

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**

**NEW DELHI**

**DATED 1<sup>st</sup> AUGUST 2012**

**Petition No. 461 of 2012**

Vodafone India Ltd. and Ors. ...Petitioner

Vs.

Union of India & Anr. ...Respondent

**BEFORE:**

**HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON**

**HON'BLE MR.P.K. RASTOGI, MEMBER**

For Petitioner : Dr. Abhishek Manu Singhvi, Sr. Advocate  
Mr. C.S. Vaidyanathan, Sr. Advocate  
Mr. Manjul Bajpai, Advocate  
Ms. Harshita Verma, Advocate  
Mr. Aneesh Patnaik, Advocate

For Respondent No. 1 : Mr. Ruchir Mishra, Advocate

For Respondent No. 2 : Mr. Saket Singh, Advocate

**ORDER**

Maintainability of the petition arises for consideration in the present case wherein the Petitioner has prayed for the following reliefs:-

*“(a) Strike down and quash the impugned decision of the DOT contained in Paras 5 and 6 of the DOT’s guidelines dated 03.07.2012.”*

2. Before however, we advert thereto, we may notice paragraphs 5 and 6 of the said guidelines dated 03.07.2012, which read as under:-

*“5. Liberalisation of Spectrum:- the spectrum to be assigned shall be liberalized. In other words, spectrum in any band can be used for providing any service within the scope of respective service licenses using any technology.*

*6. Conversion of existing spectrum to liberalized Spectrum:- Service providers may be allowed to convert their existing 1800 MHz spectrum to liberalized spectrum for a period of 20 years on payment of auction determined price. However, period of 20 years will be subject to licensee acquiring Unified Licence on expiry of existing licence. The entry fee already paid may be adjusted on pro-rata basis only on one occasion when the licensees convert their spectrum into liberalized spectrum.”*

3. The basic facts of the matter is not in dispute.

The Petitioners are licencees. According to them having regard to the National Telecom Policy, 1999 and various documents issued by the Respondent herein from time to time as also the decisions of this Tribunal, there cannot be any doubt or dispute that the licenses granted to the Petitioners are technology neutral and consequently they are entitled to use the spectrum allocated to them pursuant to or

in furtherance of the license granted in their favour in any manner whatsoever and irrespective of the nature of spectrum.

4. The Telecom Regulatory Authority of India (TRAI) issued consultation papers at diverse points of time and lastly on or about 3.2.2012, the relevant portions whereof read as under:-

*“Dated 3rd February, 2012*

***Subject: Pre-Consultation on “Allocation of Spectrum in 2G band in 22 Service Areas by auction”***

*1 The Hon’ble Supreme Court of India in its Judgment dated 2<sup>nd</sup> February 2012 in the writ petitions no 423/2010 and 10/2010, has directed TRAI as under:*

*“Keeping in view the decision taken by the Central Government in 2011, TRAI shall make fresh recommendations for grant of licence and allocation of spectrum in 2G band in 22 Service Areas by auction, as was done for allocation of spectrum in 3G band.”*

*2 On the issue of grant of licences, TRAI in its recommendation on “Spectrum Management and Licensing Framework” dated 11th May 2010 had already recommended that all future licences should be Unified Licences and that spectrum be delinked from the licence. Pursuant to this recommendation, “Draft Guidelines for Unified Licensing Regime” were also placed on TRAI website [www.trai.gov.in](http://www.trai.gov.in) on 16th January 2012 for comments of the stakeholders.*

3 *On the issue of “Allocation of spectrum in 2G band in 22 Service Areas by auction”, Stakeholders are requested to send their comments/suggestions on the issues involved.*

4 *Written comments, at this pre-consultation stage are invited from the stakeholders by 15th February, 2012. Keeping in view the time bound nature of exercise, no extension of time will be given.”*

5. Pursuant to or in furtherance of a Press release, the DOT communicated various decisions taken with regard to the TRAI Recommendations dated 11.5.2010.

Yet again however, a consultation paper was issued on 7.3.2012 by the TRAI. According to the Petitioner, in response thereto, it contended that mobile licenses having been technology neutral and as in consequence thereof use of spectrum already stands liberalized, no amendment in the conditions of license would be necessary.

6. However, the TRAI sent its recommendations to the Respondent on or about 23.4.2012, stating that “All Spectrum to be assigned through the auction process in future shall be liberalized. In other words ‘Spectrum’ in any band could be used for deploying services in any technology.”

7. Representations thereagain were made before the Hon’ble Minister of C & IT not only by the Petitioner but also by the COAI

inter-alia contending that the said recommendations of the TRAI are completely untenable.

A re-reference was made by the DOT to the TRAI. In terms of a letter dated 12.5.012, the TRAI responded thereto justifying its recommendations whereupon again representations are said to have been made.

On or about 3.7.2012, the impugned guidelines were issued. It is entitled 'Guidelines for Auction and Allotment of Spectrum in 1800 MHz and 800 MHz.'

8. The matter came up before this Tribunal on 19.7.2012.

9. This Tribunal was prima-facie of the opinion that this petition is not maintainable.

However, before a final decision was taken in the matter, it was opined that DOT should also be heard.

10. We may notice that it is not the case of the Petitioner that recommendations of the TRAI have been accepted by the DOT nor is it its case that the same will have an adverse effect on the existing licenses.

11. The guidelines have been issued by the DOT evidently keeping in view the decision of the Supreme Court of India in Writ Petition No.

423 of 2010 dated 2.2.2012 [*Centre for Public Interest Litigation v. Union of India*, (2012) 3 SCC 1 at page 63] whereby and whereunder it was *inter-alia* directed:-

**102.** *In the result, the writ petitions are allowed in the following terms:*

*(i) The licences granted to the private respondents on or after 10-1-2008 pursuant to two press releases issued on 10-1-2008 and subsequent allocation of spectrum to the licensees are declared illegal and are quashed.*

*(ii) The above direction shall become operative after four months.*

*(iii) Keeping in view the decision taken by the Central Government in 2011, TRAI shall make fresh recommendations for grant of licence and allocation of spectrum in 2G band in 22 service areas by auction, as was done for allocation of spectrum in 3G band.*

*(iv) The Central Government shall consider the recommendations of TRAI and take appropriate decision within next one month and fresh licences be granted by auction.*

12. Dr. Abhishek Manu Singhvi and Mr. C.S. Vaidyanathan, learned senior counsel appearing for the Petitioners would contend that the 'Guidelines' issued by the Respondent being final in nature, this petition is maintainable, particularly having regard to the consistent stand taken by it that the licenses granted in its favour are technology

neutral and /or the spectrum allocated to the Petitioner can be used in any manner whatsoever.

Learned counsel in support of its case, would furthermore contend that this Tribunal while construing the said 'Guidelines' should not go by its form but by its substance.

13. Strong reliance has been placed by Dr. Singhvi in Narendra Kumar Maheshwari Vs. Union of India and ors reported in 1990 (Supp) SCC 440.

In that case it was held:-

*“106. It may, however, be stated that being not statutory in character, these guidelines are not enforceable. See the observations of this Court in G.J. Fernandez v. State of Mysore<sup>12</sup> (Also see R. Abdullah Rowther v. State Transport Appellate Tribunal<sup>13</sup>; Dy. Asstt. Iron & Steel Controller v. L. Manekchand, Proprietor<sup>14</sup>; Andhra Industrial Works v. CCI<sup>15</sup>; K.M. Shanmugam v. S.R.V.S. Pvt. Ltd.<sup>16</sup>) A policy is not law. A statement of policy is not a prescription of binding criterion. In this connection, reference may be made to the observations of Sagnata Investments Ltd. v. Norwich Corpn.<sup>17</sup> Also the observations in British Oxygen Co. v. Board of Trade<sup>18</sup>. See also Foulkes' Administrative Law, 6th edn. at pp. 181-184. In R. v. Secretary of State, ex parte Khan<sup>19</sup> the court held that a circular or selfmade rule can become enforceable on the application of persons if it was shown that it had created legitimate expectation in their minds that the authority would abide by such a policy/guideline. However, the doctrine of legitimate expectation applies only when a person had been given reason to believe that the State will abide by the certain policy or guideline on the basis of which such applicant might have been led to take certain actions. This doctrine is akin to the doctrine of promissory estoppel. See also the observations of Lord Wilberforce in IRC v. National Federation<sup>20</sup>. However, it has to be borne in mind that the guidelines on*

which the petitioners have relied are not statutory in character. These guidelines are not judicially enforceable. The competent authority might depart from these guidelines where the proper exercise of his discretion so warrants. In the present case, the statute provided that rules can be made by the Central Government only. Furthermore, according to Section 6(2) of the Act, the competent authority has the power and jurisdiction to condone any deviation from even the statutory requirements prescribed under Sections 3 and 4 of the Act. In *Regina v. Preston Supplementary*<sup>21</sup> it had been held that the Act should be administered with as little technicality as possible. Judicial review of these matters, though can always be made where there was arbitrariness and mala fide and where the purpose of an authority in exercising its statutory power and that of legislature in conferring the powers are demonstrably at variance, should be exercised cautiously and soberly.

**107.** We would also like to refer to one more aspect of the enforceability of the guidelines by persons in the position of the petitioners in these cases. Guidelines are issued by governments and statutory authorities in various types of situations. Where such guidelines are intended to clarify or implement the conditions and requirements precedent to the exercise of certain rights conferred in favour of citizens or persons and a deviation therefrom directly affects the rights so vested the persons whose rights are affected have a clear right to approach the court for relief. Sometimes guidelines control the choice of persons competing with one another for the grant of benefits, largesses or favours and, if the guidelines are departed from without rhyme or reason, an arbitrary discrimination may result which may call for judicial review. In some other instances (as in the *Ramana Shetty case*<sup>1</sup>), the guidelines may prescribe certain standards or norms for the grant of certain benefits and a relaxation of, or departure from, the norms may affect persons, not directly but indirectly, in the sense that though they did not seek the benefit or privilege as they were not eligible for it on the basis of the announced norms, they might also have entered the fray had the relaxed guidelines been made known. In other words, they would have been potential competitors in case any relaxation or departure were to be made. In a case of the present type, however, the guidelines operate in a totally different field. The guidelines do not affect or regulate the right of any person other than the company applying for consent. The manner

of application of these guidelines, whether strict or lax, does not either <sup>510</sup> directly or indirectly, affect the rights or potential rights of any others or deprive them, directly or indirectly, of any advantages or benefits to which they were or would have been entitled. In this context, there is only a very limited scope for judicial review on the ground that the guidelines have not been followed or have been deviated from. Any member of the public can perhaps claim that such of the guidelines as impose controls intended to safeguard the interests of members of the public investing in such public issues should be strictly enforced and not departed from; departure therefrom will take away the protection provided to them. The scope for such challenge will necessarily be very narrow and restricted and will depend to a considerable extent on the nature and extent of the deviation. For instance, if debentures were issued which provide no security at all or if the debt-equity ratio is 6000: 1 (as alleged) as against the permissible 2:1 (or thereabouts) a court may be persuaded to interfere. A court, however, would be reluctant to interfere simply because one or more of the guidelines have not been adhered to even where there are substantial deviations, unless such deviations are, by nature and extent such as to prejudice the interests of the public which it is their avowed object to protect. Per contra, the court would be inclined to perhaps overlook or ignore such deviations, if the object of the statute or public interest warrant, justify or necessitate such deviations in a particular case. This is because guidelines, by their very nature, do not fall into the category of legislation, direct, subordinate or ancillary. They have only an advisory role to play and non-adherence to or deviation from them is necessarily and implicitly permissible if the circumstances of any particular fact or law situation warrants the same. Judicial control takes over only where the deviation either involves arbitrariness or discrimination or is so fundamental as to undermine a basic public purpose which the guidelines and the statute under which they are issued are intended to achieve.”

14. It is not contended by the Petitioners that they had a legitimate expectation in their mind that the authority would abide by the guidelines while applying the same as against the licensees.

The said decision in fact is an authority for the proposition that guidelines do not constitute law.

It has also not been argued that the said guidelines interfere with the existing license agreements.

15. As has been rightly pointed by Shri Ruchir Mishra the 'Guidelines' dated 03.07.2012 itself provides:-

*"13. Other issues:- (i) The Government of India reserves the right to amend or modify these terms and conditions before the commencement of auction process. The final conditions shall be as indicated in the bidding document.*

*(ii) The Government of India reserves the right to cancel the bidding process or disqualify any bidder without assigning any reason.*

*(iii) Trading/sharing of spectrum, if any, shall be governed by policy as may be determined by the Government of India."*

It is, therefore, not correct to contend that the said 'Guidelines' has attained finality or capable of enforcement against a GSM licensee *ipso facto* or *ipso jure*.

The decisions referred to in paragraph 106 of Narendra Nath (supra) have been followed by the Apex Court in a large number of decisions.

In S. B. International Ltd. Vs. Asst. Director General of Foreign Trade, reported in (1996) 2 SCC 439, it was held:-

*“14. The proposition in Manickchand (1972) 3 SCC 324 was reiterated by a Constitution Bench in Andhra Industrial Works Vs. Chief Controller of Exports (1974) 2 SCC 348: (1975) 1 SCR 321. While observing that the Import Control Policy statement contained in which was known as “Red Book” was not statutory, the Court observed:*

*‘ No person can merely on the basis of such a Statement claim a right to the grant of an import licence, enforceable at law. Moreover, such a policy can be changed, rescinded or altered by mere administrative orders or executive instructions issued at any time.’*

In Karnataka State Forest Industries Corporation Vs. Indian Rocks (2009) 1 SCC 150, it was opined:-

*“39. There cannot be any doubt whatsoever that a writ of mandamus can be issued only when there exists a legal right in the writ petition and a corresponding legal duty on the part of the State, but then if any action on the part of the State is wholly unfair or arbitrary, the superior courts are*

*not powerless. Reliance placed by Mr. Divan on G. J. Fernandez Vs. State of Mysore [AIR 1967 SC 1753 : (1967) 3 SCR 636] is not apposite. In that case itself it was held:*

*‘12. Thus under Article 162, the State Government can take executive action in all matters in which the legislature of the State can pass laws. But Article 162 itself does not confer any rule-making power on the State Government in that behalf.’”*

16. This Tribunal does not exercise a power of judicial review. It except in certain exceptional cases, would not entertain a petition filed by a licensee u/s 14 of the Telecom Regulatory Authority of India Act, 1997 (The Act) only because the Petitioner has an apprehension in its mind that the same may affect it adversely. Although the term ‘any dispute’ contained in section 14 of the TRAI Act is of wide nature, the same would not mean that this Tribunal without any just cause would exercise ‘Quia-Timet’ jurisdiction.

17. No final decision has been taken by the DOT as yet. The TRAI recommendations related to fresh auction which may take place for 2G Spectrum. Nothing has been brought to our notice as to how the existing licenses would be affected, if they elect to continue to hold the old licenses.

18. Dr. Singhvi would also rely upon a decision of the Supreme Court of India in *Tamboli R. Motilal Vs. Ghanchi C. Keshavlal* and another reported in 1993 Supp (1) SCC 295.

The question in that case was as to whether the document in question constituted Mortgage with Conditional Sale or a ‘Sale with an option to re-purchase’. Indisputably the same will depend upon the terms of the contract.

19. As guidelines prima-facie does not constitute an enforceable action per se and having regard to the fact that a final decision on the conditions of the auction is yet to be taken, in our opinion, this petition is not maintainable.

It is dismissed accordingly.

Liberty, however, is given to the Petitioner to approach this Tribunal as and when any occasion arises therefor.



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**(S.B. Sinha)**  
**Chairperson**

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