

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**NEW DELHI****DATED 24th FEBRUARY 2005****PETITION No. 51 OF 2004****(M.A.No.165 of 2004)**

M/s Power Grid Corporation of India Limited ...Petitioner

Vs

Union of India (DoT) ...Respondent

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

For Petitioner : Mr.C.S.Vaidyanathan,Senior Advocate with
Mr.Siddharth Singla, Advocates and
Mr.Deepak Kumar,General Manager(PGC)

For Respondent : Mr.Anil Nag,
Mr. Anil Kumar,Advocates and
Mr.P.K.Mittal,DDG(BS),DoT.

Infrastructure Providers Category-II License (IP-II License) - Licensee under IP- II license cannot provide media and end connectivities to the Indian Air Force for establishment of its WAN directly - IP - II License enables the licensee to lease, rent out and sell end to end bandwidth to telecom service providers - cannot directly access or communicate subscribers through last mile linkages - last mile linkages in the telecom sector within the domain of "Access Providers" for which separate license required.

Government of India Allocation of Business Rules 1961 - grant of license under section 4 of the Telegraph Act 1885 - only the Department of Telecommunication in the Ministry of Communications & I.T. competent to issue such license.

ORDER

M/s Power Grid Corporation India Limited (Power Grid Corporation) has filed this petition under Section 14(a)(i) and 14(A)(1) of the Telecom Regulatory Authority of India Act 1997 in which it has challenged the letter dated 05.11.2004 of the Department of Telecommunications which states that “ *M/s Power Grid Corporation India Ltd. has been provided an Infrastructure Providers Category-II License. And as per terms and condition of the license M/s Power Grid Corporation India Ltd. cannot provide media and end connectivities to the Indian Air Force for establishment of its WAN directly*”.

The above letter is not directly addressed by the Department of Telecommunication to M/s Power Grid Corporation India Limited but to an officer in the Air Headquarters (of Indian Air Force), New Delhi and is meant to be a clarification in response to a letter received by the Department of Telecommunication from that organization. It appears that Indian Air Force through the Air Headquarters had entered into certain discussions with M/s Power Grid Corporation for setting up what is being called as “Wide Area Network” (WAN) for connecting 91 locations in various parts of the country. The concept of WAN in simple terms has to be understood in contrast to what is called LAN (Local Area Network). When we wish to link a number of computers that are physically close together (such as within one building or within one compact campus), we interconnect them constituting a Local Area Network (LAN). When local area networks are sought to be interconnected over a wide geographical area, extending to other cities/towns, it is known as Wide Area Network (WAN). WAN provides the network(s) that allow a computer on one LAN to communicate with a computer of another LAN. The connectivity is through use of media which is governed by the provisions of the Indian Telegraph Act, 1885.

2. M/s Power Grid Corporation is a company wholly owned by Government of India, with the Ministry of Power as its administrative Ministry, and its main functions are to serve as a central transmission utility in the Power Sector. This company has diversified its business operations to also include within its reach, telecom services and with the approval of the Central Government is also engaged in the business of establishing a broadband optical fibre network as part of its telecom business. For doing this telecom related work M/s Power Grid Corporation has obtained what is described as an “Infrastructure Provider Category-II (IP-II) licence” from the respondent, namely, the Department of Telecommunications. This licence is valid for a period of 20 years.

3. In the petition it has been stated that M/s Power Grid Corporation India Ltd has set up a state of the art broadband optical fibre network of 20,000 kms which is connecting not only the major metropolitan cities but also remote areas across the country and has invested about Rs.1,000 crores.

4. According to the petitioner the interpretation, being taken by the Department of Telecommunications, and the restriction accordingly being imposed upon the petitioner that it cannot provide media and end connectivities to the Indian Air Force for the establishment of a WAN (Wide Area Network), is arbitrary and shows total non-application of mind on the part of the respondent (Department of Telecommunications) and is against the stipulations of the license and the provisions of the Indian Telegraph Act 1885. According to the petitioner on a conjoint reading of clause 2.2 of the license agreement and

Section 4 of the Indian Telegraph Act 1885, the petitioner can sell, lease or rent out media and end connectivities not only to the Central Government but also to any of its various departments including the Department of Defence which according to the petitioner do not require a license to establish, maintain and work telegraphs.

5. Before we proceed ahead, it would be pertinent to take note of the relevant portions of the License Agreement entered into between the Department of Telecommunications and M/s Power Grid Corporation India Ltd, dated 29.1.2001.

6. In the preambular portion it is stated as follows:

(i) "WHEREAS by virtue of the provisions of Section 4 of the Indian Telegraph Act, 1885, the LICENSOR has privilege to grant License and the LICENSEE is desired to have license for Infrastructure Providers Category-II (hereinafter referred to as IP-II License) to establish as well as lease, rent out or sell digital transmission capacity (hereinafter called end-to-end bandwidth) capable to carry a message.

AND WHEREAS in pursuance to the said desire of the LICENSEE, the LICENSOR has agreed to grant IP-II LICENSE to the LICENSEE to establish as well as lease, rent out or sell end-to-end bandwidth on the terms and conditions appearing hereinafter".

(ii) Clauses 1 and 3 states as follows:

"1. In consideration of the payment of License Fee and due performance of all the terms and conditions mentioned in SCHEDULE-I annexed hereto, on the part of the LICENSEE, the LICENSOR does, hereby grant, under Section 4 of the Indian Telegraph Act, 1885, on a non-exclusive basis, this LICENSE to establish so as to lease, rent out or sell end-to-end bandwidth within the territorial boundaries of the country"

"3. The LICENSEE hereby agrees and unequivocally undertakes to fully comply with all terms and conditions stipulated in this License Agreement and without any deviation or reservation of any kind".

(iii) In Schedule-I, the scope of the license has been described as under:

"2.1 This LICENCE is granted to provide SERVICE as defined in Para 2.2 of this License Agreement, on a non-exclusive basis and others can also granted license for the same SERVICE.

Provided always that the LICENSOR, of its own or through a designated Authority has right to operate the SERVICE anywhere in India.

"2.2 The LICENSEE shall establish necessary network for the purpose, so as to lease, rent out or sell end-to-end bandwidth i.e. digital transmission capacity capable to carry a message, to Telecom Service Providers. In no case, LICENCEE shall directly access or connect the subscribers through

last mile linkages except for Other Service Providers where no license is required under Section 4 of the Indian Telegraph Act, 1885.

EXPLANATION: Last mile linkage is the linkage on subscriber premises to the nearest telephone exchange”.

(iv) Under the head “Provision of Service” i.e. Clause 19 of the license, it is mentioned:

“19.1 The LICENSEE shall provide the SERVICE to various Telecom Service Providers (including Other Service Providers not requiring License under Section 4 of Indian Telegraph Act, 1885) without any discrimination on the same commercial principle, unless otherwise directed by the LICENSOR or TRAI as the case may be.

19.2 Subject to condition 19.1, LICENSEE shall ensure continuity of SERVICE to various Telecom Service Providers (including Other Service Providers not requiring License under Section 4 of the Indian Telegraph Act, 1885)”.

(v) Under Clause 23, “Prohibition of Certain Activities by the Licensee”, it is stated as follows:

“23.1 The LICENSEE shall not engage on the strength of this LICENSE in the provision of any other Service other than the SERVICE as defined in this License Agreement”.

(vi) Under “Definitions” which are contained in Annexure-I of the license, the following needs to be taken note of:

“1. ACCESS PROVIDERS” means the Basic, Cellular and Cable Service Providers who have a direct access with the subscribers”.

“4. CUSTOMER” means any service provider licensed under Indian Telegraph Act, 1885 who avails the Service from the LICENSEE”.

“21. SERVICE shall mean establishment of necessary network for the purpose of lease, rent out or sell end to end bandwidth i.e. digital transmission capacity capable to carry a message. In no case, the LICENSEE shall directly access the customer through last mile linkages except for Other Service Provider where no license is required under Section 4 of the Indian Telegraph Act, 1885”.

“25. Telecom Service Provider means those Service Providers who have been granted license under Section 4 of the Indian Telegraph Act, 1885 for providing various Telecom Services”.

7. In the license in clause 2.2 of Schedule-I (Terms and Conditions) the words “Other Service Providers” have been used. During the course of hearing our attention in this regard was drawn to clause 3.7 of the new Telecom Policy 1999 (NTP '99) which states as under:

“3.7 Other Service Providers: For applications like tele-banking, tele-medicine, tele-education, tele-trading, E-commerce, other service providers will be allowed to operate by using infrastructure provided by various access providers. No license fee will be charged but registration for specific services being offered will be required. These service providers will not infringe on the jurisdiction of other access providers and they will not provide switched telephony”.

8. It would be relevant to also extract Section 4 of the Indian Telegraph Act, reference to which have been made in the petition. Section 4 reads as under:

“4. Exclusive privilege in respect of telegraphs, and power to grant licenses – (i) Within India, the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs:

Provided that the Central Government may grant a license, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of India.

Provided further that the Central Government may, by rules made under this Act and published in the Official Gazette, permit, subject to such restrictions and conditions as it thinks fit, the establishment, maintenance and working –

(a) of wireless telegraphs on ships within Indian territorial waters and on aircraft within or above India, or Indian territorial waters, and

(b) of telegraphs other than wireless telegraphs within any part of India.

(2) The Central Government may, by notification in the Official Gazette, delegate to the telegraph authority all or any of its powers under the first proviso to sub-section (1).

The exercise by the telegraph authority of any power so delegated shall be subject to such restrictions and conditions as the Central Government, by the notifications, think fit to impose.

9. The first argument advanced by the petitioner is that clause (1) of the license is the enabling clause which gives the freedom to the licensee “to establish so as to lease, rent out or sell end to end bandwidth within the territorial boundaries of the country”. Further, it is argued that Clause 2.2 of schedule 1 to the license cannot go beyond the scope of clause 1 and accordingly it would be wrong to conclude that there is a requirement under clause 2.2 that the petitioner must lease rent out or sell bandwidth only to telecom service providers. According to the petitioner, the phrase “telecom service providers” in the first sentence of clause 2.2 qualifies the expression “message” and is not intended to restrict lease, rent out or sell bandwidth only to “telecom service providers”.

10. It has been further argued by the learned counsel for the petitioner that the second sentence of clause 2.2 of Schedule 1 of the license, namely, “*In no case, LICENSEE shall directly access or connect the subscribers through last mile linkages except for Other Service Providers where no license is required under Section 4 of the Indian Telegraph Act, 1885. EXPLANATION: last mile linkage is the linkage on subscriber premises to the nearest telephone exchange*” implies that end – to - end bandwidth facilities can be provided by the licensee to such of those who do not require a license under Section 4 of the Indian Telegraph Act. According to the petitioner no license will be required by any of the departments or ministries of the Central Government, including the Department of Defence, to establish or maintain telegraphs. In this interpretation the said sentence of Clause 2.2 of Schedule 1 should be taken to mean that the petitioner can provide end-to-end bandwidth to telecom service providers, as also provide media and end connectivities to “Other Service Providers” as well as those who do not require a license under Section 4 of the Indian Telegraph Act 1885, including departments/ministries of the Central Government.

11. In regard to the contention of the respondent that under the Government of India Allocation of Business Rules 1961, the Department of Telecommunication has been given the administrative responsibility in regard to the Indian Telegraph Act, 1885 and the power of the Central Government mentioned therein has to be exercised through the Department of Telecommunications, the petitioner’s contention is that the Government of India Allocation of Business Rules 1961 are inapplicable to the present case as the petitioner has already been granted Government of India approval to foray into telecom business and has executed a valid license agreement with the respondent (Department of Telecommunications) to provide media and end connectivities.

12. We find it difficult to accept the contentions of the petitioner. It is clearly mentioned in clause 1 of the license that the license is subject to the terms and conditions mentioned in Schedule 1 annexed to the license (which contains clause 2.2 referred to above) and in Clause 3 of the license the licensee has agreed and has unequivocally accepted to fully comply with all the terms and conditions without any deviation or reservation of any kind. The stipulations in clause 2.2 referred to above make it amply clear that “in no case licensee shall directly access or connect the subscribers through last mile linkages” and the only exception mentioned is for “Other Service Providers” which is a category which is well described in the National Telecom Policy 1999 (NTP ’99) which we have already mentioned above. All the stipulations in the license need to be read together to determine the scope of the license. There appears to be no justification to treat clause 1 of the license as the overriding clause.

13. A plain reading of the first sentence of clause 2.2 of Schedule 1 (Terms and Conditions) namely, “*The LICENSEE shall establish necessary network for the purpose so as to lease, rent out or sell end to end bandwidth i.e. digital transmission capacity capable to carry a message to Telecom Service Providers*” clearly suggests that the phrase “telecom service providers” is intended to qualify the expression “lease, rent out or sell end-to-end bandwidth” and not as contended by the petitioner to qualify the expression

“message”. This becomes clear from the subsequent sentence whereby the licensee is not to directly access/connect to subscribers, implying that he has to connect to Telecom Service Providers.

14. We are inclined to take the view that the expression “where no license is required under Section 4 of the Indian Telegraph Act, 1885” is linked with “Other Service Providers” and cannot be related to the expression “the subscribers through last mile linkages”, as is sought to be argued on behalf of the petitioners, which would make the entire sentence meaningless. It is mentioned in several places in the petition and also during the course of arguments that the petitioner has obtained Cabinet approval to establish telecom business. The document enclosed with the petition however merely indicates the approval given by the Department of Power dated 12th March 2003 conveying expenditure sanction for establishment of “a backbone telecom network by M/s Power Grid Corporation India Ltd.,” and there is no mention of the provisions of the Indian Telegraph Act, 1885. It goes without saying that M/s Power Grid Corporation would be required to operate the backbone telecom network in accordance with the Indian Telegraph Act and in accordance with such license as may be given by the Central Government under the said Act which power can be exercised under the Allocation of Business Rules only by the Department of Telecommunications. We find it difficult to infer that clause 2.2 gives the freedom to the licensee to lease, rent out or sell end-to-end bandwidth to all the departments of the Central Government on the understanding that they do not require a license under Indian Telegraph Act, 1885

15. It has been argued at great length by the learned counsel for the petitioner that the Indian Air Force does not require a license under Section 4 of the Indian Telegraph

Act, 1885 and that the impugned letter of the respondent (Department of Telecommunications) seems to grant exclusive monopoly to its own functionaries (Bharat Sanchar Nigam Limited etc.) and restricts the right of the petitioner to enter into the telecom business. In this regard we would like to go by the terms of the license issued by the relevant Department of the Central Government i.e. the Department of Telecommunications which clearly stipulates the scope of the license given to the petitioner. It is our understanding that the Infrastructure Category-II (IP-II) license is consciously intended to enable the licensee to lease, rent out and sell end-to-end bandwidth to telecom service providers and has specifically stipulated that the licensee shall not directly access or connect subscribers through last mile linkages. Such last mile linkages in the telecom sector fall within the domain of “access providers” for which separate licenses are required which are governed by their own set of terms and conditions. The only exception is in regard to “Other Service Providers” where there is no requirement of a license under Section 4 of the Indian Telegraph Act, 1885 and in

regard to which there is a special mention in the new National Telecom Policy 1999. We do not want to enter into the question as to how the Indian Air Force should establish its own Wide Area Network (WAN) taking into account the licensing framework existing in the country. What kind of permission or no objection is required by them from the Department of Telecommunications is an internal matter of the Central Government. As far as the present matter is concerned, it is quite clear that the petitioner is governed by the

conditions of the license given to him to which he has agreed and unequivocally agreed to comply. That he has got an approval from the Cabinet to lay the backbone telecom network and thereby enter into telecom business has to be seen in relation to the specific license given to him under the Indian Telegraph Act, 1885. The investment of Rs.1,000 crores that is stated to have been made is a commercial decision taken by the petitioner and we can only say that only such activities/functions which are permitted under the license can be undertaken by him. We do not understand how the interpretation of license taken by the Department of Telecommunications should be construed as conferring a monopoly on entities like M/s Bharat Sanchar Nigam Limited as there are a number of access providers in the country both in the private as well as public sector, who could be engaged for providing the last mile linkage on subscriber premises.

16. For all the reasons mentioned above, we see no merit in the petition which is hereby dismissed. MA 165/2004 seeking interim relief is also dismissed. In the circumstances there will be no order as to costs.

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(D.P. Wadhwa)
Chairperson

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(Vinod Vaish)
Member

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(D.P. Sehgal)
Member