

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

DATED 18<sup>th</sup> OCTOBER, 2006

**PETITION No.234 OF 2006**

Radio Mid Day West (India) Ltd.  
2<sup>nd</sup> Floor, Peninsula Center  
Dr. S.S. Rao Road, Parel  
MUMBAI – 400 012  
Acting through Mr.S.K. Akhtar  
the Authorized Signatory

....Petitioner

**Versus**

1. Union of India  
its process be served on:  
Wireless Adviser to the Govt.of India,  
(WPC Wing, LR-Section)  
Department of Telecommunications (DOT)  
613, Sanchar Bhavan, 20, Ashok Road,  
New Delhi-110001.

2. Union of India through  
Ministry of Information & Broadcasting  
'A' Wing, Shastri Bhawan,  
New Delhi-110001.

....Respondents

**BEFORE:**

**HON'BLE MR. JUSTICE ARUN KUMAR, CHAIRPERSON**

**MR. VINOD VAISH, MEMBER**

**LT. GEN. D.P. SEHGAL (RETD.), MEMBER**

-  
For Petitioner : Mr. Mukul Rohtagi, Senior Advocate with  
Mr.Gopal Jain, Advocate, Mr.Suhail Nathani and Mr.Ankit Goyal,  
Advocates

For Respondent : Mr.P.P.Malhotra, ASG with  
Mr.Vineet Malhotra and Mr.Chetan  
Chawla, Mr.Gaurav Sharma, Advocates

For Intervenor : Mr.J.J. Bhatt, Sr.Advocate with  
Ms.Anjali Chandurkar, Ms.Manali Singhal, Ms.Kanika Aeri,  
Advocates

**ORDER**

-  
-

By this petition under Sections 14 (a)(i) and 14(A)(1) of the Telecom Regulatory Authority of India Act, 1997, the petitioner has challenged the allocation of a new frequency to the petitioner in place of the frequency it was allocated earlier for broadcast on FM Radio Broadcasting Channel at Mumbai by the Union of India. The petitioner held a license to broadcast from FM Radio at Mumbai for which frequency 92.5 MHz had been allocated to it. The petitioner has been broadcasting on the said frequency in Mumbai since the year 2002. By the impugned memos/letters dated 28.06.2006 and 21.07.2006 the petitioner has been directed to vacate the said FM Radio frequency 92.5 MHz and has instead been offered frequency 94.3 MHz for broadcast in Mumbai. This new frequency offered to the petitioner is the same as frequency allocated to it for the cities of Delhi, Chennai, Calcutta, Bangalore and Pune while for the city of Ahmedabad, the petitioner has been allocated frequency 95 MHz.

According to the petitioner it has been operating on frequency 92.5 MHz for the last 4 years and has built a brand name and popularity using the said frequency and any changeover would be detrimental to its interest. For the other six cities, the petitioner is a new entrant and therefore, he does not make a grievance of allocation of a different frequency qua those cities by the respondent. The grievance in the present petition is only for the changeover for the city of Mumbai from the frequency 92.5 MHz to another.

Until the year 2000 All India Radio was the sole operator for Radio broadcasting in India. In that year the Government of India decided to open broadcasting on the FM Band to private sector and invited bids for setting up Radio Stations in various cities. The petitioner participated in the process which is described as Phase-I of the Licensing Policy and obtained a license to set up Radio Station in Mumbai on 13<sup>th</sup> October, 2000. Broadcast started in April, 2002. In April, 2005 the Government of India migrated from fixed licence fee regime to a revenue sharing model in the Radio Broadcasting Industry. With a view to broadening the operations of FM Radio to other cities of the country and inviting greater private participation the respondents offered to make available several frequencies. The policy was known as “Policy on Expansion of FM Radio Broadcasting Services through Private Agency Phase-II”. Under the said policy various new frequencies became

available for private players. Option was also given to Radio Broadcasters under Phase I like the petitioner to participate in Phase II regime. The petitioner accordingly applied for licenses to operate in other cities. The petitioner got licenses for the cities of Delhi, Bangalore, Ahmedabad, Pune, Chennai and Kolkata and frequency 94.3 MHz was allocated to the petitioner for all the cities except the city of Ahmedabad for which it was allocated frequency 95 MHz. The petitioner wanted frequency 92.5 MHz for all the cities as it was already broadcasting in Mumbai on it. However, it was allocated another frequency. But the petitioner does not make any grievance about the same in this petition.

The learned counsel for the petitioner has challenged the action of the respondents in asking the petitioner to vacate frequency 92.5 MHz in Mumbai city mainly on the following grounds:-

1. Power to change frequency can be exercised only in the interest of national security or in public interest. No such reason has been pointed out and, therefore, the exercise of power is illegal.
2. The petitioner acquired right over frequency 92.5 MHz which cannot be disturbed.
3. The petitioner has been broadcasting on frequency 92.5 MHz for the last four years and it has built a name and popularity on this frequency. The present action of unsettling the petitioner is without any basis or reason.

According to the learned counsel for the petitioner, in the FM Broadcast business the identity of a FM Station is built around its broadcast frequency and every broadcaster is recognized and accessed at its known spot frequency. In other words the number of spot frequency is identified with the broadcaster and is sacrosanct to it.

In support of the argument that impugned action is permissible only if it is in public interest or it is in interest of national security, reliance is placed on clause 11 of the License agreement which is reproduced as under:-

“The Licensor reserves its right to modify at any time the terms and conditions of this License including the schedules annexed hereto, if in the opinion of the Licensor, it is necessary or expedient to do so in public interest or on security consideration and reasons.”

The argument is that change of frequency amounts to modification of terms and conditions of license which can be done only in public interest or in interest of national security. The present is

neither a case of exercise of power in public interest nor is there any involvement of national security.

In reply the learned Additional Solicitor General appearing for the Union of India drew our attention to Schedule A to the license granted in favour of the petitioner according to which "Channel Identity" means the name of the FM Station as approved by the licensor for the particular station. On this basis he submitted that it is the name which is important in the trade and not the number of the frequency. He further produced a letter dated 21<sup>st</sup> June, 2006 from the respondent to the petitioner permitting the change of brand identity of the petitioner from "Go92.5FM" to "Radio One (1)". From the said letter it appears that on petitioner's request for change of the brand name was not objected to by the Government. He submitted that this shows that petitioner is concerned about the brand name only and frequency number is not part of the brand name.

A programme is identified by its brand name like 'Radio Mirchi', 'Radio City' etc. and not by the frequency. On a radio it is easy to change the frequency because the entire FM Band with all its frequencies is located on a small panel.

Secondly, it was submitted on behalf of the respondents that the Wireless Planning Committee, while planning for Phase II of the policy, made frequency allocation plan and identified the following frequency spots for FM broadcasting in India:-

91.1 MHz, 91.9MHz, 92.7 MHz, 93.5 MHz, 94.3 MHz, 95.0 MHz, 98.3 MHz, 104.0 MHz,  
104.8 MHz, 105.6 MHz, 106.4 MHz, 107.2 MHz.

In the frequency allocation a gap of at least .7 MHz or .8 MHz has to be kept between two successive frequencies in order to avoid interference to each other's programme. In this formulation frequency 92.5 MHz does not exist at all. Therefore, the frequency allocation of the petitioner has to be changed in any case.

He further submitted that the Association of Radio Operators of India requested for harmonization of frequencies according to which as far as possible a particular broadcaster should be given the same frequency in all the cities in India in order to avoid confusion. The Government is trying to follow the policy of frequency harmonization under which effort has been made to the

maximum extent possible to give same frequency to a particular broadcaster for all the cities for which it is given licenses. To illustrate this he placed on record charts showing that in the Phase II expansion plan there are 36 licensed broadcasters for FM Radio as against only 8 broadcasters in Phase I. Phase II covers 87 cities as against 12 cities covered under Phase I. According to the learned ASG though it was a difficult exercise to ensure maximum allocation of same frequency to a particular broadcaster throughout the country but the respondents succeeded in doing so to a very large extent to satisfy maximum number of broadcasters. M/s. Adlabs Films Ltd., one of the new entrants has been granted license for 45 cities and it has been allocated frequency 92.7 MHz for all the cities. M/s. Adlabs applied for intervention in the present proceeding which was allowed. They have filed a reply and their counsel was also heard during the hearing of this petition.

Out of 36 broadcasters in the Phase II regime, only two have more than one frequency stops besides the petitioner. Further it has been pointed out that in the Phase II regime, only three broadcasters are required to shift their Phase I frequency which includes the petitioner. According to the respondents it was more because of technical constraints rather than any design or malafide.

For petitioner an additional difficulty is that the frequency on which it was earlier broadcasting in Mumbai has ceased to be available for broadcast. Under the new plan, frequency 92.5 MHz does not find a place at all. Therefore, the petitioner has to shift to another frequency in any case. The petitioner has been allocated frequency 94.3 MHz for 5 cities and it has accepted the same without demur. For the city of Mumbai he has been offered the same frequency. It will be in the interest of petitioner to have the same frequency for its broadcast in different cities including Bombay.

So far as the question of power to change the frequency is concerned, our attention was drawn to the license agreement to show that the power to change frequency is there. A particular reference was made to clause 1(c)(b) which is reproduced as under:

“1(c) (b) be capable of using the frequencies authorized in the relevant Schedule as measured by the standard of measurement in use for the time being by the Government of India (hereinafter called the Government) and such other frequencies as shall be authorized by the Central Government in writing from time to time and the licensed apparatus employed for transmission shall invariably be tuned accurately to the authorized frequency appropriate to the relevant schedule;”

This clause is in general terms and conveys the idea that there is nothing sacrosanct about frequency numbers. Clause 11 of the agreement, in which public interest and national security find mention,

deals with modification of terms and conditions of license. A change in frequency cannot be said to be modification of terms and conditions of license.

Mr. P.P. Malhotra, the learned ASG drew our attention to Section 4 of the Indian Telegraph Act in this connection to show that the respondent has absolute power in such matters. Thus he based his argument about power to change frequency both on the basis of statute as well as on the basis of license agreement. We find merit in the submission of the learned ASG that the respondent has the power to reallocate frequencies to the broadcasters and there is no hurdle created by the license in exercise of this power.

From this it follows that no broadcaster has any vested or indefeasible right qua any particular frequency. The argument that the petitioner has acquired a right in frequency 92.5 MHz is totally misconceived. The Government can always change allocation of frequency to a particular broadcaster for justifiable reasons.

Mr. Bhat, learned Senior Advocate appearing for the Intervener submitted that his client has been allocated frequency 92.7 MHz for 45 cities in the country and they have already started operation in some of the cities and so far as the petitioner is concerned, he submitted that it has to change its earlier allocated frequency in any case because of the non-availability of 92.5 MHz at all. The Intervener was allowed license to broadcast in 45 cities and giving him a common frequency was a difficult task which the Government was able to perform by allocating frequency 92.7 MHz. He stated he did not mind if his client was given any other frequency common for all the cities. But now it is not possible since the intervener has already started broadcasts in some of the cities for which it had licenses. According to him the number of a frequency does not matter at all. The Intervener is not impinging on the reputation or the goodwill of petitioner in any manner since it is not allocated 92.5 MHz. The goodwill and reputation depend on the quality and content of the programme and not on number of frequency. Lastly, he argued that the petitioner was told that he has to vacate frequency 92.5 MHz in June, 2006 while he has approached this Tribunal only in late September, 2006. In the meanwhile some of the broadcasters have already started operations at the respective frequencies allocated to them which makes it difficult for them to shift, if any readjustment was to be allowed at this stage.

We have carefully considered the rival contentions. So far as the question of power to change frequencies is concerned, the petitioner has not been able to make out a case. In fact in the rejoinder hearing, the learned counsel for the petitioner conceded that it is not a question of power, it is a

question of exercise of power. The power to regulate has been given in the licence itself and the same cannot be disputed. Section 4 of the Indian Telegraph Act, 1885 has an overriding effect. It reserves all powers qua a licence in the Licensor. There is nothing in the License agreement which limits this power of the Licensor.

Now coming to the question of exercise of power the Government has given its justification for the course of action adopted by it. Expansion of the broadcast regime in Phase II and resultant entry of several players in the field has led to the present situation. Harmonization of frequency is the main consideration for which the impugned action has been taken. We are unable to find any fault with the said objective which the Government has tried to achieve. It is quite fair and reasonable that as far as possible a particular broadcaster should have the same frequency for each city where it operates. This will avoid confusion to the listeners. The frequency harmonization, in fact, was supported by the Radio Broadcasters Association of which the petitioner is a member. The petitioner is a signatory to a letter of the Association sent in this behalf to the Government of India. The harmonization policy appears to be just, fair and reasonable.

This is also now clear that the petitioner has to shift from 92.5 MHz, in any case because the said frequency has ceased to be available as a frequency for broadcast at FM Radio Band. When one has to shift, whether it shifts to 92.7 MHz or to 94.3 MHz, that does not make much of a difference. The new frequency band has to be advertised by the broadcaster in any case. The importance of brand name of the broadcaster cannot be underestimated, particularly, in view of the provision in the "Channel Identity" clause which talks of brand name of the broadcaster. Frequency is not part of the brand name of the petitioner. The petitioner got its brand name changed which was not objected to by the Government. Petitioner's popularity is through its brand name. It cannot insist on having a particular frequency number.

The petitioner also submitted that the exercise of power by the Government is malafide. The petitioner has not been able to make good this plea. It has not been able to show how it is malafide. Nothing is shown as to who is acting malafide. Allegation of malafide has to be specific. Malafide it cannot be because nobody is treading on the reputation of the petitioner by displacing petitioner from 92.5 MHz. Nobody makes any gain from petitioner being shifted to another frequency. Rather we would consider it in the interest of petitioner that it will have same frequency i.e. 94.3 MHz for all the cities for which it has broadcasting licence except Ahmedabad for which petitioner makes no grievance. What has happened is the consequence of expansion of broadcasting

system. In Phase I, there were only 8 broadcasters for 12 cities while in Phase II there are 36 broadcasters for 87 cities. The frequencies had to be adjusted and it is the consequence of the system for which no grievance can be made. The petitioner on its own showing has built a reputation for its brand name i.e. Radio One (1) which should stand in good stead for it.

Assuming we were to try for readjustment of the frequencies, the delay on the part of the petitioner in approaching this Tribunal has rendered such an exercise impossible. Other players have already started their programmes from the respective frequencies allocated to them and it is not possible to dislodge them at this stage. In fact the petitioner itself has started broadcasting at frequency 94.3 MHz, in other cities allocated to it. We do not find any unreasonableness or arbitrariness in the action of the Government. The petition has no merit and is dismissed.

.....J  
[Arun Kumar]  
Chairperson

.....  
[Vinod Vaish]  
Member

.....  
[D.P. Sehgal]  
Member