

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL****NEW DELHI****PETITION No.6 OF 2003****DATED 11<sup>th</sup> FEBRUARY, 2005**

Aircel Digilink India Limited

... Petitioner

Versus

Union of India &amp; Another

... Respondents

**BEFORE:****HON'BLE MR. JUSTICE D.P. WADHWA,****CHAIRPERSON****LT.GEN.D.P.SEHGAL(RETD.),MEMBER**

Petitioner through : Mr.C.S.Vaidyanathan,Senior Advocate with Mr. Manjul Bajpai,  
Ms.Jayne Kuriakose and Ms.Neyha, Advocates

Respondents through : Mr.Rakesh Gosain for Mr. Rajeeve Mehra, Advocate with  
Mr.M.K.Khatri,A.D.(VAS-III), DoT

[Migration Package – CMTS U.P.(East) Circle – notice inviting tender – Net Present Value(NPV) – concept of – petitioner becomes second highest bidder – both H1 and H2 granted licence – dispute – can petitioner fall back on its original bid – acceptance of Migration Package voluntarily and taken advantage of – petitioner bound by the terms of Migration Package – petition dismissed]

**ORDER**

The petitioner, M/s. Aircel Digilink India Limited (ADIL), is a registered company under the Companies Act, 1956 and was granted licence dated 28<sup>th</sup> December 1995 under the second proviso to Section 4 of Indian Telegraph Act, 1885, to establish, maintain and operate cellular mobile telephone service in Uttar Pradesh (East) Circle Service area.

The petitioner has filed this petition challenging *inter-alia* the unjust and inequitable treatment meted out to the petitioner by the Department of Telecommunication (DoT), Government of India, in as much as while the other cellular operators have been charged only 30% of their total 10 year cellular levy as entry fee upon migration to National Telecom Policy-99 (NTP 99), the petitioner has been charged about 85% of its 10 year levy as entry fee, which he alleges as unfair, unjust, unreasonable, arbitrary, illegal and violative of the petitioner's rights under Article 14 and 19 (1) (g) of the Constitution of India.

The petitioner principally seeks directions from this Tribunal to:-

- (a) "direct the Respondents to re-compute the Licence Fee amount payable under Clause (iv) of the Migration Package dated 17.04.2000", and further to
- (b) direct the Respondents to refund to the Petitioner the said amount of Rs. 73.22 crore together with interest thereon at the rate of SBI PLR + 5% (compounded monthly) computed from the date of payment of the said excess amount by the Petitioner till the date of refund by the Respondents".
- (d) pass such other or further orders as this Hon'ble Tribunal may deem fit and proper in facts of the case.

In response to the notice inviting tender dated 16<sup>th</sup> January 1995 for establishing, maintaining and operating cellular mobile service in territorial circle of Uttar Pradesh (East), the petitioner had quoted a licence fee amount of Rs. 234.20 crore to be paid over a period of 10 years. Another bidder i.e. M/s. Koshika Telecom Limited (KTL) had quoted an amount of Rs. 210.89 crore to be paid in 4 years. The Department of Telecom had stated in the Tender Document that normal payment schedule will be arrived at by dividing the cellular levy for the period of licence in the following proportion:-

<u>Year</u>	<u>Proportion</u>
1 <sup>st</sup> Year	1
2 <sup>nd</sup> Year	1
3 <sup>rd</sup> Year	1
4 <sup>th</sup> Year	1
5 <sup>th</sup> Year	1
6 <sup>th</sup> Year	1.2
7 <sup>th</sup> Year	1.2
8 <sup>th</sup> Year	1.2
9 <sup>th</sup> Year	1.2
10 <sup>th</sup> Year	1.2

The evaluation for the bidding was to be arrived at by discounting the quoted cellular levy at a rate of 16% per annum with respect to the quoted payment schedule. The Net Present Value (NPV) offered for the whole period was to be arrived at by equalizing the amount at the commencement of the licence period and then compared. Accordingly, the NPV of KTL was Rs. 156.00 crore whereas that of ADIL it worked out to Rs. 127.06 crore. Though the total amount quoted by the petitioner was higher than KTL but based on NPV, KTL became H1 bidder and ADIL became H2 bidder.

Since there were two operators in the Circle, the licence to KTL was being given based on their status as H1 bidder. The petitioner was asked to match the payment schedule with that of H1 bidder to get the second licence, which was to be done both in terms of NPV and payment schedule. The NPV of KTL came to Rs. 156 crore though the total amount to be paid in first four years was Rs. 210.88 crore. The petitioner could have opted for payment of Rs. 287.55 crore as per the tender document spread over a period of 10 years - Rs. 26.14 crore for the first five years and Rs. 31.37 crore in the next five years. The petitioner agreed to the payment plan like that of KTL for making payment during the first four years as shown under:-

<u>Terms</u>	<u>Period</u>	<u>Payable as per agreement</u>
1 <sup>st</sup> Year	12.12.95 – 11.12.96	21.1
2 <sup>nd</sup> Year	12.12.96 – 11.12.97	21.1
3 <sup>rd</sup> Year	12.12.97 – 11.12.98	84.4
4 <sup>th</sup> Year	12.12.98 – 11.12.99	84.4
5 <sup>th</sup> – 10 <sup>th</sup> Year	12.12.99 – 11.12.05	-
	<b>Total</b>	<b>210.9</b>
	<b>NPV</b>	<b>156</b>

Based on the acceptance of the above terms of payment the petitioner was issued licence for UP (E) Circle on 28<sup>th</sup> December 1995. Clause 19.1 of the Licence Fee Agreement states that licence fee will be paid by the petitioner in 4 years as under, which amounted to a total of Rs. 210.8863 crore.

<u>Year</u>	<u>Licence Fee (in Rs. Crore)</u>
1	21.0886
2	21.0886

3	84.3546
4	84.3545
5	Nil
6	Nil
7	Nil
8	Nil
9	Nil
10	Nil

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**Total** **210.8863**

The petitioner contended that the licence fee applicable to them was for 4 years whereas for operators in other Circles it was for 10 years which according to him is discriminatory. This case was deliberated upon during the discussion where the Learned Counsel for the Government refuted the allegation and said that there was no discrimination since in this particular Circle there were only two operators and same terms were applied to both. We are of the opinion that respondent is correct in its submission that each Circle has to be treated separately and as long as the same licence fee and payment plan and norms for working out the same are applied by the licensor to all the operators in the Circle the case of discrimination does not arise. The petitioner willingly accepted the terms of payment in 4 years amounting to a total NPV of Rs. 156 crore as was for the other bidder. Therefore, the point raised under Article 14 of the Constitution of India does not stand the scrutiny of law.

The petitioner stated that he had bid the licence fee to be paid spread over in 10 years whereas he was made to match the payment schedule of the H1 bidder i.e. KTL. He stated that in the payment plan of 10 years he would have paid much less since subsequently the Migration Package was offered by the government

Learned Counsel for the DoT brought to our notice that Clause 8.2 of the tender document provided that short listed bidders would be ranked as H1 and H2 and on the basis of the evaluation would be asked to match the highest levy of the Circle. Clause 12.7 of the tender states that highest levy would be the levy and schedule of payment quoted by the H1 bidder. We, therefore, feel that the petitioner had no choice but to match the payment schedule of H1 in order to get the licence which he subsequently agreed voluntarily and therefore got the licence for the operation of cellular network.

Since initially the Cellular Service Providers were not doing well and the services did not take off at the desired pace, the Government in accordance with the NTP 99 offered a Migration Package to Revenue Share Regime. Clause 2 of the said Migration Package provides, inter-alia, that the licencees will be required to pay one-time entry fee and the licence fee as a percentage of share of gross revenue and further that the entry fee chargeable will be the licence fee dues payable by the licencees up to 31-07-1999. Thus under the said Migration Package the

Government decided to treat the licence fee dues up to 31-07-1999 i.e. about 30% of the total cellular levy as the entry fee and no further licence fee on fixed licence fee basis was payable after Migration.

On the point of migration, it was stated by the Learned Counsel for DoT that packages were offered to KTL and the petitioner on 22.7.1999. The petitioner gave an unconditional acceptance to the Migration Package so offered and never raised any point even about normalization unlike KTL who gave conditional acceptance. The petitioner was well aware of the terms of the Migration Package and he was under no compulsion to accept the same. In view of the acceptance of the Migration Package and having taken advantage of the terms thereof we are of the opinion that the petitioner does not have any ground to raise the issue at this stage. It is not a post migration dispute as the petitioner would like us to so hold. He is estopped from going outside the Migration package.

Clause (vi) of the Migration Packages dated 22.7.1999 provided that if either of the Cellular Operators in a given service area does not accept the package, both the existing operators will continue in the existing licensing arrangement until validity of the present licences. Earlier, however, in view of the conditional acceptance given by KTL to the Migration Package both the operators, i.e. the petitioner as also KTL, continued under the old fixed licence fee regime. But then KTL, later on, gave acceptance and the government offered a fresh Migration Package to KTL and the petitioner to which both gave their unconditional acceptance.

The petitioner also contended that KTL defaulted and its licence was terminated. The petitioner, therefore, said that since it is the only remaining service provider for cellular mobile communication its plea should be accepted in view of the migration since it has paid for 8 ½ years and now paying for the remaining period of 20 years consequent to the Migration Package will result in their making payment for 25 years. We do not want to draw a parallel between the performances of KTL with that of the petitioner. KTL did not comply with the terms of the Migration Package after accepting the same and instead filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 before the Hon'ble High Court of Delhi and subsequently filed a Special Leave Petition before the Hon'ble Supreme Court of India. Upon dismissal of the SLP by the Hon'ble Supreme Court of India the licence of KTL was terminated on the ground of merit alone and bank guarantee invoked. Since the petitioner accepted the terms of licence and then accepted the Migration Package and continued its business in accordance with the licence agreement and Migration Package, it as such is bound by the terms of the Migration Package.

The petitioner is also holding license for cellular service for Haryana Telecom Circle. Respondent has pointed out that by way of the total levy offered by the petitioner for Haryana Telecom Circle with faster payment schedule or so called front-loaded payment schedule of six years in place of the normal prescribed datum schedule of 10 years, the petitioner was ranked as highest No.1 bidder for Haryana licence. The petitioner was offered a Migration Package and accepted the said package and has made the full payments of entry fee upto the relevant cut-off date of Migration Package for Haryana Telecom Circle as per the original payment schedule laid down in the licence agreement without any so-called normalization claim by the petitioner for the UP (East) licence. The petitioner had not made any grouse or dispute in respect of Haryana Circle.

In reply to this, petitioner only says that licence for Haryana Circle has no bearing on the present dispute. This only shows that each Telecom Circle has to be treated separately.

We may also note that in BPL Cellular Ltd.(BPL vs. (1) Union of India (2) Aircel Ltd. (Petition No.6 of 2001, decided on 3.3.2004) complaint of BPL was that Aircel Ltd. was a late entrant cellular operator in the Tamil Nadu Telecom Circle and thus paid less entry fee compared to that paid by BPL and, therefore, direction was sought for ensuring level playing field. While dismissing the petition this Tribunal observed as under:

“(Counsel for BPL) 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 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”.

We, therefore, do not find any merit in this petition and would dismiss the same. In the circumstances of the case parties are, however, left to bear their own costs.

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**(D.P. Wadhwa)**

**Chairperson**

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**(D.P. Sehgal)**

**Member**

