that under the scheme the bidders were to be marked as H1, H2, H3 etc., 'H' standing for highest. H2 bidder was required to match the levy of fees and payment schedule with the highest bidder (H1) to be eligible for grant of license. In case H2 refuses to match the levy of license fee and payment schedule with H1, the offer was to be made to H3, the third highest bidder and so on.

After the bids were evaluated highest bidder was found to be the petitioner who had given a bid for Rs.836 crores (spread over 10 years). Second highest bidder was Hinduja HCL Singtel Communications Pvt. Ltd. (HHSCPL) who had submitted a bid for Rs. 544 crores and the third highest bidder was Aircel Limited who had submitted a bid for Rs.450 crores. After the second highest bidder matched the bid of the petitioner, both were issued Letter of Intent (LOI) for award of license on 11.11.1995. Both were to accept the offer within one month. It was stipulated in the LOI that if it was not accepted within the stipulated period, it would be deemed to have been cancelled unless otherwise extended (emphasis supplied). Petitioner signed the license agreement on 19.12.1995 after fulfilling the conditions of LOI. It paid Rs.76.00 crores being the license fee for the first year and also furnished financial bank guarantee and complied with other terms of the LOI. However, the second bidder i.e. HHSCPL sought time, but in spite extension of time having been granted since it failed to fulfill the conditions of LOI, the offer expired on 30.5.96. Action was taken

against the second highest bidder i.e. HHSCPL for encashment of the bank guarantee which had been submitted along with tender documents and which amounted to Rs.20.00 crores. This led to litigation started by HHSCPL on various grounds against the decision of the DOT to encashment of the bank guarantee. However, ultimately it is stated that the Madras High Court settled the matter in favour of the DOT and the bank guarantee was encashed and proceeds received by DOT. It is the contention of the petitioner that the extension of time under LOI to the second highest bidder namely HHSCPL was against the terms of the Notice Inviting Tender.

In the meantime, the third highest bidder Aircel Limited had been writing to the DOT offering to match the license fee of the petitioner since HHSCPL was unable to meet the conditions of LOI. DOT, therefore gave offer to Aircel as per LOI dated 24.6.97. LOI stipulated that license fee for 10 years would be Rs.836 crores spread over 10 years, first year's license fee being Rs.76.00 crores. Conditions of LOI issued to Aircel Ltd. were the same as that issued to the petitioner. Aircel accepted the terms of the LOI within one month, complied with its requirement and it was issued license on 24.4.98. Aircel made representations on the basis of which effective date of license was finally fixed as 31.12.98. Both the petitioner and Aircel were awarded license which were in terms of the National Telecom Policy-1994 and they started operating in the Tamil Nadu Telecom Circle.

Upto this stage I do not find any document raising objection from the petitioner for issue of license to Aircel on the similar basis as the petitioner. Subsequently, it transpired that defaults were committed by the service providers all over the country i.e. cellular and basic operators, towards payment of license fee dues. It appeared that they had given bid amount which was not quite commensurate with the income that the service would generate. There were mounting arrears and requests were made by the service providers for the relief like moratorium, extension of the period of license, extension of the effective date, reduction in the amount of arrears on the ground of their alleged

precarious financial conditions. They said that owing to their miscalculation of the market size etc. resulted in making unrealistically high bids. This led the Government to come up with a New Telecom Policy-99 (NTP-99), effective from 1.4.99 which had been approved by the Cabinet. There is on record opinion of Attorney General of India dated 16.6.99 and also reasons for conclusion of the opinion. Learned Attorney General noted in his opinion : 'It is undeniable that the telecom industry has become sick and there is an urgent need to revive it and to further its growth in the national interest by initiating measures which would enable the telecom industry, which is vital to the nation, to recover from its sickness'. With the object to revive the telecom industry DOT came up with a 'migration package' offered to all the service providers. The 'migration package' was offered to all the service providers on 22.7.1999 containing various terms and conditions and the service providers were required to give their unconditional acceptance by 31.7.99. The cut off date for change over to NTP-99 regime being 1.8.99. Migration package was offered to both the petitioner and Aircel Ltd. and both gave their acceptance. Since much turns on the interpretation of the 'migration package' it would be appropriate to reproduce the same in full.

'NO.842-153/99-VAS(Vol.V)(Pt.)

Dated 22nd July,

1999

Without Prejudice

To

All Service Operators

Subject:-Proposed Package for Migration of existing Licensees of Cellular (Metros and Telecom Circles) and Basic Telecom Services to New Telecom Policy-1999 regime.

Reference: Licence Agreement No. ... dated for ...
Telephone Service

In accordance with Government approval, the following Package is proposed for migration of the existing Cellular (Metros and Telecom Circles) and Basic Telecom Service Operators to NTP-99 regime:

(i) The cut off date for change over to NTP-99 will be 1.8.99.

(ii) The licensee will be required to pay one time Entry Fee and License Fee as a percentage share of gross revenue under the licence. The Entry Fee chargeable will be the licence fee dues payable by existing licensees upto 31.07.1999, calculated upto this date duly adjusted consequent upon notional extension of effective date as in para (ix) below, as per the Conditions of existing licence.

(iii) The Licence fee as a percentage of gross revenue under the licence shall be payable w.e.f. 1.8.99. The Government will take a final decision about the quantum of the revenue share to be charged as licence fee after obtaining recommendations of the Telecom Regulatory Authority of India (TRAI). In the meanwhile, Government have decided to fix 15% of the gross revenue of the Licensee as provisional license fee. The gross revenue for this purpose would be the total revenue of the Licensee company excluding the PSTN related call charges paid to DOT/MTNL and service tax collected by the licensee on behalf of the Government from their subscribers. On receipt of TRAI's recommendation and Government's final decision, final adjustment of provisional dues will be effected depending upon the percentage of revenue share and the definition of revenue for this purpose as may be finally decided.

(iv) A total of at least 35% of outstanding dues including interest payable as on 31.7.1999 and LD Charges in full will have to be paid on or before 15.8.1999. The amount paid, if any, against the earlier demand sent under letter dated 25.1.99 for paying 20% or more of the outstanding dues, may be adjusted at licensee's option. The balance dues will have to be paid on or before 31.1.2000 alongwith interest calculated upto the actual date of payment.

(v) Even where the existing bank guarantees (FBG), have been encashed earlier, these will need to be kept alive/recouped simultaneously with the acceptance of this package. The value of the financial bank guarantee(s) will have to be further enhanced within a period of four months i.e. by 30.11.1999 so as to cover the outstanding amounts due including further sums which may become due.

(vi) If either of the cellular operator in a given service area does not accept the package, both the existing operators will continue in the existing licensing arrangement until the validity of the present licences.

(vii) Consequent upon migration to the NTP-99, the licensees will forego the right of operating in the regime of limited number of operators as per the existing licence agreement and would operator in a multipoly licensing regime i.e. additional licenses without any limit may be issued in a given Service Area.

(viii) There shall be a lock-in- of the present share-holding for a period of five years counted from the date of licence agreement (effective date). Transfer of share holding directly or indirectly though subsidiary or holding companies shall not be permitted during this period. However, issue of additional equity share capital by the licensee companies/their holding companies by way of private placement/public issues shall be permitted. Further, the lock-in provisions shall not be applicable in case

the shares are transferred pursuant to enforcement of pledge by the lending financial institutions/banks due to events of defaults committed by the borrowers with the condition that such shares should have been pledged for investment only in the particular licensed project.

(ix) For the purpose of calculation of outstanding licence fee upto 31.7.1999, the effective date of all the licenses of Cellular Telecom Circles and Basic Telephone Services will be notionally extended by a period of six 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 six months. In cases where extension of period of more than six months has already been given, there will be no further change.

(x) The liquidated damages as per the existing licence agreement shall be paid latest by 15.8.99.

(xi) The period of licence shall be 20 years starting from the effective date of the existing licence agreement.

2. Migration to the NTP-99 on the conditions mentioned above will be permitted on the premise that the aforesaid conditions are accepted as a package in its entirety and simultaneously all legal proceedings in Courts, Tribunals, Authority or in Arbitration instituted by the licensee and Associations of Cellular and Basic Service Operators (COAI & ABTO) against DoT or UOI shall be withdrawn. Further any dispute with regard to the license agreement for the period upto 31.7.1999 shall not be raised at any future date. The acceptance of this package will be deemed as a full and final settlement of all existing disputes whatsoever irrespective of whether they are related with the present package or not.

3. After the terms and conditions of the package are accepted, amendments to the existing licence agreement will be signed between the licensor and the licensee.

An undertaking in the enclosed proforma by an authorized signatory of acceptance of the package by the licensee should reach DOT within a week's time and in any case not later than 29.7.1999 (Forenoon). In case no response is received within the stipulated period, it will be presumed that licensee does not propose to migrate to the new regime, and the licensee will continue to operate under the terms and conditions of the existing licence.'

It would be seen that as from 1.8.99 it was the revenue sharing regime and while entry fee paid by the petitioner entering the migration package was Rs.238.56 crores and that by the Aircel Ltd. it was 44.35 crores. Now the grievance of the petitioner starts. Petitioner says level playing field has been

disturbed because of differential in the entry fee and the differential being 194.21 crores. Petitioner says that it made various representations to the DOT which were not properly considered and its representation was finally rejected by letter dated 22nd August, 2000. This letter of rejection reads as under :

'No. 842-316/2000-VAS

2000

Dated: August 22,

To

M/s. BPL Cellular Limited
BPL Telecom Centre,
No.54, Richmond Road, Bangalore- 560 025

Subject: Migration of M/s. BPL Cellular Limited to revenue sharing regime of NTP-99 in Tamil Nadu Circle- License Fee payable up to the cut-off date of Migration and representation thereof.

Dear Sirs,

Please refer to your letters dated 20.07.2000, 8.7.2000, 21.6.2000 and other correspondence on the subject.

1. The undersigned is directed to convey that your representation regarding cost disadvantage to your company vis-à-vis the second operator in Tamil Nadu Circle namely, M/s. Aircell Limited on account of various factors like license fee up to the cut-off date of migration, lease line charges excess operating cost/investment and down trends/fall of equipment prices in the recent years, etc. is examined. It is to intimate that the relief prayed for on the above counts has been found untenable both on merits and applicable procedure. Therefore, your request for relief is hereby rejected.

2. As you were offered a package of migration to revenue sharing regime of New Telecom Policy-1999 under letter dated 22.7.1999, which was accepted unequivocally by you, with the condition that any dispute with regard to the license agreement for the period ending up to 31.7.1999 shall not be raised at any future date and that the acceptance of the Package will be deemed as full and final settlement of all existing disputes whatsoever irrespective of whether they are related with the package or not. You may, therefore, appreciate that your representation on the license fee paid for the period up to cut-off date of Migration, an issue already settled and covered under the migration package is not proper.

Yours faithfully

Sd/-

(R.S.Goel)

Asst. Director General (VAS-II)'

Mr. Vahanvati learned senior counsel for the petitioner said the defense raised by the DOT in the present case is basically two-fold, (i) the petitioner accepted the migration package and once having accepted the same it is not entitled to raise any dispute and therefore, any grievance raised cannot be gone into, and (ii) how can petitioner complain when it had monopoly in the circle for three years or alternatively the petitioner had the first mover advantage and on that account no grievance, if any, of the petitioner could be considered. Mr. Vahanvati said under the terms of the Notice Inviting Tender both the bidders were to commence service simultaneously and it was not legal on the part of the DOT to go on giving extension to HHSCPL, the second highest bidder till its bid came to be rejected and the Aircel Limited, the third highest bidder, came into place. On the request of the petitioner, DOT brought on record various letters written by HHSCPL seeking extension of time on various grounds after receipt of the LOI. These letters are right upto 24.2.97. After letter dated 13.12.96 when HHSCPL wanted further extension till 28.2.97 in order to have a joint venture agreement with another partner, the last letter is dated 24.2.97 wherein HHSCPL mentioned that for reasons stated in the letter it wanted to withdraw its bid and also said that the bid bank guarantee of Rs.20.00 crores be not invoked and no penalty be levied. As we have seen above, the bank guarantee was invoked by DOT and the amount of Rs.20.00 crores since received. There are also letters of Aircel Ltd. on record which were written to DOT, the first letter being of 5.1.96. In this letter Aircel wrote that it understood from the newspaper reports that DOT was considering the proposal of HHSCPL for change of partner which Aircel objected and said that any change of partner at that stage was violative of tender conditions and that any change in the tender conditions would be detrimental to the interest of Aircel which was the third highest bidder. Since there was no reply to this letter, Aircel wrote another letter dated 12.2.96 wherein it mentioned that since HHSCPL did not pay the license fee the offer may be given to it, it being the third highest bidder. Again DOT did not respond. On 31.5.96 Aircel wrote

another letter objecting to the grant of extension to HHSCPL and said that it was prepared to match royalty offered by BPL Cellular Ltd., the highest bidder and wanted that LOI be issued to it. There are further two letters dated 10.6.96 and 22.7.96 of Aircel somewhat on the same terms and earnestly requesting DOT to issue LOI. Petitioner also now objects to the grant of any extension to HHSCPL, the second highest bidder, but I find no document on record that it ever objected to the grant of any extension to HHSCPL, rather it was Aircel who was doing that. It cannot be said that the petitioner was unaware of the grant of extension to HHSCPL and ultimately DOT did revoke LOI and invoked bank guarantee of Rs.20.00 crores given by HHSCPL. The matter even went to the Madras High Court for the DOT to assert its right. It cannot be said that there was any ulterior motive of the DOT in granting extension to HHSCPL. It could certainly grant extension in terms of the LOI and which it did for certain period. DOT acted within its right and no motive could be attached to the action of DOT. When petitioner knew that extension was being granted and the entry of second operator was being delayed, it would rather feel happy to be the sole operator in Tamil Nadu Circle. Petitioner cannot now turn back and say that extensions were wrongly granted. This plea of the petitioner has to be rejected.

When LOI was granted to Aircel by letter dated 24.2.97 which was on the same terms as that of the petitioner and Aircel became the second operator in Tamil Nadu Circle, no objection of any kind was raised by the petitioner, in fact it had none, as payment of license fee was also Rs.836.00 crores spread over for a period of 10 years from the date of agreement. The objection that any extension was granted to Aircel, the third highest bidder as now being raised by the petitioner is clearly thought of only now. For almost three years petitioner was the sole operator and was having a monopoly in Tamil Nadu Circle. It had certainly first mover advantage. To counter this, petitioner has brought on record a report of M/s. Booz-Allen & Hamilton (for short Booz-Allen) :

Booz-Allen stated to be independent consultants were commissioned by the petitioner to study the effect of Migration Package on the

late entry of 3rd Respondent, Aircel Limited. A copy of this report dated 26.10.1999 was filed with the petition which showed that Aircel Limited had a financial advantage of about Rs.350 crores over the petitioner. In their reply filed by the respondents to the averments made by the petitioner in respect of filing of the report of the aforesaid consultants, it has been submitted that the report conducted by Booz-Allen at the instance of the petitioner was admittedly based on such facts and premises provided by the petitioner and therefore, it was not an independent analysis acceptable as evidence in support of the case of the petitioner. It is, therefore, contended that contents of the report were subject to strict proof and to be admitted only if it was proved in accordance with law. Further, it is stated that the report had no relevance. Thereafter on 18.05.2001, petitioner filed an application (M.A. No.19 of 2001) seeking permission to file additional documents which was a further report of the aforesaid experts sent to the petitioner with its covering letter dated March 16/May 04, 2001. This application was allowed by order dated 22.08.2001 and permission to file the report of experts titled "Final Memorandum" was allowed. As a matter of fact in a reply to this application also it was again stated that report of Booz-Allen was not an independent analysis acceptable as evidence. In view of the objections raised by the respondents as to the admissibility of the report, the petitioner filed another application it being M.A. No.20 of 2001. In this application, it was stated that the respondents had raised an objection as to the report of Booz-Allen that the report did not contain an independent analysis acceptable as evidence and the Tribunal may itself call any independent body like TRAI to conduct an economic impact study of the financial disparities between the two operators in Tamil Nadu Circle and to submit its study/analysis for the assistance of the Tribunal in considering the issues raised before the Tribunal in the petition.

In the order dated 28.03.2002 of the Tribunal, it has been recorded that arguments were heard in the main petition as well as M.A.No.20 of 2002 in part. On this date petitioner sought time to file an affidavit to bring on record additional documents. Petitioner was given time to file such an affidavit by 12.04.2002.

There is on record in index dated 29.04.2002 of the petitioner filing three affidavits. One of Mr.D.V.Sehgal, attorney holder of the petitioner seeking to bring on record affidavits dated 15.04.2002 and 16.04.2002 of Booz-Allen and also the signed copy of letter dated 26.10.1999 of Booz-Allen. The second affidavit is of one Mr.Atul Singh claiming to be the associate of Booz-Allen and the third of Mr.John Adam claiming to be the senior associate of Booz-Allen. With the affidavit of Mr.Atul Singh a revised presentation dated May 2002, prepared by Booz-Allen has been filed. Affidavit of Mr.John Adam refers to the report dated May 16/May 04, 2001. These affidavits testify to the steps taken to prepare the reports and their correctness. None of these three affidavits state the qualification of Booz-Allen as to how Booz-Allen justifies to be an expert for preparing the report. Mr.Agarwala, learned counsel for the 1st respondent submitted that Booz-Allen does not qualify to be an expert under Section 45 of the Evidence Act which is as follows:-

45. Opinions of experts. – When the Court has to form an opinion upon a point of foreign law or of science or art, or as identity of handwriting [or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, [or in questions as to identity of handwriting] [or finger impressions] are relevant facts.

Such persons are called experts.

Certainly, under Section 45, the report of Booz-Allen is not relevant as the Tribunal is not concerned to form opinion upon a point of foreign law or science or art, or as identity of handwriting or finger impressions. Certainly in judicial proceedings a professional can give his report like a Building Engineer as to the nature of construction, Chartered Accountant as to the correctness of the accounts etc. but that report can be admissible only if the professional gives his qualifications, his experience and is also subjected for cross-examination if his report is challenged. In the present case, affidavits have been filed by the petitioner without there being any specific order of the Tribunal and on the face of the affidavits themselves the qualifications and expertise of the persons giving the report have not been mentioned. For that matter, Tribunal does not know the

qualification of Booz-Allen and its expertise in the field on which reports have been given. When doubts were raised as to the relevancy and admissibility of reports of Booz-Allen, the petitioner itself filed an application (MA No.20 of 2002) seeking appointment of an independent expert like TRAI. That application was opposed and a statement made by the petitioner in MA No.20 of 2002 was dismissed as withdrawn. Since the reports of Booz-Allen could not have been proved, these cannot be considered in evidence. In this view of the matter it is not necessary to go into further submissions of Mr.Agarwala as to the value of the report of Booz-Allen.

The report of Booz-Allen being out of record, there is nothing on the record to contradict the stand of DOT and tht of Aircel, the third respondent that the petitioner had first mover advantage and also being the sole operator of mobile service in Tamil Nadu Circle for almost three years. It is difficult to accept the contention of the petitioner that it had no such advantage when it particularly claims to be an efficient service provider. It is quite reasonable to assume that the petitioner had great advantage when it had monopoly in the Tamil Nadu Telecom Circle and being the first mover. It is only after NTP-99 was announced and there was proposal of migration of all cellular and basic operators to migration under NTP-99 and DOT was in the process of finalising the terms of migration. It was brought to the notice of the DOT by the petitioner that the two operators in the Tamil Nadu Circle had varying effective dates which would imply that in entry fee from cut-off date of 31.7.99 there would be substantial difference between the two operators. Petitioner pointed out by its letter dated 12.7.99 that entry fee had a significant impact on the project cost and the peak funding required of the operation and that would mean that fix cost element would vary substantially between the two operators. It was pointed out that the entry fee that Aircel would be required to pay was Rs.44.14 crores (equal to the dues till 31.7.99) and that by the petitioner Rs.238.41 crores which would put Aircel on much advantageous position. It was lastly pointed out that the petitioner had to invest additional corpus of about Rs.60 corres towards

microwave backbone which was necessitated by the then prevailing high cost of leased line existing at the relevant time and thus resulting in difference of project cost of Rs.353.30 cores and all this would give advantage to the Aircel to offer low cost structure. However, as noted above, migration package was offered uniformly to all the cellular mobile and basic telephone operators. Now it was entry fee to start service and license fee by way of share in revenue of the service provider. Entry fee to offer telephone service was now the license fee already payable upto 31.7.99 and thereafter it was revenue sharing regime where instead of paying any further license fee in terms of the tender the operator was to share part of the revenue realised, with the DOT. That in short was the effect of the migration package which was subject to strict terms and conditions to be accepted by the operators. It was voluntary for the operator to accept the migration package or remain to operate as per the existing terms of the licence. The migration package certainly placed Aircel at an advantageous position. But then there was no coercion on the part of the DOT on the petitioner to accept the migration package. In fact, as noted above, as the letter dated 12.7.99 of the petitioner to the DOT would show it was well aware of the consequences of entering into migration package. Petitioner says that in the Consultation Papers issued by Telecom Regulatory Authority of India (Consultation Paper Number 99/6 dated 14th December, 1999) on issues relating to Cellular Mobile Service” raised itself a question for public debate: “How is the issue of different amounts due till 31.7.1999 from CMSP’s (Cellular Mobile Service Provider) in the same circle to be addressed?” In the recommendations dated 31.8.200 TRAI recommended nominal amount of entry fee for new fixed service providers and was of the view then when contrasted with the existing fixed operators who had paid comparatively high entry fee the situation had to be remedied as it was not conducive to proper and fair competition. TRAI recommended that in all fairness the existing fixed operators should be provided level playing field and opportunities for fair competition vis-à-vis the new entrants. TRAI, therefore, recommended waiver of four years license fee for the

existing fixed service providers. DOT, however, was not agreeable and send the recommendations of the TRAI back to it for reconsideration. TRAI reaffirmed its recommendations made earlier. It may be relevant to reproduce the views of DOT on the recommendations of TRAI when it sent to TRAI to reconsider its recommendations :

'Waiving of license fee for a limited period of 4 years in respect of existing licensees.

DoT Comments

- (i) Migration package offered to Basic Service Operators envisage multipoly regime without any protection. The time limit of five years for duopoly regime in service areas where license was already issued was provided in NTP-99 but the migration package did not provide for the same. All the Basic Service Operators have accepted the migration package unconditionally without any deviation or reservation. Neither NTP-99 nor the migration package envisages such favour.

In view of commitments in the court of law and Parliament at the time of offering of the migration package as well as in view of acceptance by the operators of the migration package, it will not be possible to justify and stand the scrutiny of the Court for waiving the license fee for any period for existing licensees.

Keeping in view of the above, the Government has not accepted the recommendation for waiving of license fee for existing private basic service operators. TRAI is, therefore, requested to reconsider the above recommendation.

Response of the TRAI for reconsideration was as under:

TRAI Response

The main consideration behind this recommendation is the significant difference in the amount of the entry fee paid by the existing six basic operators and those who will be entering the field following the fresh recommendations. While it is true that the operators who have been allowed to migrate to the new regime paid the high entry fees in fulfillment of their commitments, it has also to be kept in view that once they have been allowed to migrate, the conditions under which they compete with the new entrants are not so adverse that leave no room for equal competition. Precisely speaking an anti-competitive situation should not be allowed to arise.

In this context it is also noteworthy that even the adjustment proposed, i.e. waiver of license fee for 4 years, reduces the gap and mitigates the imbalance only partially and the pre—NTP-99 licensees continue to suffer the high cost burden resulting form the higher entry license fee paid by them. The Authority is, therefore, of the view that working with

too big an economic disadvantage, these service providers may find it very difficult to make additional investments required in future and could fail to do so. It is also quite likely that the quality of their services will be affected adversely for want of the required investments. In view of these factors, the Authority is convinced that some measures are necessary to reduce the difference between the cost of running networks owned by the pre-NTP-99 service providers and those that are owned by those coming in future under the revised terms permissible subsequent to NTP-99. As such TRAI reiterates its earlier recommendations in this regard.'

It may, however, be noted that the recommendation of TRAI was with respect to fixed service providers and were with reference to pre-NTP entrants and post NTP-entrants. In the present case both the CMSPs i.e. the petitioner and the Aircel were pre-NTP entrants. DOT, however, stuck to its earlier stand that no change was required in view of the acceptance by the operators of the migration package.

Mr. Vahanvati said that the migration package did not debar the petitioner from raising the present dispute which he said was outside the migration package. With reference to migration package he said para (2) thereof debarred the operator from raising "any existing dispute" or "reviving pending proceedings" or "dispute pertaining to license agreement". His further submission was that the very migration package was to be decided after consultation with TRAI and that when TRAI itself raised the issue but DOT refused to go into the question which was in breach of the migration package itself. In this connection, Mr. Vahanvati referred to para (2) and 1 (iii) of the migration package. A bare reading of para (2) would show that it was subject to acceptance of all the terms and conditions of the migration package and it clearly barred any dispute with regard to the license agreement for a period upto 31.7.1999, whether it was existing dispute or that may arise in future. Acceptance of the migration package was deemed to be as full and final settlement of all existing disputes whatsoever irrespective of whether they are related to the present package or not. I do not think there could be any doubt that the dispute now being raised in the present petition was covered under the migration package. Petitioner itself says that it had raised the dispute by its letter

dated 12.7.99 to DOT which was prior to offer of migration package by DOT. Moreover, as I have mentioned above, after the migration package it was entry fee to provide service and license fee was by way of percentage of the revenue earned by the service provider. Under para (1)(iii) what was left to be the final decision, was the quantum of revenue sharing which was to be decided after consultation with TRAI. For the time being, the Government had decided to fix 15% of the gross revenue of the licensee as provisional license fee. This para (1)(iii) has nothing to do with the entry fee and the sharing of gross revenue was to be uniformly applied to all service providers after consultation with TRAI and it could not be said that it could be different to each service provider. That reading would put the migration package at naught. Mr. Vahanvati then said that two differential effective dates for the petitioner and the Aircel were caused by reason of DOT's failure to give effect to the terms of the tender. He said it was obligatory on the party of the Government to ensure that both operators execute the agreement simultaneously. In the present case different effective dates have caused this dispute because of inaction of the Government and that has resulted in discrimination when under the migration package entry fee recovered is on the basis of dues of the license fee already paid. He said this distortion was only in the Tamil Nadu Circle. This has been disputed and it has been shown that the present case does not stand alone and there are other circles also where similar question could arise. No fault can be laid at the doorsteps of DOT when Aircel was an entrant at a latter date. Petitioner did not raise any dispute for the late entry of Aircel and it is the case of the petitioner that dispute arose only in terms of the migration package which gave undue advantage to Aircel over the petitioner. In this connection, reference was made to letter dated 2.11.2000 written by DOT to TRAI wherein it was pointed out that the existing licensees of basic and cellular operators were given a package for migration to revenue sharing regime under NTP-99 and the cut-off date of migration was fixed as 1.8.1999 and further that in terms of the package, the operators were to pay license fee upto 31.7.1999 in terms of the existing licenses. It was also pointed

out that license fee paid by the petitioner was Rs.238.56 crores (effective date 12.12.95) and that paid by Aircel was Rs.44.35 crores (effective date 31.12.98) and that the difference in license fee was due to late entry of Aircel. DOT then pointed out that in this letter that the petitioner, "have now expressed their concern that due to the huge difference in the entry fee for pre-migration period, the level playing field has been disturbed; perhaps they had also made a representation directly to TRAI on this issue. There is an apprehension that M/s. Aircel may indulge in predatory pricing or under-cutting etc. in Tamilnadu circle". It was then pointed out that while any issue relating to migration package and pre-migration period could not be reconsidered, the question/possibility of predatory tariff, if any, may be considered by TRAI. It is difficult to understand what advantage is being drawn by the petitioner by referring to this letter.

Both Mr. Agrawala, senior counsel for DOT and Mr. Jaideep Gupta, senior counsel for Aircel have referred to para 1(vi) of the migration package which is as under:

(vi) "If either of the cellular operator in a given service area does not accept the package, both the existing operators will continue in the existing licensing arrangement until the validity of the present licences".

As noted above, the acceptance of the migration package was voluntary act on the part of the service providers. There was no compulsion or coercion. Before even the migration package was finalized and offered to service providers petitioner knew if it was to suffer any disadvantage on account of late entry of Aircel after the migration package is accepted by both of them. Petitioner is now talking of level playing field. If the migration package had not been offered he has no grievance and level playing field was same for both to the petitioner and Aircel. Petitioner's complaint is that migration package had disturbed the level playing field. Petitioner could very well have refused to accept the migration package and in that event in view of para 1(vi) Aircel also could not have been offered the migration package and both would have continued to operate in Tamil Nadu Circle on the existing licensing arrangement. It is the petitioner who had itself changed the position for Aircel and now it cannot

complain, if there is any disturbance in the level playing field. After having advantage of the migration package, petitioner now cannot turn around and complain of disturbance of level playing field and seek any relief from the DOT.

In all fairness to Mr. Vahanvati, said that the petitioner has no complaint against HHSCPL and Aircel.

Mr. Vahanvati strenuously argued that keeping in view the terms and conditions of the license DOT did not take any steps to set right the level playing field which had been disturbed in Tamil Nadu Circle on account of migration package. But then those terms of license lose significance when the parties accept new terms under the migration package which terms would now get incorporated in the license. It is not that the petitioner has not taken advantage when it accepted the migration package. In fact on petitioner migrating to the migration regime, Aircel also did so. By its conduct petitioner made Aircel to change its position. The issue which is being now raised by the petitioner was very much there before even the migration package was offered to the service providers. There was no compulsion on the part of the petitioner to accept the migration package. Had the petitioner not accepted the migration package, Aircel also could not have done so and there would have been no grievance of the petitioner. Grievance of the petitioner now is self made. Petitioner was well aware of the dispute that was likely to arise on its acceptance of the migration package which dispute was therefore a pre-existing dispute. Petitioner is now estopped from raising any such dispute. Petitioner cannot turn around after taking advantage of the migration package under which petitioner was not then required to pay the license fee in terms of the license and was rather to share the revenue earned by way of the license fee. I have been referred to certain judgments by Mr. Vahanvati to submit that when DOT is contending waiver of the right by the petitioner, DOT has to show that petitioner was conscious of its right and was fully informed of the result of the settlement. As we find acceptance of the migration was informed and conscious decision of the petitioner fully knowing its consequences vis-a-vis Aircel with regard to the

disturbance of the level playing field now being alleged. I do not think it necessary to refer any those judgments as they do not lay any law which can be applied to the facts of the present case.

By separate order I had rejected the contention of the DOT raising plea of privilege in respect of certain documents. I could have raised a presumption against DOT for withholding those documents, but I do not find it is a case where there need to be raised any such presumption inasmuch as contention raised before me could not be different than those raised by the petitioner to DOT in its representations. Claim made by the petitioner has been rejected by the DOT on 22nd August, 2000 as mentioned above and which rejection to my mind is quite explicit and valid. Petitioner has been unable to show if it did not enjoy the first mover advantage as it was exclusive operator in Tamil Nadu Circle for three years and secondly migration package was accepted by the petitioner without any reservation which was certainly advantageous to the petitioner otherwise petitioner was not bound to accept the same.

After considering the whole aspect of the matter, I find no merit in this petition and it is dismissed with cost. Counsel fee Rs.10,000/- each for DOT and Aircel.

.....J

WADHWA)

(D.P.

Chairperson