

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED 18TH JULY, 2011

PETITION No. 116 of 2007

Association of United Telecom Service
Providers of India & Ors. ... Petitioners

Versus

Union of India & Anr. ... Respondents

BEFORE :

HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON
HON'BLE MR. G.D. GAIHA, MEMBER
HON'BLE MR. P.K. RASTOGI, MEMBER

For Petitioner : Mr. C.S. Vaidyanathan, Sr. Advocate
Mr. Nakul Mohta, Advocate
Ms. Shikha Sareen, Advocate

For Respondent : Mr. Ruchir Mishra, Advocate

J U D G M E N T

S.B. SINHA FOR SELF AND MR. P. K. RASTOGI, MEMBER

The First Petitioner is an Association of Operators of Telecommunication Services using CDMA technology.

The petitioners Nos. 2 to 5 are licensees; licenses having been granted in their favour in terms of the Indian Telegraph Act, 1885 (hereinafter called and referred to for the sake of brevity as 'the said Act').

Facts

2. The Union of India adopted National Telecom Policy in the year 1994; pursuant to or in furtherance whereof, licenses were granted to the Cellular Operators on GSM technology (hereinafter called and referred to for the sake of brevity as 'the Cellular Operators').

3. Another National Telecom Policy was adopted in the year 1999 whereby and whereunder the Central Government intended to grant licenses also to the operators operating on CDMA technology.

4. Indisputably, the royalty for use of microwave frequency and backbone frequency used to be charged on a the basis of formula $R = MWC$.

5. It is stated that for effecting a call from the handset of a mobile, Base Trans Receiver Stations (BTSs) are required to be set up to transmit signals. Several BTSs are controlled by Base Station Controller (BSC), which in turn, are controlled by Mobile Switching Centre (MSC).

6. For the purpose of transmitting the signals from one location to the other, BTSs are established. The transmission of signals from one location to another is basically for the domestic network access of the operators of telecommunication services. The network connectivity i.e. access can be

provided either through cable network, which has optical fibre connectivity, or through airwaves i.e. microwave connectivity.

7. It is not in dispute that whereas the connectivity through use of optical fibre is not only difficult to achieve but is extremely expensive, the microwave connectivity being a high frequency wave (above 1 GHz) is the preferred one.

8. It is also not in dispute that for the said purpose, the first respondent is not statutorily obligated to grant access microwave frequency in the range of 15/18/23 GHz. It is also not imperative in terms of the conditions of license. It is, however, necessary for the licensees. Start up spectrum is to be ordinarily provided by the W.P.C. Wing of the Respondent No.1.

It may be true that the conditions of licence do not contain any bar in grant of spectrum, but there is nothing on record to show that the same is imperative in character. The procedure laid down for grant does not ipso-facto create a legal right. However, to our mind, this is not of much relevance.

9. The petitioner has brought on record definition of some terms, which are relevant for our purpose, being as under :-

*“a. **POINT TO POINT MICROWAVE LINK** is a link which is used to transmit signals/data from one point to another point i.e. from one BTS site to another BTS site. Point to Point link is used for transmission of both voice and data.*

b. **POINT TO MULTIPOINT TRANSMISSION** is achieved through local multi point distribution system (LMDS). Frequencies used for LMDS are 10.5, 3.3 and 2.4-2.5 GHz.

c. **HUB** is a communication device which is used to distribute data to several devices which have been received from some other particular device i.e. hub basically redistributes the received data. Hub acts as a server in local multipoint distribution system.

d. **SPOT/CARRIER** is a radio wave to carry out transmission at one particular frequency. In Cable Division Multiple Access (CDMA) technology, one carrier allocated is of 1.25 MHz.”

10. So far as transmission of signals from BSCs to MSCs are concerned, however, Backbone Microwave Frequency of 6/7 GHz (as has been contended by the respondent), being necessary to reach the consumers, the respondent No.1 are obligated to provide for the same.

11. We may, in this connection, notice the statements made by the petitioner in para 10 of the petition.

“Microwave Access Network (MWA) refers to the terrestrial wireless links interconnecting the service provider’s MSC(s), BSC(s) and/or BTS(s) in a station using MW frequency normally in the frequency

band of 10 GHz & above. On the other hand Microwave Backbone Network (MWBB) refers to the terrestrial wireless links interconnecting the service provider's MSC/BSC or BTS in one station to MSC/BSC/BTS in another long distant station using Microwave Frequency, generally below 10 GHz frequency band. The frequencies for access and back bone networks are allotted to the Service Providers by the Licensor who realizes annual charges as Royalty for usage of the Frequency Spectrum."

12. In the year 2001, in terms of the National Telecom Policy, 1999, the CDMA operators were also allowed to provide for the limited mobile services as basic service operators.

13. So far as Cellular Operators are concerned, however, with effect from 01.8.1999, Royalty on the Backbone and Access Frequency were charged on 'Revenue Share' (AGR) basis. On 18.4.2002, an order was issued by respondent No.2 specifying spectrum charges in respect of cellular network for MW access and MW backbone network based on revenue sharing. Herein, we are not concerned with the percentage thereof.

14. On or about 01.4.2003, a corrigendum was issued by the Respondent No.2 modifying the formula as contained in its order dated 20th July, 1995 for the BSOs, which is in the following terms :-

“In pursuance of the powers conferred by Section 4 of the Indian Telegraph Act, 1885 (13 of 1885) and in partial modification to this Ministry’s order No.R-11014/4/87-LR(Pt) dated 20th July 1995, it has now been decided that Para 4 and Para 5 of the above order be read as :

- 1. (Para-4) Royalty for all kind of terrestrial Microwave Links for
 - 4.1 Fixed Microwave Radio Relay Networks*
 - 4.2 Point to Multi-point Networks**
- 2. (Para-5) The royalty for all kind of terrestrial Microwave Links shall be charged on the basis of :*

5.1 Constant Multiplier M where :

M=1200 for point to point Microwave Link(s) with end-to-end distance Less than or equal to 05 Kms.

M=2400 for point to point Microwave Link(s) with end-to-end distance greater than 05 Kms but less than or equal to 25 Kms

M=4800 for point to point Microwave Link(s) with end-to-end distance greater than 25 Kms but less than or equal to 60 Kms.

M=9000 for point to point Microwave Link(s) with end-to-end distance greater than 60 Kms but less than or equal to 120 Kms.

M=15000 for point to point Microwave Link(s) with end-to-end distance greater than 120 Kms but less than or equal to 500 Kms.

M=20000 for point to point Microwave Link(s) with end-to-end distance greater than 500 Kms.

5.2 Weighing Factor ‘W’ which is decided by the adjacent channel separation of the R.F. channeling plan deployed where

W = 30 for adjacent channel separation upto 2MHz

W=60 for adjacent channel separation greater than 2MHz, but less than or equal to 7MHz

W=120 for adjacent channel separation greater than 7MHz, but less than or equal to 28MHz

W=(120)+(30 for each additional 7MHz Bandwidth or part thereof) for adjacent channel separation greater than 28MHz

5.3 *Number of RF channel used (equal to twice the number of duplex RF Channel pairs) represented by 'C'*

Then, Annual Royalty $R=M \times W \times C$

3. *The order shall come into force from the date of issue.*
4. *These issue with the concurrence of wireless finance branch vide their Dy. No.WPF/139/03 dated 26.03.2003.*
5. *All other conditions of the order no. R-11014/4/87-LR(Pt) dated 20th July 1995, as amended from time to time, will remain the same."*

15. On and from 14.11.2003, the Central Government introduced UASL regime in terms whereof the Basic Service Operators were given options to shift thereto. By reason of the said policy, terms and conditions were substituted to the extent that amended licenses were to be issued so far as the technology is concerned. By reason thereof, the license fee was to be charged on AGR basis.

16. We may furthermore notice the financial conditions laid down therein in this behalf, from a perusal whereof it would appear :-

- (i) An entry fee, being one-time non-refundable amount of Rs.203.66 crores, was to be paid.
- (ii) The license fee was to be paid annually at the rate of 12 percent of the Adjusted Gross Revenue; and
- (iii) Beside the same, Radio Spectrum charges were to be paid both for access microwave frequency and backbone microwave frequency separately.

We may also notice Clauses 18.3.1 and 18.3.2 of the license governing the field :-

“18.3.1 In addition to the Licence Fee as per Clause 18.2, Annual Royalty and Licence Fee for wireless licence for Base Stations and wireless subscriber terminals shall be payable to the Wireless Planning & Coordination Wing as a percentage of Adjusted Gross Revenue (AGR) earned from wireless subscribers. The said percentage of AGR shall be 2% or as amended from time to time for utilizing spectrum upto 5+5 MHz. While calculating the AGR for the limited purpose of levying such annual royalty and licence fee, revenue from wire-line subscribers shall not be taken into account.

18.3.2 Further royalty for the use of spectrum for point to point links and other access links shall be separately payable as per the details and prescription of Wireless Planning & Coordination Wing. The fee/ royalty for the use of

spectrum/possession of wireless telegraphy equipment depends upon various factors such as frequency, hop and link length, area of operation and other related aspects etc. Authorization of frequencies for setting up Microwave links by Licensed Operators and issue of Licenses shall be separately dealt with WPC Wing as per existing rules.”

- (iv) Indisputably, the CDMA operators have been obtaining allocation of spectrum on the basis of a separate government order. Such allocation had been made to one of the operators on or about 21.4.2005 for various circles. Clauses 2.3, 3 and 4 of the said communication read as under :-

“2.3 SACFA clearance is to be obtained separately.

3. You are requested to submit the deployment in prescribed format available on website www.dot.gov.in in electronic format for further necessary action. Frequency earmarked should not be activated before obtaining the operating License.

4. Spectrum charges will be realized w.e.f. the date of issue of this letter.”

The stage from which, however, the spectrum charges should be realized has been the subject matter of a policy decision, correctness whereof is in

question and we shall consider the legality and validity thereof at an appropriate stage.

17. Validity and/or legality of clause 4 of the said communication dated 21.4.2005 is in question.

18. By reason of a letter dated 02.7.2004, the petitioner No.1 requested that the procedure for allocation of spectrum as well as spectrum charges (royalty and license fee) being streamlined for UASLs in accordance with the conditions applicable to Cellular Operators, which would thereby conform to the guidelines issued in this behalf. The said request was also repeated by other letters as well. It is not in dispute that having regard to the representations made by the petitioner and, in particular the Petitioner No.1 Association, the first respondent sought for a brief comments from it. The respondent No.1 by a letter dated 13.9.2006 emphasized the need of providing for a level playing field. It was furthermore requested that payment for LMDF frequency be based on revenue share in stead and in place of number of Hubs.

19. By reason of an order dated 03.11.2006, the Central Government, however, acceded to the said request with prospective effect, stating :-

“2.2 The above spectrum charges (as percentage of AGR) are applicable for both for MW access carriers (in Metros and other telecom service areas) as well as the MW backbone carriers separately.

3. These orders shall come into force from the date of issue.”

20. One of the challenges made by the petitioner herein is the validity of Clause 3 aforementioned. We may, however, notice that although it was not a part of the pleadings, the respondent herein has placed before us a report of the Working Group constituted for the purpose of examining and recommending the quantum of spectrum charges (revenue share) for MW access and backbone network for GSM and CDMA based telecom service providers. According to the respondent, the said Group was constituted pursuant to the recommendations made by the TRAI, the relevant portions whereof read as under :

“4.5 Spectrum charging for terrestrial links :

TRAI Recommendation : *To promote the most efficient usage of spectrum for links utilizing technologies other than the traditional cellular platforms, and deployed in point-to-point or point-to-multi-point links, the system of charging for those spectrum allocations should be altered from its current form. For the new system of charging the proposed method is as follows :*

$$R = (\sqrt{M}) * W * C * A * S * P * B \text{ (para 5.5.4.3).}$$

Committee's views : The Committee finds that the formulae recommended by TRAI is too complicated & difficult to implement and may lead to disputes. The Committee feels that the present formula for spectrum charging for terrestrial links is much simpler, non-controversial and therefore may continue.

4.5.1 Spectrum Charges for Service Providers

For the Service Providers, the present charging method on percentage of AGR basis for backbone and access networks of GSM Operators may continue and the same may be adopted for the CDMA Operators also. Further, it is noticed that the present percentages are too low to ensue optimal utilization of the spectrum. Therefore the Committee recommends revision of these percentage charges for microwave access and backbone networks of GSM and CDMA services as follows :

(i) For Microwave Access Network :

Service Area	<u>Existing spectrum charges</u>		Proposed spectrum charges
	<u>Bandwidth</u>	<u>Revenue share</u>	
Metro	<u>Upto 224 MHz</u>	<u>0.25%</u>	0.1% for every 28 MHz or part thereof
	Every additional 56 MHz or part thereof	0.05%	
Circles	<u>Upto 112 MHz</u>	<u>0.25%</u>	0.2% for every 28 MHz or part thereof
	Every additional 28 MHz or part thereof	<u>0.05%</u>	

(ii) For Microwave Backbone Network :

Service Area	<u>Existing spectrum charges</u>		Proposed spectrum charges
	<u>Bandwidth</u>	<u>Revenue share</u>	
Circles	Up to 56 MHz	0.1%	0.3%
	Every additional 28 MHz or part thereof	0.05%	0.15%

21. It is not in dispute that the first petitioner as also the Cellular Operators Association of India were represented before the said Committee.

22. Before us, a letter has been produced being dated 18.9.2006 wherein a statement has been made to the following effect :-

“4.1 Representative from AUSPI stated that they have signed the UASL licence in 2003 and since then they have been requesting for revenue based charging for their MW networks. He further suggested that the spectrum charging should only cover the administrative cost of managing the spectrum. He also suggested the following revenue share for MW spectrum :

<i>MW Access</i>	<i>@ 0.1% of AGR</i>	<i>Spectrum up to 224 MHz BW</i>
<i>MW Backbone</i>	<i>@ 0.05% of AGR</i>	<i>Spectrum up to 56 MHz</i>

AUSPI representative also requested that the revenue share for MW Access and Backbone networks of CDMA based service providers may be implemented from 1.10.2006, besides a single revenue share for the GSM/CDMA Access and MW networks. Responding to this suggestion, Chairman stated that the Access networks are necessarily wireless based, but the Microwave networks could also be engineered on OFC or other media and need not be only through wireless, hence there has to be a different charging principle for Microwave networks.”

23. It, however, appears that by a letter dated 01.12.2006, the petitioner No.1 requested the Chairman of the Telecom Commission and Secretary, Department of Telecommunications stating that there existed an anomaly so far as the amount of royalty payable by the Cellular Operators, on the one hand, and the CDMA operators, on the other, is concerned and, thus, in the interest of level playing field, the said order dated 03.11.2006 be made effective from the date of issue of the UASL guidelines.

24. It furthermore appears that on or about 19.01.2007, another meeting took place wherein, inter-alia, the following decisions were taken :-

“Effective date for charging on access & backbone networks :

AUSPI request : To ensure level playing field, make the Order dated 3.11.2006 effective from at least the date of migration to UASL i.e. Nov., 2003.

WPC view : It was clarified in the meeting that the orders take effect prospectively. Hence the revenue share for MW Access and Backbone can not be effective from retrospective date.”

Proceedings before this Tribunal

25. The petitioners filed this petition on or about 11th May, 2007 praying inter-alia for the following reliefs :-

“a) Hold and declare that the action of the Respondents in unilaterally altering the basis for payment of royalty charges for access and backbone network from the date of operating license to the date of earmarking is unilateral, arbitrary and impermissible in law;

b) Hold and declare that the extra payments made by the Members of the Petitioner Association on this account need to be refunded or adjusted in future payments;

c) Hold and declare that the action of the Respondents in not extending the benefit of uniform charging methodology to the CDMA operators at par with the GSM operators from November 2003 onwards is discriminatory, arbitrary, illegal and violative of Article 14 of the Constitution of India;

d) Direct the Respondents to refund/grant consequential refund of the excess amounts together with the interest @ 12% per annum from November 2003 or the date of the respective UASL licenses to the date when CDMA UASL Licensees were allowed to pay as per the AGR method (03.11.2006) and adjust the difference between the higher amounts collected on the basis of arbitrary formula and the amounts which it ought to have charged based on the revenue sharing pattern.”

26. Basically, the petitioners in this petition have raised the following issues:-

A. Whether the members of the Petitioner’s association providing mobile servicing with CDMA technology should be treated at par with the mobile operators using GSM technology for the purpose of

payment of spectrum charges for microwave from the date when the Petitioners migrated to the UASL i.e. November 2003.

- B. Whether the government can seek payment of spectrum usage charges before giving permission to use spectrum in the form of the operating licence and change the payment methodology without any order, notification, amendment in the existing provisions.
- C. Whether government can seek payment of spectrum usage charges for the entire quarter even when the spectrum allocation is made in the last week of the quarter.

27. It is not in dispute that in the event the first issue is decided in favour of the petitioner, the 2nd and 3rd issues would become redundant.

28. The matter came up for consideration before this Tribunal on 05.02.2009 when the following order was passed :-

“Heard the counsels for both the parties. It appears to us that the following will be the appropriate course of action:

1. *The petitioners who were earlier basic operators and who have migrated to UASL regime, should be treated on par with the cellular operators from the date on which they migrated to UASL.*

2. *In so far as the date of charging for Microwave spectrum is concerned, the following would be the arrangement:*

a) *for the period prior to 31.3.05, it will be from the date of operationalization, and not from the date of earmarking.*

b) *for the period 1.4.05 till 31.1.09, it will be from the date of expiry of four months from the date of SACFA clearance.*

c) *From 1.2.09, it will be two month from the date of SACFA clearance provided the party concerned has made a proper application within two months from the date of earmarking. It is further clarified that in the event the party does not make a proper application within two months from the date of earmarking, it will be charged for the earmarked spectrum from the date of earmarking.*

It is also further clarified in the event a party which has been earmarked spectrum at any date prior to the date of this order does not apply for SACFA clearance within two months from the date of this order, it will be charged from the date of earmarking irrespective of the above suggestions.

It shall be incumbent upon the WPC Wing of the DoT to inform the applicant within 15 days of the date of application if the said application is not in order, failing which, it will be deemed to be a valid application. If the SACFA clearance is, for any reason declined, the party would be free to apply afresh for SACFA clearance in which case the date of charging will be on expiry of two months from the date of SACFA clearance.

Counsel for respondents submits that he will seek instructions on the above proposed arrangement and revert within four weeks.”

29. As for one reason or the other, the respondent did not respond thereto, in terms of the said order dated 05.02.2009, it was directed :-

“The order dated 5.2.2009 was dictated in presence of counsel for the parties. That was proposed to be the final order in this case. Counsel for the respondent requested for time to seek instructions. On his request, the matter was adjourned to 25.3.09. On 25.3.09 again request was made on behalf of the respondent for adjournment. Nobody present on behalf of the respondent was in a position to assist the Tribunal. Again on request of respondent, the matter was finally adjourned for today. It was made clear that no further adjournment will be granted. Today, Mr. K. Singhal, Advocate is present on behalf of Mr.Vineet Malhotra, Advocate. He wants to make some submissions. However, Mr.Munesh Kumar, the departmental representative who is present, states that he is not aware of what Mr.Singhal wants to submit before the Tribunal and, therefore, he does not want Mr.Singhal to make any submissions. In view of this Mr.Singhal does not want to say anything further.

In these circumstances, we make the order proposed as per the proceedings dated 5.2.2009 absolute subject to the following clarification:

(a) Learned counsel for the petitioners pointed out that sometimes the spectrum is allocated during the quarter and the liability is raised for the entire quarter. He seeks a direction that

spectrum should be charged on pro rata basis depending on the date of allocation. We direct that where spectrum is allotted in the first half of a quarter, the allottee shall be liable to pay for the entire quarter. If, however, spectrum is allotted during the second half of a quarter, the liability will be pro rata.

(b) Spectrum for microwave shall include LMDS.”

30. The respondents herein aggrieved by and dissatisfied with the said order, preferred an appeal thereagainst before the Supreme Court of India, which was marked as Civil Appeal No. 8771-8772 of 2010.

31. By an order dated 03.12.2010, the order of this Tribunal was set aside by the Apex Court, stating :-

“Heard learned counsel on both sides. The impugned orders are perfunctory.

They give no adequate reasons. Without going into the merit of these appeals, we set aside the impugned orders. The Telecom Disputes Settlement and Appellate Tribunal (for short, "TDSAT") is directed to decide the matter de novo in accordance with law. All contentions on both sides are expressly kept open. We request the TDSAT to decide the matter as expeditiously as possible preferably within a period of three months.

The civil appeals are, accordingly, disposed of.”

The matter is, thus, before us.

Submissions :-

32. Mr. C.S. Vaidyanathan, the learned senior counsel appearing on behalf of the petitioners, would contend :-

- (i) Keeping in view the National Telecom Policy, 1999 and the guidelines issued in respect of UASL licenses providing for neutrality in technology, it was obligatory on the part of the respondents herein to charge royalty both for 'Access Microwave Frequency' and 'Backbone Microwave Frequency' on and from 11.11.2003 and not from 03.11.2006.
- (ii) Keeping in view the fact that date of allocation of frequency cannot be the cut-off date for the purpose of levy of charges of royalty as such allocation does not amount to grant of a license, and as therefor, SACFA clearance is required to be taken and in that view of the matter, the charges levied from the date of issuance of the allocation of spectrum must be held to be wholly unreasonable.
- (iii) Even if any allocation is made on the last date of the quarter, the charges cannot be levied for the entire quarter and in that view of the matter, the respondents should be directed to levy charges

proportionately from the date of grant of the allocation and not for the entire quarter.

33. Mr. Ruchir Mishra, the learned counsel appearing on behalf of the respondents, on the other hand, urged :-

- (i) From the order dated 18.4.2002, it would appear that for the GSM operators, royalty was to be charged on AGR basis and in that view of the matter as CDMA operators did not have full mobility on that day, it cannot be said that they have been discriminated against, as UASL regime came into existence only with effect from 14.11.2003.
- (ii) The corrigendum dated 01.4.2003 being still in force, both for 'Access Microwave Frequency' and 'Backbone Microwave Frequency', the CDMA operators were being charged on the basis of the formula laid down therein. The quantum of the licence fee as also the radio spectrum charges, as provided for in Clause 18.3.1 of the licence, being the same both for cellular operators and CDMA operators, no discrimination can be said to have been made by reason of the impugned order.

- (iii) As admittedly, the CDMA operators have been getting allocation of spectrum on the basis of a separate government order and the respondent No.2 having a discretion in relation thereto, wherefor policy decisions had to be taken from time to time, which were made applicable to all the allottees of spectrum, it cannot be said that the decision impugned in this petition is arbitrary & discriminatory.
- (iv) The respondents had to take a policy decision that royalty would be charged from the date of earmarking of the frequency keeping in view the fact that resort was taken to 'frequency holding' by the allottees and after the impugned order was passed, some CDMA operators in fact have surrendered their frequencies.
- (v) In any event, recommendations having been made by a Committee appointed for the purpose of examining and recommending the quantum of royalty charges and it having filed a report on or about 10.8.2005 wherein representatives of the Petitioner No.1 took part and suggested that the calculation of royalty on the AGR basis be brought about with effect from 01.10.2006, the petitioners cannot be permitted to raise any contention inconsistent therewith or contrary thereto.

- (vi) The levy of the royalty, being on a quarterly basis as per the conditions of licence, no exception thereto can be taken.

Retrospectivity Issue

34. In view of the order dated 03.12.2010 passed by the Supreme Court of India, we have heard the parties de novo and at great length.

35. We may, at the outset, notice that Mr. Vaidyanathan has placed strong reliance upon an order dated 22.9.2005 issued by the first respondent herein, whereby and whereunder the percentage of AGR had been altered with retrospective effect, to contend that it cannot be a policy that under no circumstance, the financial concessions can be granted with retrospective effect. The said order reads as under :

“The issue of charging royalty and licence fee for cellular mobile telephone service has been reviewed and it has now been decided that the cellular licenses shall pay spectrum charges with effect from 1.8.99, the cut off date of change over to NTP.99 regime. On revenue share basis of 2% Adjusted Gross Revenue (AGR) towards WPC charges covering royalty payment for the use of cellular spectrum upto 4.4 MHz + 4.4 MHz and licence fee for cellular mobile handsets and cellular mobile base stations and also for possession of wireless telegraphy equipment as per the details prescribed by Wireless Planning and Coordination Wing (WPC). Any additional bandwidth, if allotted subject to availability and justification shall attract

additional royalty and licence fee as revenue share (typically 1% additional revenue share of bandwidth allocated is upto 6.2 MHz + 6.2 MHz in place of 4.4 MHz + 4.4 MHz).

3. Further, royalty and licence fee for the use of spectrum for point to point links and access links (other than cellular service spectrum) shall be separately payable as per the details and prescription of Wireless Planning and Coordination Wing. The fee/royalty for the use of spectrum/possession of wireless telegraphy equipment depends upon various factors such as frequency, hop and link length, area of operation etc. Authorisation of frequencies for setting up microwave links by cellular operators and issue of licences shall be separately dealt with by WPC Wing as per existing rules.”

36. It is, however, not in controversy that the said order does not relate to spectrum. We may, moreover, notice that the charges for allocation of spectrum for MW access and backbone networks of cellular networks was issued for the first time on or about 18.4.2002, the relevant portions whereof read as under :-

“2. Assignment of frequencies for MW access and MW backbone networks for cellular operations, would continue to be considered on the basis of full justification of the requirements and availability of the spectrum, on case-to-case and link-to-link basis, after taking into consideration the interest of the other users with a view to measuring electromagnetic compatibility etc. The complete technical analysis and all related aspects of frequency assignments, including efficient use of spectrum, will apply before assigning frequencies for

various MW access backbone links. There will be no obligation on the part of the Government to assign frequencies for such purposes. Migration to revenue sharing concept is basically to simplify the system for charging of spectrum and in no way it should be linked to the grant of frequency spectrum.

7. The above package of spectrum charging on percentage revenue share will be available to the cellular operators on the premise that it is accepted in its entirety and simultaneously all legal proceedings, with regard to spectrum charging, instituted by them or COAI against the Government in Courts and Tribunals (TDSAT) etc. shall be withdrawn. The cellular operators without prejudice should make payments of all outstanding dues of spectrum charges in accordance with the applicable Government of India orders within a month from the date of issue of this order.

8. This Order will come into force from the date of issue.”

37. The said order, thus, was given a prospective effect. We have noticed heretobefore that a corrigendum in regard to calculation of royalty was issued on 01.04.2003.

A policy decision adopted by the Union of India on consideration of the representations made by an Association of operators and/or operators themselves is a matter of policy.

It is, in our opinion, idle to contend that only because in a given case, a policy decision was given retrospective effect, the same procedure must be followed in all other cases.

38. An economic policy, ordinarily, can be adopted by the State while laying down terms & conditions of licence. If a retrospective order is made by the Union of India, it would be exercising its own prerogative. Ordinarily, the order in these types of matters should be given a prospective effect.

The petitioners would contend that they had a legal right. If they had a legal right, they should have approached this Tribunal immediately after denial of the said right by the Union of India before this Tribunal. In stead, they made representations and asked the Union of India to grant some concessions in their favour and/or change the method for calculation of the amount of royalty.

It is one thing to say that the licensees have a constitutional or legal right in the matter of mode and manner of calculation of royalty for use of spectrum but it is another thing to say that they are entitled to force the Central Government to adopt a particular mode of calculation of royalty as a matter of right and that too, with a retrospective effect.

39. It is on the aforementioned backdrop, we may notice the relevant portion of the guidelines for Unified Access (Basic Cellular Services) License, whereupon strong reliance has been placed by the petitioners.

“In pursuance of this decision, the following shall be the broad Guidelines for the Unified Access Services License.

- (i) The existing operators shall have an option to continue under the present licensing regime (with present terms & conditions) or migrate to new Unified Access Services Licence (UASL) in the existing service areas, with the existing allocated/contracted spectrum.*

- (ii) The license fee, service area, rollout obligations and performance bank guarantee under the Unified Access Services Licence will be the same as for Fourth Cellular Mobile Service Providers (CMSPs).”*

40. A bare perusal of the said guidelines will demonstrate that the level playing field was to be provided in respect of the matters enumerated therein. It is not in dispute that the quantum of royalty to be charged for grant of access microwave frequency 15/18/23 GHz being for domestic purpose, the same was not a condition of license.

41. It is furthermore evident that the cellular operators stood on a different footing in so far as they were to be charged on a revenue share basis on and from 18.4.2002, on which date the CDMA operators were not permitted to operate on full mobility.

42. The question of any discrimination in this behalf, therefore, in our opinion, does not arise.

43. The equality clause contained in Article 14 of the Constitution of India envisages that persons similarly situated should be treated alike. Article 14 does not contemplate that although a group of persons had been getting certain benefits on the date of coming into force of the policy decision, they will be deprived thereof so as to bring them at par with the new licencees.

44. By reason of the terms & conditions of the licence, some discretionary power has been conferred on the WPC. A policy decision was required to be taken by the competent authority so far as the laying down the terms & conditions of licence and/or quantum of royalty charges are concerned. Such policy decisions, subject to any statutory or constitutional interdict, may also be amended from time to time.

We have noticed heretobefore Clause 18.3.2 of the UASL licence granted to the cellular operators and basic operators separately.

The charges for spectrum had been separately dealt with by the WPC Wing as per existing rules. So far as the basic operators are concerned, it was mentioned that WPC Wing of the Respondent shall determine the fees/royalty for use of spectrum/prohibition of 'wireless telegraphic equipments' having regard to the various factors, such as frequency of uplink, area of operation and other related aspects.

Both the categories of operators were to pay royalty and licence fees on MW point to point/access link which was to be levied in terms of the existing rules.

What were the existing rules at the relevant point of time is the question.

45. For the GSM operators, who have migrated to UASL, the rules which were formulated for the purpose of payment of royalty and licence fees on point to point access was as per the WPC Wing's order dated 18.4.2002 providing for payment on AGR basis. However, the exiting rules so far as the CDMA operators, who have migrated to UASL, continued to be the order dated 20.7.1995 providing for royalty and licence fees on point to point access on formula basis.

46. Indisputably, the petitioners herein had been paying royalty/licence fees on formula basis as opposed to the AGR basis, which was applicable to CDMA operators.

It is on that premise that representations were made for change in the existing policy decision. Admittedly, for the purpose of considering the said representation of the petitioner, application of mind was necessary. The Regulator made recommendations in terms of Clause 11(1)(a) of the TRAI Act in July, 2004. The matter was considered by a Committee constituted for the said purpose. It submitted its report on 10.8.2005, pursuant whereto a Working

Group was constituted to examine and recommend the quantity of spectrum charges (AGR) under the chairmanship of the Wireless Adviser.

Evidently, therefore, the matter required deeper consideration. Several meetings were held and ultimately the policy decision had to be amended by issuance of a corrigendum on 03.11.2006 in terms whereof the CDMA operators were required to pay royalty and licence fees on MW point to point uplink and access charges on AGR basis.

47. It may be true that the respondents being a State, does not have any unfettered discretion. They cannot act arbitrarily. Their decisions are subject to judicial review. But it is also well settled that although a policy decision is not beyond the pale of a judicial review, it ordinary should be interfered with only on limited grounds and not on the merit thereof.

48. It is not a case where this Tribunal exercises an appellate jurisdiction so as to enable it to enter into the merit of the decision.

49. There cannot, however, be any doubt or dispute that the respondents being 'State' within the meaning of Article 12 of the Constitution of India, are bound to act reasonably and thus, cannot impose wholly unreasonable and discriminatory charges.

50. The petitioners themselves did not question the correctness or otherwise of the financial conditions contained in the UASL licence dated 14.11.2003.

51. Clause 3.2 provides for determination of royalty by the WPC. Such determination was required to be made keeping in view the fact that the spectrum is a scarce commodity. If it has been asking for level playing field, it could have questioned conferment of power in this behalf on WPC. It was also required to take into consideration the events, which might have taken place after UASL regime came into being. We would notice the statements made by the respondent in its reply a little later.

52. Mr. Vaidyanathan, however, would submit that the matter relating to quantum of royalty had not been pending before TRAI. Our attention in this behalf has been drawn to paragraphs 27 to 31 of the rejoinder, wherein it has been contended that TRAI had not made any recommendation but in any event pendency of TRAI's recommendations, cannot be a ground of charging exorbitant rates illegally for microwave spectrum based on technology i.e. those UASL operators using GSM technology should give lower rates than the rates charged from UASL operators using CDMA technology.

53. The fact remains that the matter with regard to the allocation of spectrum and/or charges to be levied therefor by the respondents herein, was

pending consideration before TRAI. It had given its recommendations from time to time. In fact, with regard to the allocation of 2G and 3G spectrum, some issues are still pending before TRAI.

54. The report of the Committee has been placed before us, from a perusal whereof it would appear that the Petitioner-Association through its General Secretary himself suggested that the Royalty on AGR basis be effected from 01.10.2006. It is true that the report of the Working Group had not been brought on record by way of pleadings or affidavit.

55. Even if we proceed on the basis (although official records are presumed to have been maintained in normal course of business and thus the representation made by the representatives of the Petitioner No.1 Association that UASL regime be made effective from 1st October, 2006 should not be doubted) that no concession was made by the representative of AUSPI may be held to be correct, the principal question, which would arise for consideration is whether the decision of the respondents is 'wholly illegal and arbitrary'?. We do not think so.

56. The respondents have given an opportunity of hearing not only to the representatives of the Petitioner No.1 Association but also to the representatives of the Cellular Operators Association of India, a body

representing the Cellular Operators. It had to take into consideration the views of others also. If, for the said purpose, it had been awaiting the recommendations of TRAI and/or took into consideration the relevant factors, it cannot be said that the impugned decision is so arbitrary that it should be struck down as such.

57. There is another aspect of the matter, which cannot also be lost sight of. The cellular operators are not before us. This Tribunal ordinarily should not be oblivious of two different concepts of equality, namely 'Over inclusive concept' and 'under inclusive concept' of equality. Equality can be achieved by either giving a positive direction, which may be mandatory in nature, and another by way of a prohibitory order or by striking down a portion of the order, which is discriminatory in nature.

58. In B. Rajendera Prasad And Anr. Vs. Controller of Examinations, reported in 2004 (1) ALD Pg. 80, it has been held :

“While dealing with these aspects, the Court, however, has to adopt different situations. In the case of “over inclusion” the Court has no other go to strike down the State action which has included those persons who do not fit into category of classification. However, if it is a case of “under inclusion” as is the case before us, the Court cannot

give a mandamus to the State to include that category of persons, who are left out of the classification for it is axiomatic that it is for the public authority to make law or to make regulations. If the Court comes to the conclusion that “under inclusion” is arbitrary though it may satisfy rationality test and nexus test, the Court has to remit the matter back to public authority to reconsider the whole issue. But, the Court cannot issue any direction to include persons who as a group are left out of defined class.”

This Tribunal directed the Union of India to place the records before us. Having gone through the records, we are satisfied that in the meeting dated 14.7.2006 the representatives of the petitioner suggested that the royalty on MW point to point uplink and access uplink on AGR basis be implemented from 01.10.2006. It is, therefore, evident that the petitioners even did not at that point of time insist that the same should be given retrospective effect from 15.11.2003. Such a conduct on the part of the authorized representative of the petitioner, in our opinion, constitutes an estoppel by conduct.

We are of the opinion that different rules were existing for the GSM operators and CDMA operators with regard to the payment of royalty/licence fees for spectrum charges. Stricto sensu the matter was not governed by the conditions of licence. Discretionary power was conferred on the WPC Wing. Royalty/licence fee for use of spectrum was charged for two different categories of operators on different basis. They are situated differently, being governed by different rules and were otherwise covered by Clause 18.3.2 of their respective licences, the question of the purported amendment in the policy was not given

a retrospective effect, the same ipso facto would not attract the wrath of Article 14 of the Constitution of India. Whether the action on the part of the State is unreasonable and otherwise violates the level playing field may have to be considered from different angles, but then in a situation of this nature, in terms of which two different rules were operating keeping in view the sources thereof as also the prerogatives of the WPC to determine the mode of calculating licence fee payable having regard to the various factors which would include the consideration as to whether one side will be benefited keeping in view the nature of the equipments used for operation of their business.

59. Article 14 of the Constitution of India, in a case of this nature, cannot be said to have any application.

Correctness of the order of the earlier Bench being dated 05.02.2009 is in question. The same having been set aside by the Supreme Court of India in exercise of its appellate jurisdiction is, thus, no longer operative.

We are, therefore, to consider the controversy between the parties while exercising our jurisdiction in adversarial System.

The approach of this Tribunal, while passing the said order dated 05.02.2009, was completely different.

60. An opinion was formed with regard to the reasonableness of the impugned order and the Bench considered the same to be a reasonable one. If

the respondent for one reason or the other did not agree thereto expressly, the matter could have been heard. Moreover, the records of DoT were called for.

The parties, in our view, should have been given an opportunity of hearing by the Tribunal. Reasons were required to be assigned. If the Respondent did not respond to the suggestions of the Bench of this Tribunal, the matter should have been proceeded with upon hearing the counsel of the parties and perusing their records. This Tribunal has now heard the parties and perused the records. It is entitled to take a different view; the former opinion being neither operative nor binding.

It does not create a binding precedent.

61. Reference to charge of royalty on the ground of neutral technology, in our opinion, may not be correct.

Neutrality of technology means an option given to a party to take any of the technologies. The same would not mean same treatment be given to both categories of operators for all purposes. The operators having been in use of two different technologies, therefore, cannot claim equality in all respects; the technology as also the equipments being different. The efficiency of utilizing the same may also be different. In any event, it is not necessary to determine the same.

62. It is in that context only, the members of the Petitioner No.1 Association thought it fit to make a representation, which was ultimately allowed upon due

consideration thereof and upon obtaining the recommendation of the TRAI, but the same would not mean that the same was bound to be allowed with a retrospective effect. Two different sets of rule being operative, it was for the Central Government to consider the same. If for the said purpose, a committee was constituted and the Central Government acted on the basis of the report of the said Committee, the same cannot give rise to invocation of the equality clause.

At the cost of repetition, it must be mentioned that the concept of equality has different shapes. It would only mean that equals should be treated equally if all factors are similar. Here, admittedly all factors were not similar. Different rules having been operating, the amendment in the procedure was necessary to be laid down. If a separate order was required to be passed which has been done in the instant case, no exception thereto can be taken.

63. What is under challenge is the validity of the said order. Whether the said order should have been given a retrospective effect or prospective effect, is the only question.

The question of applicability to the level playing field, therefore, must be considered from a broader perspective i.e. not only as to whether CDMA operators and GSM operators were similarly situated but also the fact that processes were required to be undertaken in arriving at a decision. If the said decision has been implemented with a prospective effect, the role of this Tribunal being limited, it is difficult to expand our jurisdiction in the matter. In

a case of this nature, it cannot equate its power as akin to the superior Courts of the country, exercising power of judicial review. Even if such a power can be exercised, in the opinion of this Tribunal no such case has been made out.

64. We may in this connection notice two recent decisions of the Supreme Court of India.

In *Bajaj Hindusthan Ltd. Vs. Sir Shadi Lal Enterprises Ltd. and Another* reported in 2011 (1) SCC 640, the Apex Court has held as under :-

“34. The High Court has held that exemption from licensing can be granted under Section 29-B to small industries but not to large industries. With respect we cannot agree. A perusal of Section 29-B(1), which has been quoted above, shows that a notification under the said provision can be issued in respect to four categories. Smallness of the industry, is only one of such categories. The fourth category viz. “the stage of development of any scheduled industry” is very wide, and thus gives wide power to the Central Government to delicense even large industries.

39. We should not be understood to have meant that the judiciary should never interfere with administrative decisions. However, such interference should be only within narrow limits e.g. when there is clear violation of the statute or a constitutional provision, or there is arbitrariness in the Wednesbury sense. It is the administrators and legislators who are entitled to frame policies and take such administrative decisions as they think necessary in the public

interest. The Court should not ordinarily interfere with policy decisions, unless clearly illegal.

40. *Economic and fiscal regulatory measures are a field where Judges should encroach upon very warily as Judges are not experts in these matters. The impugned policy parameters were fixed by experts in the Central Government, and it is not ordinarily open to this Court to sit in appeal over the decisions of these experts. We have not been shown any violation of law in the impugned notification or press note.”*

Yet again, recently in *State of H.P. & Ors. Vs. Himachal Pradesh Nizi Vyavsayik Prishikshan Kendra Sangh* reported in 2011 (4) SCALE 801, it has been held :-

“11) The High Court has lost sight of the fact that education is a dynamic system and courses/subjects have to keep changing with regard to market demand, employability potential, availability of infrastructure, etc. No institute can have a legitimate right or expectation to run a particular course forever and it is the pervasive power and authority vested in the Government to frame policy and guidelines for progressive and legitimate growth of the society and create balances in the arena inclusive of imparting technical education from time to time. Inasmuch as the institutions found fit were allowed to run other courses except the three mentioned above, the doctrine of legitimate expectation was not disregarded by the State. Inasmuch as ultimately it is the responsibility of the State to provide good education, training and employment, it is best suited to frame a policy or either modify/alter a decision depending on the circumstance based on relevant and acceptable materials. The

Courts do not substitute its views in the decision of the State Government with regard to policy matters. In fact, the Court must refuse to sit as appellate authority or super legislature to weigh the wisdom of legislation or policy decision of the Government unless it runs counter to the mandate of the Constitution.”

65. Yet again in Heena Kausar Vs. Competent Authority reporting in 2008 (14) SCC 724 it has been held as under :-

“23. This Court in State of W.B. v. Anwar Ali Sarkar as also in Ram Krishna Dalmia v. Justice S.R. Tendolkar categorically laid down the twin test of classification. The classification, however, should be based on reasonable and rational differentia and should not be arbitrary.”

66. More significantly, however, as a prospective effect has been given to an economic policy, the Courts ordinarily should not interfere therewith, subject of-course, to arriving the same being not arbitrary, discriminatory or otherwise illegal. We, therefore, are of the opinion that the impugned order dated 3rd November, 2006 cannot be struck down, as being discriminatory or violative of the National Telecom Policy.

Charge of Royalty from the date of earmarking issue

67. Allocation of frequency is done for the purpose of giving effect to the licenses. It is accepted that after such allocation, the operators are required to take clearance from a large number of Government agencies. They are known as Standing Advisory Committee for Frequency Allocation (SACFA). Upon earmarking of the frequency, an application is required to be filed by the operators pointing out the spot selected by them for SACFA clearance.

68. The respondents in their reply, stated :-

“It is submitted that it had emerged that in the past that when spectrum charges were being charged from the date of issue of licence or from the date of use of frequency, there were cases where neither the service provider started the service nor the radio spectrum allocated was surrendered by the Operator.

It is submitted that keeping in view this fact a decision was taken that for efficient and optimal use of spectrum which is a scarce resource, the Government decided to levy the spectrum charges to the Operator from the date of earmarking of the frequency from March, 2005. This was necessitated due to non use of the earmarked spectrum by the Operators and also due to the fact that demands of radio spectrum were increasing day by day in view of the growth of telecom sector in India.

It is reiterated that Radio Spectrum is a limited scarce natural resource, which has to be used optimally and efficiently by all wireless users. That levy of Spectrum charges from the date of allocation/earmarking is one of the tools to enforce efficient, optimum and effective use of radio spectrum.

In this context it may be pointed out that once a particular frequency is earmarked in favour of a particular operator, it cannot be assigned to other operator to whom it has been allotted in that area until and unless the previous operators surrenders it of its own. It becomes unavailable for the respondent, once it is allocated to an Operator.

It is also relevant and pertinent to point out that spectrum is required to increase the teledensity in the country and cannot be allocated to be wasted by mere allocation without any use by the Operator. That once a spectrum is allocated to a particular operator it cannot be allowed or earmarked to another operator unless it is surrendered. Therefore, as far as the respondent is concerned, the Spectrum become unavailable to the respondent from the time it is earmarked and therefore the decision taken by the respondent to charge royalty from the date of earmarking is correct and cannot be found to be in any manner unreasonable.

In this context it is also pertinent to mention that since the introduction of spectrum charges from the date of earmarking of frequency, many telecom operators, especially, CDMA based operators, have surrendered large number of frequencies unutilized by them.

It is submitted that the decision to levy telecom charges from the date of earmarking have been taken after considering the matter in detail.”

“49. Para 49 of the petition is wrong and denied. It is denied that the respondents should have made the change in payment methodology for CDMA Operators for microwave from 2002. It is submitted that the CDMA based UASL operators came into existence from November, 2003 after migration from BSOs to UASL. These operators were governed by a separate license agreement issued to BSOs. That there was no change in policy for spectrum charging in respect of Microwave Access/Backbone till November 2006 and CDMA & GSM based UASL were paying spectrum charges as per their respective government order existing then. The order dated 3rd November 2006 pertaining to uniform spectrum charging for microwave Access/Backbone networks of GSM as well as CDMA based operators and also rationalization of the spectrum charges is applicable from the date of issue of the order. Further no government order having financial implications is issued retrospectively in general. Therefore, the present order has not been made effective retrospectively.”

69. A statement has been made in the petition that the time for obtaining SACFA clearance used to take 18 to 24 months. Our attention in this behalf has been drawn to para 13 of the petition which is in the following term :-

“As a practice, generally it took about 12-18 months, after earmarking of a particular spot till obtaining actual permission for operating a link.”

70. We have noticed heretofore the statement made by the respondent. The petitioners, however, except making a general statement, did not state specifically as to how much time had been taken for grant of SACFA clearance in the cases of the petitioners other than the first petitioner.

71. We may notice that the affidavit in support of the petition has been affirmed by the Secretary General of Petitioner No.1 Association, Mr. Subhash Chandra Khanna. He has not verified the aforementioned statement as true to his knowledge.

72. We may notice para 2 of his affidavit, which reads as under :-

“That I have read and understood the contents of the accompanying Petition, which has been drafted by our Counsel under my instructions. The contents thereof are true and correct to the best of my knowledge based on official records maintained in usual course of business and information received and believed to be true and correct. Legal submissions are based on the legal advice rendered

and verily believed to be true and correct. No part of it is false and nothing material has been concealed therefrom.”

The question before us essentially relates to an order passed by the Central Government with regard to allowing of a private operator to establish telegraphs upon allotment of spectrum, which is a matter of policy decision. Correctness of such policy decision must be considered on the basis of materials brought on record. There is a tabulated statement made by the Union of India in para xx and xxi of the written submissions that other statutory organizations and public sector undertakings have also been brought within the purview of the said policy. We have no doubt about correctness of the said statement. The petitioners also in their written submissions have not controverted the same. If this Tribunal adopts it to be one of the grounds for upholding the policy decision, in our opinion, no exception thereto should be taken.

73. If any operator was aggrieved by any act of in-action on the part of the respondent No.2, it could have approached this Tribunal directly. Nobody has done so. The contention of the respondent that all the allottees of spectrum are to pay the charges from the date of earmarking of the frequency must be accepted as correct.

74. If even the departments of the Central Government, statutory organizations and Public Sector Undertakings are to pay the royalty from the date of earmarking, no question of discrimination arises.

The question before us may essentially an order passed by the Central Government in regard to allowing of a private operator to establish telegraphs upon allotment of spectrum is a matter of policy decision. Correctness of such policy decision must be considered on the basis of materials brought on record. There is a tabulated statement made by the Union of India in para xx and xxi of the written submissions that other statutory organizations and public sector undertakings have also been brought within the purview of the said policy. We have no doubt about correctness of the said statement. The petitioners also in their written submissions have not controverted the same. If this Tribunal adopts it to be one of the grounds for upholding the policy decision, in my opinion, no exception thereto can be taken.

75. We would, however, direct the respondents to consider any specific case in this regard, if any operator brings the same to its notice.

Quarterly Payment Issue

76. The date of allocation of spectrum assumes some significance. An operator should not be made to pay for an act, which is not within its control.

We are, therefore, of the opinion that that part of the earlier orders of this Tribunal appears to have some justification. No person, including a 'State' can unjustly enrich itself. Only because the license provides for payment of royalty on quarterly basis, the same would not mean that irrespective of the date of allocation, said charge must be levied mechanically. Apart from the fact that there existed a condition of license of payment on quarterly basis, as noticed heretofore, no arguments have been advanced.

Epilogue

77. Before parting with this case, we are of the opinion that unfortunately in the earlier round of litigation, the respondents had not made any submission. There might have been some discussions at the Bar and this Tribunal thought to make a proposal which, it was considered, would be acceptable to the respondents. It was expected of a State that it would come up with one stand or the other. It could have rejected the suggestion of this Tribunal and raise its own contentions. For reasons best known to it, it chose to remain silent.

78. We furthermore fail to understand as to why such important documents, like the report of the Working Group had not been placed before this Tribunal at the first stage. No such contention has also been raised in the pleadings. We have no doubt in our mind that the competent authority of the WPC shall take

notice of the fact and take such action against the officers concerned or at least see to it that in future, the same is not repeated.

79. For the reasons aforementioned, this petition is allowed in part and to the extent mentioned hereinbefore.

However, in the facts and circumstances of this case, there shall be no order as to costs.

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

.....
(P.K. Rastogi)
Member

rkc