

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

DATED 20th JANUARY, 2010

PETITION NO. 77 OF 2009

Internet Service Providers Association of India (ISPAI) Petitioner

Vs.

Union of India, through Secretary, DoT. Respondent

BEFORE :

**HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON
HON'BLE MR. G.D. GAIHA, MEMBER**

For Petitioner : Ms. Meenakshi Arora, Advocate
Mr. Rahul Narayan Advocate

For Respondent : Mr. Sachin Dutta, Advocate with
Ms. Poorva Nanawati, Advocate

JUDGMENT

S.B. Sinha

1. The petitioner is an association of the Internet Service Providers who have been granted licenses under Indian Telegraph Act, 1885 for providing data services to their respective customers. The ISP license holders are required to transmit data in the broadband 2.5 to 2.69 GHz. For some reason or the other, to which we may refer to a little later, they were asked to surrender the said bandwidth and shift to another.

2. Indisputedly the Government of India has taken a decision to auction the available spectrum. Inter alia, on the premise that the guidelines issued by the respondent on 1.8.2008 as amended on 11.9.2008, for the said purpose were issued ignoring the recommendations made by the Telecom Regulatory Authority of India (TRAI) as contained in the 'Recommendations on Spectrum Related Issues' dated 13th May, 2005, 27.09.2006 & 10.05.2007, this petition has been filed inter alia for the following reliefs :-
 - (i) Set aside the Guidelines issued by the respondent dated 1.08.2008 as amended on 11.09.2008;
 - (ii) Pass an order directing the respondent to reformulate guidelines relating allocation of spectrum keeping in mind the Broadband Policy 2004, the recommendations of TRAI, as well as representations of all stakeholders including the petitioner to ensure equitable distribution of spectrum in accordance with the principles of a level playing field and national priorities.
 - (iii) Pass an order directing the respondent to cancel the allotment of spectrum to MTNL/BSNL under the Guidelines.

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

3. Relying, on or on the basis of the recommendations dated 13.05.2005, 27.09.2006 and 10.05.2007, the petitioner contends :

(i) In issuing the impugned guidelines the recommendations of the TRAI have not been taken into consideration and the impugned guidelines puts the UASL Licensees to unfair advantage over the ISP license holders despite huge difference in the bargaining power and economic strength between them and thereby treating unequals as equal and depriving them of a level playing field.

(ii) The number of areas sought to be auctioned having been limited by the respondent only to four blocks, out of which one has been dedicated to MTNL, a situation has been created by reason whereof the capability of the holders of ISP licenses has been squeezed to the minimum.

(iii) Although in terms of the guidelines of 2007 some reservations have been made for allotment of the spectrum to the data service providers; by reason of the amendment carried out thereto being dated 11.9.2008 the same has been removed, as a result whereof the members of the petitioner association would not have any opportunity to participate in the auction.

(iv) The bandwidth which was reserved for data services having been made open also to voice and other UASL license holders, the capability of the members of the petitioner association to take part in the auction has drastically been reduced.

4. Ms. Meenakshi Arora, the learned counsel for the petitioner would take us through the recommendations of the TRAI and also the Broadband Policy of 2004 in great details; to contend:
- (i) the holders of license having been operating mostly for catering to the needs of semi-urban and rural people and their investment being limited, the impugned guidelines must be held wholly arbitrary and, thus, violative of Article 14 of the Constitution of India.
 - (ii) The respondent having failed to provide adequate protection to the small time operators like ISP holders, the impugned policy decision cannot be sustained.
 - (iii) The Broadband Policy of 2004 having recognised that there was a demand of broadband, pursuant where to and in furtherance whereof TRAI having made recommendations to treat data service providers differently from other service providers who have a deep pocket, a situation should not have been created as a result whereof the marginalised service providers would have no other option but to go out of their businesses.
 - (iv) The recommendations of TRAI having recognised the necessity to provide for a niche market for the ISP license holders by providing them a large number of similar bands, the action taken by the respondent in putting the spectrum on auction ignoring the same, in terms of the impugned guidelines, cannot be sustained, particularly in view of the fact that by reason thereof the level playing field in the matter of investment, pricing, re-farming of spectrum, quantum of license fee and the economic and other capabilities of the petitioner have been compromised.

5. Mr. Sachin Dutta, the learned counsel appearing on behalf of the respondent, on the other hand, would contend :-

- (i) Auction now being proposed to be held in respect of 4 blocks only namely, 2 blocks in 2.3 to 2.4 GHz band and 2.5 to 2.69 GHz band respectively, the respondent cannot be held to have acted arbitrarily or without jurisdiction in issuing the guidelines.
- (ii) The bandwidth of 2.5 to 2.69 GHz having limited availability being only confined to only viz 40 MHzs, the auction is proposed to held only to that extent, as the rest of the same is being used by Department of Space and as and when the same is vacated, more spectrum would be available for auction.
- (iii) TRAI recommendations for allotment of spectrum to the ISP license holder is being confined to 3.4 to 3.6 GHz band, which is not the subject matter of auction, the petitioner cannot be said to have made out any case for grant of any relief.

6. The basic fact of the matter is not in dispute. The Broadband Policy was introduced by the Government of India in the year 2004, the preamble whereof reads as under :-

“Recognising the potential of ubiquitous Broadband service in growth of GDP and enhancement in quality of life through societal applications including tele-education, tele-medicine, e-governance, entertainment as well as employment generation by way of high speed access to information and web-based communication, Government have finalised a policy to accelerate the growth of Broadband services.

Demand for Broadband is primarily conditioned and driven by Internet and PC penetration. It is recognised that the current level of internet and broadband access in the country is low as compared to many Asian countries Penetration of Broadband, Internet and Personal Computer (PC) in the country was 0.02%, 0.4% and 0.8% respectively at the end of December, 2003. Currently, high speed internet access is available at various speeds from 64 kilobits per second (kbps) onwards and presently an always-on high speed internet access at 128 kbps is considered as 'Broadband'. There are no uniform standards for Broadband connectivity and various countries follow various standards.

Government envision an accelerated growth in Internet penetration and PC as the success of Broadband would largely be dependent on their spread. It has been decided that following shall be the framework of the policy.”

7. Clause 4.0 dealing with “Other Issues” acknowledges that cost of bandwidth constitutes a major cost component for broadband services which would be on priority and would be addressed by Government and TRAI.

8. Clauses 4.3 and 4.4 dealing with role of other agencies and fiscal issues read as under :

“4.3 Role of other Agencies

PCs, content and applications are important constituents for overall growth of internet and Broadband services. Broadband services will accelerate decentralised governance at Panchayat level.

The role of other facilitators such as electricity authorities, Department of ITs of various State Governments, Departments of Local Self Governments, Panchayats, Department of Health and Family Welfare, Department of Education is very important to carry the advantage of Broadband services to the users particularly in rural areas.”

“4.4 Fiscal Issues

The Department of Telecommunications assigns a very high priority to indigenous manufacture of Broadband related equipments. It shall endeavour to work closely with the concerned Ministries and Manufacturers Associations so that the equipments are available at an affordable price. The department is conscious of the fact that Broadband services can reach the urban and rural consumers only if services are offered at affordable and easy terms. Department of Telecommunications will work out a package in consultation with Ministry of Finance and related Departments as well as concerned service providers to achieve this.”

9. TRAI after holding an open house consultation process made recommendations in respect of spectrum policy on various issues including spectrum pricing, spectrum allocation and re-farming, spectrum trading, M&A and surrender etc. It has interalia, made recommendations with regard to key objectives having in mind level playing field amongst the service providers using various technologies in connection with allocation and pricing of spectrum as also ensuring availability of spectrum wherefor it thought of providing a more competitive tariff.

10. Chapter 5 of the said recommendations provides for Spectrum charging and allocation for other terrestrial wireless links. Clause 5.1 thereof reads as under :-

“5.1 Internet and Broadband access have been widely recognized as catalysts for economic and social development of a country. Significant initiatives have been taken both by the Authority and the Government to pursue initiatives that will boost the growth of the relevant industries in this regard. Further to those initiatives, spectrum policy also needs to be formulated with the growth of future technologies, wireless data services and promotion of competition kept in mind. Just as in telephony, wireless broadband access can lead the way to allow India to leapfrog other countries in achieving widespread connectivity with relatively higher efficiency and lower cost.”

11. It also laid down the policy for other terrestrial wireless link with a view to achieve the goal referred to therein to support the quick and cost effective spread of internet and broadband, both for commercial and residential users.

12. It made a distinctive approach with regard to ISP licenses. Clause 5.6.6 of the said recommendation reads as under:-

“Likewise, while today only UASL operators have the facility of acquiring spectrum on a circle-wise or geography-wise basis, other licensees who want to provide services under the ambit of their licenses should also be extended such facility. It may be possible to tackle this last issue independent of the other larger issues of emerging technologies and management techniques mentioned above.”

13. The Authority made similar recommendations in terms of its report submitted on 27.09.2006 wherein the principles specified in Clause 1.12 were followed as regards the broader resources, Clause (viii) whereof reads as under :

“Keeping a level playing field: No conditions should exist which favour one group of stakeholder more than another, with the only exception being the public interest – if there is a choice to be made between maintaining a level playing field and maximizing the public interest, the public interest should prevail.”

14. In clause 4.13 the Authority made recommendations on spectrum allocation in 800 MHz band with which we are not concerned.

15. Chapter-5 deals with Spectrum for BWA technologies. Clause 5.1 reads as follows :-

“Broadband Wireless Access (BWA) technologies enable high-speed data communication over wireless links. It offers significant advantages over wireline broadband systems based on cable network or DSL, having better coverage, speedy deployment, high scalability, lower maintenance and upgrade costs, and phased investment to match the market growth.”

16. Spectrum requirements for BWA considered in Clause 5.17 which reads as under:

“In order to ensure that sufficient spectrum is available for BWA systems, the Authority recommends that at least 200 MHz of spectrum should be made available for BWA to accommodate growth requirement until 2007, and 300 MHz of spectrum should be earmarked by 2010.”

17. While considering the matter relating to allotment of spectrum in 3.4 – 3.6 GHz it was observed that by the most recommended for broadband wireless deployments was the said band. We may notice that paragraph 5.49, 5.50 and 5.53 of the said recommendations deal with policy for other terrestrial wireless links.

18. The Authority furthermore recommended that one block of spectrum should be allocated to categories A, B, C, of ISP licensees in cities or SSAs with population of less than one million.

On the question of setting the reserve price, it was of the opinion that the effective spectrum acquisition fee for Metros should be Rs. 10 crore, in addition to a performance bank guarantee of Rs. 5 crore that may be released upon successful completion of the roll out obligations.

- 19.** Having noticed the broad recommendations of TRAI, we may now consider the guidelines issued by the respondent as amended on 11.09.2008, the relevant clause being Clause 3.1 reads as under:-

“(a) Spectrum shall be auctioned in the 2.5 GHz and 2.3 GHz bands. Each successful bidder can get 20 MHz either in 2.5 or 2.3 GHz bands (TDD mode) in a telecom service area. The number of blocks shall be two in 2.5 GHz band and two in 2.3 GHz band.

Spectrum in 700 MHz and 3.3-3.6 GHz bands shall be auctioned as and when it becomes available.

- (b) The reserve price for 20 MHz (TDD) shall be as under:

Circle	Reserve Price (in Rs. crores) for 20 MHz
Metro & Category ‘A’	80
Category ‘B’	40
Category ‘C’	15

- (c) The earnest money (in the form of a Bank Guarantee from a Schedule Bank) shall be 25% of the reserve price.”

- 20.** Admittedly TRAI had made recommendations of allocating certain spectrum to the data service operators only in the broadband width of 3.4 -3.6 GHz.

21. The petitioner, however, in paragraphs 11 and 15 of the rejoinder raises a contention that the said bandwidth is most unsuitable for use in providing data services. The Central Government is required to take a policy decision in the matter of auction of the spectrum having regards to its huge demand vis-à-vis scarcity in the matter of availability thereof. It is yet to take into consideration the recommendations of TRAI in respect of the auction of spectrum in respect of 3.4 – 3.6 GHz. We may, however, notice that admittedly the petitioners for one reason or the other had not asked to shift from the broadband 2.5- 2.69 GHz way back in 2004. It is, therefore, not a case where recommendations of TRAI have totally been ignored. Stage for consideration of the said recommendation is yet to reach.

Recommendations of TRAI were to be taken into consideration by the respondent wherever required.

The petitioner's counsel says that irrespective of the recommendations of TRAI, their contention should have been taken into consideration even in respect of a bandwidth which was not the subject matter of such recommendations. We do not agree.

22. Ms. Arora would contend that it is incorrect to say that all ISP operators were offered the said bandwidth. The learned counsel has drawn our attention to the following statements made in the rejoinder of the petitioner, which read as under :

“(c) ISPs are not in a position to utilize other frequencies such as 3.3-3.4 GHz, 2.7-2.9 GHz, 5.7 etc. which according to the Respondent are available for their use.

The 2.5-2.69 GHz frequency band is the most suitable for last mile services of ISPs. Firstly, since its designation by the ITU for data services, all the equipment needed by ISPs is based on the utilization of 2.5-2.69 GHz frequency. Manufacturers of equipment for other frequencies are few and the costs are much higher so as to render it economically unviable for most ISPs to use them. Secondly, using these frequencies would entail

considerable infrastructural costs as towers etc. would need to be erected on virtually every building in order to give a good connection to customers. Thirdly, ISPs had earlier been allotted this frequency and had begun steps to utilize them when the respondent took back the said frequencies from them. Several ISPs had applied for necessary licenses to utilize the said frequency but the respondent had failed to grant the same despite having even accepted the fees for them. It has recently been announced that one of the four bands in this frequency has already been allotted to MTNL/BSNL. In these circumstances when Spectrum has been taken from one license and given to other forcing all other licenses to bid for only 3 bands is both arbitrary and unfair.”

Such a contention in our opinion should have been raised before TRAI when consultation process was going on. In this petition TRAI is not a party. Even otherwise it being a recommending body, its recommendations may not be subject matter of a challenge before a court of law. We may furthermore notice that in terms of the proviso appended to Section 11 of the TRAI Act, the recommendation of TRAI is not binding on the Central Government. We must, however, observe that the recommendation of TRAI should be given due weight, although the respondent may not ultimately agree therewith.

- 23.** As would appear from the discussions made hereinafter it is not at all necessary for us to enter into such a disputed question of fact. Even the said contention, we may notice had not been made in the original petition.

It was furthermore contended that the ITU only in 2006 designated the said band for data services and only in the years 2007 and 2008 some of the ISP license holders obtained the same. It, however, is not in dispute that most of the ISP operators due to lack of infrastructural facilities including those for procurement of equipment etc. had not been using the originally allotted bandwidth as a result whereof they had been asked to surrender the same.

- 24.** The decision of the Central Government in that behalf was acted upon. The members of the Petitioner Association accepted the said recommendations without any demur whatsoever. We are, therefore, of the opinion that it is too late in the day to turn round and question the validity thereof in a collateral proceeding. A party aggrieved by such a decision should have approached this Tribunal when it was necessary. The holders of the ISP license had shifted to another bandwidth. They, therefore, in our considered view, cannot be permitted to question the correctness of the said decision in this proceeding indirectly when they cannot do so directly.
- 25.** We are, therefore, required to proceed on the basis that internet service providers having been assigned spectrum for their ISP connection in their frequency band 3.4 -3.6 GHz, 2.7 -2.9 GHz, 5.7 and 10.5 to 10.650 GHz, now have no *locus standi* to question the present auction policy of the Central Government which is only being confined to 4 blocks in the bands as noticed hereinabove in this proceeding.
- 26.** It is stated that some more frequency bands i.e. 5150-5250 have also been exempted from licensing requirements for indoor purposes. The guidelines for allotment of auction of spectrum for BWA are now open to all. In the event the petitioner finds it difficult and/or faces some hardship in competing with other competitors for the present, they can certainly take part as and when the broadband reserved for them are put to auction. Even otherwise, some hardship alone on the part of the members of the petitioner association may not by itself be a ground for interfering with a policy decision.

- 27.** We also intend to place on record the stand of the Central Government in this behalf, which are as under:
- (i) DOT in its guidelines has made eligible UASL, CMSPs and ISP's for participating in the auction of BWA spectrum.
 - (ii) Only 40 MHz is presently available for BWA in the frequency band 2.5 – 2.69 GHz as Department of Space is using this band for mobile satellite service as well as broadcasting satellite service. With the available technology, successful bidders can provide data as well as voice services through BWA network.
 - (iii) As per the guidelines, the reserve price of the BWA spectrum has been kept lower than the 3G reserve price, based on the recommendations of TRAI. Lower reserve price of BWA will help penetration in rural part of the country.
- 28.** So far as the price factor contained in the recommendations of TRAI is concerned, we are of the opinion that with the demand of spectrum going up and in view of scarcity thereof price of the spectrum is bound to go up.
- Even TRAI in its recommendation has given priority to public interest.
- 29.** Although public interest is said to be an unruly horse, there cannot be any doubt or dispute that the decision of the Central Government in a situation of this nature should be considered to have been taken in public interest; at least at this stage. *(See (2008) 13 SCC 30 (Para 123) Entertainment Network (India) Ltd. Vs. Super Cassette Industries Ltd., (2008) 1 SCC 728 at 738) Devinder Singh & Ors. Vs. State of Punjab & Ors..*

It is true that as to whether a decision had been taken in public interest or not ultimately would fall for consideration before a competent court of law, but it is not suggested by the petitioner that the decision taken by the Central Government does not subserve the public interest.

Nothing has been shown to us that the data service licenses granted to the members of the petitioner association, contain any specific mandate to provide broadband service through BWA only, nor is there any provision to earmark any frequency spectrum band for the said purpose.

It may be true that use of any other medium viz. optical fibre, Cable TV Network, Copper cable may prove to be costly but the ISP licensees had accepted the said option with their eyes wide open.

It is possible that the policy decision to hold auction in respect of the bands in question has been taken because of meagre availability of the spectrum, i.e. to the extent of 40 MHz for the present, keeping in view the expected easy availability of equipment internationally designed to work in these bands.

- 30.** Although a policy decision adopted by the Central Government may not be beyond the pale of judicial review but it is also trite that ordinarily an economic policy should not be interfered with. (See Guruvayoor Devaswom Managing Committee and Another Vs. C.K. Rajan and others (2003) 7 SCC 546 at 570 (e-f); and BALCO Employees' Union (Regd.) Vs. Union of India and Others (2002) 2 SCC 333. In any view of the matter the petitioners are entitled to participate in the auction. BWA auction in the abovementioned bands are, in our considered view not inconsistent with the recommendations of TRAI.

- 31.** In this case, as noticed hereinbefore, the Central Government has not refused to consider the recommendations made by TRAI.

No occasion had arisen to do so. Furthermore, no court of law/Tribunal can and/or should do anything which would infringe the march of technical development. It is not disputed that technology permits and facilitates provision of high speed data, voice, video as well as many other services in that band.

- 32.** We are further of the opinion, keeping in view the facts and circumstances of the present case that it is not a fit case, where this Tribunal should interfere with the guidelines issued by the Central Government at this stage and to put on hold the proposed auction which would run counter to public interest.

- 33.** For the foregoing reasons, there is no merit in the petition which is dismissed accordingly. But in the facts and circumstances of the case, there shall be no order as to costs.

.....,J
(S.B. Sinha)
Chairperson

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(G.D. Gaiha)
Member