TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 13th January, 2012

Petition No. 1 of 2011
(M.A.No.49 of 2011 & M.A.No.106 of 2011)

Unitech Wireless (Tamilnadu) Pvt. Ltd. & Ors. ..... Petitioners

Vs.

Union of India and Anr. ..... Respondents

(**Along with** Petition Nos.2/2011,3/2011,4/2011,8/2011, 9/2011,10/2011.11/2011,12/2011,13/2011,19/2011,20/2011, 21/2011,22/2011,23/2011,24/2011,36/2011,37/2011, 41/2011,42/2011,47/2011,48/2011,49/2011,52/2011, 53/2011,54/2011,55/2011,56/2011,57/2011,58/2011, 62/2011,63/2011,64/2011,65/2011,66/2011,67/2011, 68/2011,69/2011,70/2011,71/2011,72/2011,73/2011, 74/2011,75/2011,76/2011,77/2011,78/2011,79/2011, 80/2011,82/2011,83/2011,84/2011,85/2011,97/2011, 109/2011,110/2011, 114/2011, 122/2011, 123/2011, 124/2011, 125/2011, 126/2011, 127/2011, 128/2011, 129/2011, 130/2011, 131/2011, 132/2011, 133/2011, 134/2011 & 135/2011)

BEFORE:

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

For Petitioners (For Unitech, Aircel and Dishnet)	:	Mr.Meet Malhotra, Senior Advocate Mr. Ravi S.S. Chauhan, Advocate Mr. Ranjan Mukherjee, Advocate
(For Videocon)	:	Mr.Meet Malhotra, Senior Advocate Ms.Ruchi Agnihotri, Advocate Ms. Bincy Susan, Advocate Mr.Jai Mohan, Advocate

(For S.Tel)	:	Mr.Dayan Kishan, Advocate Mr.Gautam Narayan, Advocate Mr. Amit Gupta, Advocate
(For Sistema)	:	Mr.Ramji Srinivasan, Senior Advocate Mr.Mansoor Ali Shoket, Advocate Ms.Vibha Dhawan, Advocate
For Respondents	:	Ms.Maneesha Dhir, Advocate Mr.K.P.S.Kohli, Advocate Ms.Poonam Anand, Advocate Mr.Kshitiz Khera, Advocate

J U D G E M E N T

INTRODUCTION

This batch of petitions filed by several licensors; namely Unitech Wireless (Tamilnadu) Pvt. Ltd., Videocon Telecommunications Ltd., Aircel Ltd., Dishnet Wireless Limited, Sistema Shyam Teleservices Ltd., S. Tel Pvt. Ltd., raise a question of legality and validity of orders passed against the Petitioners levying liquidated damages on the premise that they have failed to comply with their respective roll out obligations in terms of Clause 35 of the Conditions of Licence.

Keeping in view the fact that for different operators, different petitions have been filed circle-wise, it was suggested by the learned Additional Solicitor General of India appearing on behalf of the Respondent that it would file reply issue-wise, which by and large would be applicable in all cases.

2. By an order dated 10.02.2011, the following issues were accordingly framed :-

"1. What would be the meaning of start up spectrum within the meaning of the provisions of clauses 8.1, 34 and 35?

2. What would be the time period which should be excluded for the purpose of calculating the delay in clearance by SACFA i.e average delay or the total delay (or the actual delay)?

3. Whether in terms of the license agreement, is it obligatory on part of the Licensor to issue show cause notices for imposition of Liquidated Damages?

4. Whether in terms of the Condition 5 of the license agreement, Licensor in the public interest and in the interest of the security of the 'State' subsequently change/modify conditions?

5. What would constitute 10% of the DHQs to be covered by the Licensees in the first year to meet the rollout obligations in terms of Clause (iii) and (x) of the amendment letter dated 10.02.2009?

6. Whether the Licensees can ask for any injunction against the performance bank guarantees which are absolute, irrevocable and unconditional and otherwise a contract between the Licensor and the bank?

7. *Whether Microwave Access and Microwave Backbone frequencies having regard to Clauses 43 and 18.3.2 are a sine qua non for meeting the rollout obligations?*

8. *Whether the time taken on account of the delay in security clearance for the equipments is liable to be excluded in meeting the roll out obligations?"*

3. However, on or about 25.02.2011, some additional issues have been framed.

It was made clear that replies would be filed issue-wise and factual averments made in the petition need not be traversed in-extenso and replies on statement of fact in each petition may be filed. However, the Respondent sought to file replies in all the cases. Opportunities for filing replies had been granted from time to time. Despite the same, replies in all the matters were not filed. No reply has been filed in case of some of the petitioners and at least in 47 matters.

4. Hearing of the matters started from 26.9.2011. On the next date of hearing i.e. on 27.9.2011 Mr. Malhotra, appearing on behalf of Unitech Wireless (Tamilnadu) Pvt. Ltd. (hereinafter referred to as 'Unitech'), sought for

certain clarifications in the matter of prayer of the Respondent to file replies in other cases.

By an order of the said date, it was directed :-

> *"i) the matter shall be heard issue-wise;*
>
> *ii) In the event it is found that any disputed question of fact arises and having regard to the determination of the issues already framed if it becomes necessary to give an opportunity to the parties to address us on issues of fact, adequate opportunities would be given to both the parties so that their respective interest may be protected.*
>
> *iii) However, if it is found that the respondents were bound to comply with the principles of natural justice and thus determination of issues of fact are not necessary, such a course of action may also be taken.*
>
> *iv) No further reply would be permitted to be filed hereafter subject to any other or further directions which may be passed."*

5. Petition No. 10 of 2011 with the consent of the parties was treated to be the lead matter. We would notice the factual aspect from the said petition unless otherwise required.

Background Facts :

6. The Petitioners were granted licence on diverse dates in the month of February and March, 2009. The said licenses, however, became effective on and from 25.01.2008.

7. The licences granted to the Petitioners were in the nature of Unified Access Service Licence, which were issued on non-exclusive basis for a period of 20 years for the Licence Service Areas specified therein.

One operator was, however, allowed to apply for licence for more than one service area.

8. 'Unitech' was granted licence initially in respect of 22 circles. However, later on, Tamilnadu circle having merged with the Chennai Metro Circle, the number of circles, in respect whereof licences were granted, came down to 21.

9. 'Unitech' applied for grant of start-up spectrum. Initially, it was allocated the same. It applied also for grant of Microwave Access and Microwave Backbone spectrum, which were, however, allocated after some time.

10. The Respondent, inter-alia, on the premise that the Petitioners have not met their roll out obligations, imposed liquidated damages of Rs.5.5 crores inter alia in respect of its Tamilnadu circle, the relevant paragraphs whereof, read as under :-

> *"Whereas The Company has failed to commission the services in atleast 10% of the District Headquarters (DHQs)/Towns in Tamilnadu (including Chennai Service area) Service Area, as it has not registered with the TEC/TERM Cell for coverage testing of atleast 10% of the District Headquarters (DHQs)/Towns within one year of date of allocation of the startup spectrum as per following details :-*

Name of License Service Area	*Date of allocation of startup spectrum*	*Average SACFA Delay in number of days*	*Due date for fulfilling the first year roll-out obligations*	*Date of registration with TERM cell of DoT by Licensee*	*Delay in number of weeks*	*Amount of LD in Rs.* *Crores*
Tamilnadu (including Chennai Service Area)	*22-APR-08*	*3*	*26/04/2006*	*19/02/2010*	*44*	*5.55*

> *THEREFORE, The Company has violated condition 8 and condition 34 of the UAS Licence Agreement as amended vide DoT letter No. 842-320/2005-VAS-II (Vol.III)/28 dated 10 Feb., 2009.*
>
> *NOW THEREFORE, M/s. Unitech Wireless (Tamilnadu) Pvt. Ltd. is directed to pay the liquidated damages amounting to Rs.5.5 Crores (In words Rs. Five Crores Fifty-Five Lakhs) as per condition 35.2 of*

the UASL agreement immediately and in any case within 15 days of the date of this notice failing which further action may be initiated under the conditions of the UAS license agreement. The Amount may be deposited by means of demand draft/banker's cheque drawn on any scheduled bank in favour of PAO, Department of telecom headquarters, New Delhi 110001, in the Pay and Accounts Office of the Department of Telecommunications at New Delhi.

The Licensor, however reserves the right to claim/recover any additional liquidated damages on this account, if found payable at a later date."

11. It may, however, be noticed that the average SACFA delay has been calculated in respect of each circle separately, to which we shall refer to at an appropriate stage.

Apart from the delay in grant of SACFA clearance, some of the petitioners contend that security conditions as also conditions for L.T.I., which were imposed later on, also caused huge delay and came on the way of the licensees in meeting their roll out obligations.

12. By and large Issue Nos. 2, 4 & 8 deal with the question of delay; whereas Issue Nos. 1 and 7 deal with the question of frequency.

Issue No.5 was framed only in respect of J&K Circle in the matter of S. Tel. Pvt. Ltd.

So far as Issue No. 6 is concerned, we are of the opinion that as the question of compliance of the mutual obligations of the parties hereto are required to be determined, the matter relating to the grant of a decree for permanent injunction restraining the Respondent from invoking the Performance Bank Guarantees need not be determined in these matters.

Relevant Statutes and the License Agreement.

13. The license agreement provides that the grant has been made by the licensor not only in terms of the proviso appended to Section 4 of the Indian Telegraph Act on a non-exclusive basis but also in terms of the provisions of the Wireless Telegraph Act, 1933 and Telecom Regulatory Authority of India of India Act.

14. We may notice that Part II of the Indian Telegraph Act stipulates that the Central Government shall have exclusive privilege of establishing, maintaining and working telegraph. Proviso appended thereto however, enables the Central Government by way of grant of licence to part with such privilege on such terms and conditions and in consideration of such payments as it thinks fit, so

as to enable any other person to establish maintain or work a telegraph within any part of India.

Part IV of the said Act provides that any person maintaining or working unauthorized telegraph shall be punishable.

Section 20A provides that breach of conditions of license is also punishable with fine which may extend to Rs.1000/- and with a further fine which may extend to Rs.100/- every week during which breach of the condition continues.

15. Section 3 of The Indian Wireless Telegraph Act, 1933 prohibits possession of Wireless Telegraphic Apparatus without license.

Section 5 provides for grant of license. Section 6 makes possession of a new wireless telegraphic apparatus other than a wireless transmitter a punishable offence.

Condition of license

16. Pursuant to a grant of LOIs in favour of the petitioners, license agreements were executed inter alia on or about 29.02.2008 but with a retrospective effect from 25.01.2008.

Clause 2.2 provides rendition of access service of all types, whether wireless or wireline. It is, thus, not limited to one type of service.

In case of Wireless Service, as indicated heretobefore, the licence conditions would be governed by the Indian Telegraph Act and Indian Wireless Telegraph Act.

Clause 5 of the agreement empowers the licensor to amend the license in public interest, security of nation and proper conduct of telegraph.

Clause 6 of the licence provides for restriction for transfer of license.

Clause 16.3 also provides that the aforementioned Acts shall govern the license agreement.

Clause 42 again provides for the application of the Indian Telegraph Act.

Clause 7 provides for the provision of service; whereas Clause 8 provides for delivery of service.

It is in the aforementioned context, we may also notice the definition of 'Applicable Systems' which reads as under :-

> *"APPLICABLE SYSTEMS : "APPLICABLE SYSTEMS" means all the necessary equipment, systems/sub-systems and components of the network engineered to meet relevant ITU standards, ITU-T, ITU-R recommendations, TEC specifications and international standardization bodies such as 3GPP/3GPP-2/ETSI/IETF/ANSI/ EIA/TIA/IS for provision of SERVICE in accordance with operational,*

technical and quality requirements and other terms and conditions of the Licence Agreement."

The licensees are required to maintain the standard prescribed by ITU.

Clause 14 on which apart from Clauses 18, 34 and 35 the Respondent places reliance, provides for Way Leave.

The licensee has bound itself to abide by the conditions of license as also any direction which may be issued by TRAI or DoT.

The said provision must be read ejusdem generis as the agency referred to therein for clearance is for the purpose of right of way and not for any other purpose.

Clause 18.3 and in particular clauses 18.3.1 as also 18.3.2 provide for payment of license fee on revenue share basis.

Clause 18.3.2 provides for fee or royalty for use of spectrum/possession of wireless telegraphic equipment which would depend upon various factors, such as frequency, hop and link length, area of operation and other related aspects.

It also provides that authorization of frequencies for setting microwave links by licensed operators and issue of licenses were to be separately dealt with by the WPC Wing as per the existing rules.

Clause 23.1 provides for Technical Conditions.

We may notice Clauses 23.1 and 23.5 :-

> *"23.1 The Licensee shall provide the details of the technology proposed to be deployed for operation of the service. The technology should be based on standards issued by ITU/TEC or any other International Standards Organization/bodies/Industry. Any digital technology having been used for a customer base of one lakh or more for a continuous period of one year anywhere in the world, shall be permissible for use regardless of its changed versions. A certificate from the manufacturers about satisfactory working for a customer base of one lakh or more over the period of one year, shall be treated as established technology.*
>
> *23.5 The frequencies shall be assigned by WPC from the designated bands prescribed in National Frequency Allocation Plan – 2002 (NFAP-2002) as amended from time to time. Based on usage, justification and availability, spectrum may be considered for assignment, on case by case basis. The frequencies assigned may not be contiguous and may not be same in all cases, while efforts would be made to make available larger chunks to the extent feasible. The detailed guidelines for allocation of frequency spectrum and charges thereof etc. would be separately issued from time to time."*

17. Clause 24 provides for applicable system in terms whereof the licensee had been made responsible in respect of the matters specified therein. It

provides for engineering details. However, the amendment provides for a self-certification.

It is in the aforementioned situation, Clauses 34 and 35 of the licence agreement are required to be construed.

The said Clauses read as under :-

> *"**34. Roll-out Obligations** :*
>
> *34.1 LICENSEE shall be solely responsible for installation, networking and operation of necessary equipment and systems for provision of SERVICE, treatment of SUBSCRIBER complaints, issue of bills to its subscribers, collection of its component of revenue, attending to claims and damages arising out of his operations.*
>
> *34.2(a) Applicable for Category "A", "B", and "C" Service Area Licence(s)*
>
> *LICENSEE shall ensure that*
>
> (i) *Atleast 10% of the District Headquarters (DHQs) will be covered in the first year and 50% of the District Headquarters will be covered within three years of effective date of Licence.*
>
> (ii) *The licensee shall also be permitted to cover any other town in a District in lieu of the District Headquarters.*
>
> (iii) *Coverage of a DHQ/town would mean that at least 90% of the area bounded by the Municipal limits should get the required street as well as in-building coverage.*

(iv) *The District Headquarters shall be taken as on the effective date of Licence.*

(v) *The choice of District Headquarters/towns to be covered and further expansion beyond 50% District Headquarters/towns shall lie with the Licensee depending on their business decision.*

(vi) *There is no requirement of mandatory coverage of rural areas.*

34.2(b) Applicable for Metro Service Area Licence(s)

The LICENSEE shall be required to provide in 90% of the service area Street as well as in-building coverage within one year of the effective date.

35. <u>Liquidated damages</u>

35.1 The time period for provision of the Service stipulated in this Licence shall be deemed as the essence of the contract and the service must be brought into commission not later than such specified time period. No extension in prescribed due date will be granted. If the Service is brought into commission after the expiry of the due date of commissioning, without prior written concurrence of the licensor and is accepted, such commissioning will entail recovery of Liquidated Damages (LD) under this Condition. Provided further that if the commissioning of service is effected within 15 calendar days of the expiry of the due commissioning date then the Licensor shall accept the services without levy of LD charges.

35.2 In case the LICENSEE fails to bring the Service or any part thereof into commission (i.e. fails to deliver the service or to meet the required coverage criteria/network roll out obligations) within the

period prescribed for the commissioning, the Licensor shall be entitled to recover LD charges @ Rs.5 Lakh (Rupees Five Lakhs) per week for first 13 weeks; @ Rs.10 lakhs for the next 13 weeks and thereafter @ Rs.20 lakhs for 26 weeks subject to a maximum of Rs.7.00 crores. Part of the week is to be considered as a full week for the purpose of calculating the LD charges. For delay of more than 52 weeks the Licence may be terminated under the terms and conditions of the Licence agreement. The week shall mean 7 Calendar days from (from midnight) Monday to Sunday, both days inclusive and any extra day shall be counted as full week for the purposes of recovery of liquidated damages."

The license agreement envisages as to provisioning of the subscriber access network i.e. from mobile handset to tower.

In terms of Clause 43.5(ii), the extent of allocation of frequency would differ from one service area to another service area.

The allocations are made having regard to the world standard technologies both for GSM and CDMA.

Clause 43.5 (iv) confers an unfettered right on the licensor to allocate microwave access and microwave backbone spectrum.

18. In view of the statutory provisions as also conditions of licence, it is evident that there are mutual obligations both on the part of the licensor and the licensee to comply with the conditions applicable to them respectively.

Amendment to the licence agreement

19. It is not disputed that the Industry made a representation before the Union of India contending that it was difficult for the licensees to meet the first phase of their roll out obligations within one year from the effective date of licence.

Indisputably, the licence agreement was amended in terms of a circular letter dated 10.02.2009 by the Respondent purported to be in exercise of its power conferred upon it under Clause 5 of the Conditions of Licence.

It reads as under :-

> *"Subject : Amendment to the Unified Access Services (UAS) Licence agreement for Roll-Out obligations*
>
> *The issues regarding Roll-Out Obligations and imposition of Liquidated damages in various service areas have been under consideration of the Licensor and the undersigned is directed to convey that in exercise of the power vested in the Licensor under clause 5.1 of the Universal Access Service Licence Agreement, inter-alia, reserving the right to modify at any time the terms and conditions of the LICENCE, in public interest, security of the nation or proper conduct of the SERVICE, the Licensor has prescribed the following criteria for Roll-out obligations and imposition of*

Liquidated Damages, from the effective date of the license by amending clause 8.1, 34 and 35 of the License :-

(i) Roll-out obligations shall apply for wireless network only and not for wireline network.

(ii) The Licensee shall ensure that metro service area of Delhi, Mumbai, Kolkata and Chennai are covered within one year of date of allocation of start up spectrum.

(iii) In non-metro service areas, the licensee shall ensure that in first phase of roll out obligation at least 10% of DHQs where startup spectrum has been allocated are covered within one year of such spectrum. The date of allocation of frequency shall be considered for computing a final date of roll-out obligation.

(iv) Further, in second phase of roll out obligation, the licenses shall ensure that at least 50% of DHQs, where start up spectrum has been allocated are covered within three years of date of allocation of such spectrum in non-metro service areas.

(v) While computing the period of one year under sub-paras (ii) to (iv) above the average delay in SACFA clearance shall be excluded.

(vi) Coverage of a DHQ/town shall mean that at least 90% of the area bounded by the Municipal limits shall get the required street level coverage.

(vii) The date of application for SACFA or date of allocation of frequency, whichever is later, shall be taken into

account for the purpose of calculating average delay in SACFA clearance.

(viii) The Licence is permitted to cover any other town in the District in lieu of the District Headquarters.

(ix) In-building coverage shall not be considered for roll-out obligations as mentioned in sub-paras (ii) to (iv) above and for imposition of liquidated damages.

(x) For calculation of number of DHQs to be covered, the fraction which comes to 0.5 or above shall be rounded off to the next whole number and if the fraction is less than 0.5 it shall be ignored.

(xi) Date of registration by TEC/TERM is to be treated as date of meeting the roll-out obligation in case of coverage criterion is met for roll-out obligation on testing.

(xii) PBG shall be encashed to the extent of the Liquidated Damages."

20. By reason of the said circular, clauses 8.1, 34 and 35 of the Conditions of Licence were amended.

It is beyond any doubt or dispute that a retrospective effect was given thereto.

21. Construction of Clauses (iii), (v), (vii), (x) and (xi) of the said circular letter dated 10.02.2009 fall for consideration in the instant case.

22. National Frequency Allocation Plan deals with all kinds of frequencies and not only of the startup spectrum, to which we shall refer to a little later.

Hearing-Past Practice

23. In Aircel (Petition No.123 of 2011), a point has been taken that the Respondent had given an opportunity to the Petitioner therein for showing cause as to why the liquidated damages should not be imposed in the following terms :-

> *"16. Further, the action of DoT in issuance of the aforesaid Demand Notices is in contravention of the principles of Natural Justice and is in complete contrast to the past conduct of the DoT and its dealings with old existing players on similar issue/s. In the past DoT had not only issued show cause notices to old existing players when similar issue/s arose qua them but also entertained lengthy and bilateral discussions and resolution of the lis with them in a far more amicable and lenient manner. In fact, pursuant to the issuance of Show Cause Notices to the existing service providers discussions of the highest levels with inter alia the Secretary Telecom were held which led to relaxations of norms and consequential amendment/s to the UAS Licences on 10.02.2009.No such opportunity has been extended to the Petitioner, even though*

the demand is unwarranted and in any event the developments subsequent to 10.02.2009 merit a review of the norms for calculating unliquidated Damages. The outright issuance of Demand Notice to the Petitioner is nothing short of willful victimization and arbitrary and discriminatory treatment vis-à-vis the existing players and violates the Demand Notice and renders it non-est."

24. In its rejoinder/short reply, the Petitioner has stated :-

"That the content of the reply in respect of the issues is wrong and denied and the contents of the petition are reiterated. The imposition of damages sought to be made by the respondent are penal in character, though termed as Liquidated Damages. Further, since there were disputes and disagreements regarding effective date and computation of time for rollout, it was obligatory and necessary for the respondent to have first issued a show cause notice before seeking to impose the Liquidated Damages and non-issuance of a show cause notice is clearly a violation of the principles of natural justice and the entire action of the respondent is vitiated on that score alone."

25. It has, therefore, been contended that there was a past practice for giving such an opportunity of hearing which, however, may not be of much importance.

Submissions

26 Mr. Meet Malhotra, Mr. Ramji Srinivasan, learned senior counsel and Mr. Dayan Krishan, learned counsel appearing on behalf of the Petitioners would contend :-

(i) The Respondent acted illegally and without jurisdiction in imposing liquidated damages on the Petitioners in so far as it failed to take into consideration that there being mutual obligations in terms of the licence agreement and it having not performed its part of contract, time was not of the essence thereof;

(ii) The Respondent in computing the amount of liquidated damages should have taken into consideration the maximum delay in grant of SACFA clearance and other clearances and the same having not been done, the impugned order is wholly unsustainable;

(iii) The Respondent having regard to the purpose and object for which the licence agreement had been entered into namely, Wireless Services and not Wireline Services, it was obligatory on its part not only to allocate Start Up spectrum but also Microwave Access Spectrum and Microwave Backbone Spectrum;

(iv) The Respondent committed a serious error in passing the impugned orders in so far as it failed to take into consideration the

fact that the Petitioners being new licensees, it was not possible for them to take recourse to the alternate technology, namely, laying down optical fibre cables and/or copper cables for the purpose of connecting BTS with BSCs and BSCs with MSCs and vice-versa;

(v) In a case of this nature, the Respondent was bound to comply with the principles of natural justice before imposing liquidated damages, which in effect and substance is in the nature of penalty;

(vi) In any event, keeping in view the fact that the amount of liquidated damages are calculated on a graduated scale and ultimately may lead to termination of licence, the requirements of law, as envisaged under Sections 73 and 74 of the Indian Contract Act must be held to have not been made out;

(vii) In a case of this nature, where the parties should have 'level playing field' and in particular the Respondent being a 'State' within the meaning of Articles 12 of the Constitution of India was expected to act reasonably and fairly and, thus, in case of doubt or dispute, the terms of the contract should be construed in favour of the licensees and against the licensor;

(viii) The licence agreement having used the terms 'allocations of frequency', 'frequency bands' and 'frequencies', the same should be

held to mean frequency of all three types and not the Start Up spectrum alone;

(ix) The terms 'average delay' cannot be given any rational meaning and thus, keeping in view the purpose and object for which the licence agreement had been executed, the maximum delay should be taken into consideration as the same had come on the way of the licensees in meeting out their roll out obligations.

27. Ms. Maneesha Dhir and Mr. K.P.S. Kohli, on the other hand, urged :-

(i) The conditions of license must be read as a whole, wherefrom it would appear that the licensees having undertaken/agreed to fulfill all the terms and conditions as also having made itself bound to abide by such directions which may be issued by the DOT and the TRAI, the impugned demands should not be interfered with as the Petitioners have failed to comply with their roll out obligations.

(ii) It is not correct to contend that it was not necessary for the licensees and/or was otherwise not possible for them to meet their roll out obligations within one year from the date of allocation of Start-Up spectrum.

(iii) In any event the provisions of the conditions of licenses having not been questioned nor could in law be done, the licensees cannot be heard to say that any delay on the part of the licensor other than the ones contemplated by the conditions of license should be taken into consideration for the purpose of imposition of liquidated damages.

(iv) The Respondent keeping in view the public interest as also safety and security of the nation and proper conduct of Telegraph having amended the license and having issued directions from time to time, it was obligatory on the part of the licensee to carry out its contractual obligations particularly in view of the fact that the roll out obligations in the first year in respect of 10% of the DHQs were to be carried out in any of the three towns of a circle irrespective of its size and/or other infrastructural facilities available.

(v) Provisions for liquidated damages having been inserted in public interest as also for the purpose of ensuring sharing of revenue on AGR basis and that too on graded scale, the same cannot be held to be bad in law.

(vi) A bare perusal of Clause 43.5 of the conditions of license would clearly demonstrate that what was obligatory on the part of the

licensor was to allocate only the GSM spectrum and not the microwave backbone spectrum or microwave access spectrum.

(vii) Clause 43.5(iv) having conferred an unfettered discretion on the part of the Respondent, the licensees cannot be heard to contend that they could not comply with their roll out obligations on account of delay on its part or otherwise.

(viii) The licensees having regard to the tenor of the conditions of the license could have complied with the conditions of the delivery of service as contained in Clause 8, upon connecting the BTSs inter se or BTS (Base Line Controller), or Base Side Controller to Main Switching Controller and vice versa.

(ix) It is from that point of view only Clause 14 of the conditions of license becomes relevant.

(x) 'Unitech', in various letters having admitted that GSM spectrum is the Start Up spectrum, it is estopped and precluded from contending otherwise.

(xi) The Petitioners having made clear and explicit admission and furthermore having accepted the benefits of the agreement, cannot be permitted to question the validity or otherwise thereof having regard to the fact that a party to the contract cannot approbate and reprobate at the same time.

(xii) Having regard to the minutes of meeting dated April, 2009 wherein the requirements of meeting out the roll out obligations on the part of the licensees having clearly been spelt out and the Petitioners having accepted the same, these petitions are otherwise not maintainable.

SACFA Clearance

28. SACFA is a high powered committee consisting of 14 members. For the purpose of obtaining its clearance, applications are required to be filed. Whereas according to the Respondent having regard to Clause (vii) of the amendment dated 10.02.2009 an application for SACFA clearance can be filed for the purpose of consideration of the height of the tower as also for the purpose of consideration from the point of view of frequency interference at a given point of time i.e. even prior to earmarking of frequency; according to the Petitioners only after frequency is allocated the licensee must file an application.

29. Mr. Kohli would urge that SACFA clearance is ordinarily necessary for the purpose of seeing as to whether the tower placed by licensee is compatible to the other radio system and as also to see that the same does not obstruct any flight path. It was contended that in the event a tower is put outside a

circumference of seven miles of any airport and the average mean sea height level is 40 meters, SACFA clearance is immediately granted.

Re : Issue of Delay

30. The questions, which have been posed with regard to the delay aspect of the matter, inter-alia are :-

(i) What is the start time for reckoning the period of one year?

(ii) What does the frequency allocation constitute? In other words, whether the same has to be calculated from the date of allocation of GSM spectrum only but also from the date of allocation of other frequencies?

31. It has been contended that delay on the part of the DoT had occurred for various reasons, as for example :-

(i) SACFA clearance;

(ii) Lawful Interception Report; and

(iii) Import of equipments.

32. We may take up the question of delay on the part of the DoT with regard to SACFA clearance at the outset.

33. Clause 43 of the Conditions of Licence occurring in Chapter VII thereof postulates frequency authorization. We are herein concerned with Clauses 43.1, 43.3, 43.4 and 43.5.1 thereof.

Explanation appended to Clause 43.3 states that :-

> *"EXPLANATION : SACFA is the apex body in the Ministry of Communications for considering matters regarding coordination for frequency allocations and other related issues/matters. (Siting clearance refers to the agreement of major wireless users for location of proposed fixed antenna from the point of view of compatibility with other radio systems and aviation hazard. It requires inter departmental coordination and is an involved process).Normally the siting clearance procedure may take two to six months depending on the nature of the installations and the height of the antenna/masts."*

34. Bare perusal of the said provision, it is contended, would clearly go to show that it does not speak separately of allocation of GSM spectrum and allocation of other types of frequencies.

The DoT, on the other hand, states that allocation of GSM although is sine-qua-non for rendering wireless services, allocation of other types of frequencies are optional in nature, in so far as upon allocation of GSM frequencies, the operators would be at liberty to lay fiber optic cable for the purpose of rendering of service.

The question is as to whether such an inference can be drawn up from the conditions of licence and if not, wherefrom the same emanates?

35. It is accepted that SACFA clearance used to take two to six months time as would be evident from the Explanation appended to Clause 43.3 of the Conditions of Licence. By reason of a press release in 2002, Respondent, however, directed that SACFA clearance should be given within 60 days.

We have noticed hretobefore the amendment carried out on 10.02.2009.

36. In the reply filed by the Respondent, on the other hand, the average delay upon completion of the period of sixty days was said to have been considered.

37. We may furthermore notice that in the cases of Aircel and Videocon, Respondent has shown the average delay to be nil, although at least seven days' delay were caused on an average basis for SACFA clearance.

38. In the aforementioned context, we may notice the contention of the Respondent.

In its short reply, it referred to the aforementioned letter dated 10.02.2009 amending the conditions of licence to contend :-

> *"The Amendment Letter dated 10.02.2009 at Clause (iii) provides that the Licensee shall ensure that in the first phase of rollout obligation, at least 10% of the DHQs be covered within one year of allocation of spectrum. Further, at Clauses (v) and (vii) of the Amendment Letter dated 10.02.2009, it is stated that while computing the period of one year, the average delay in SACFA clearance shall be excluded and the date of application for SACFA or date of allocation of frequency, whichever is later, shall be taken into account for the purpose of calculating average delay in SACFA clearance."*

39. While saying so in para 6 of the reply, it stated that roll out obligation in 10% of the DHQs in the Tamilnadu Service Area were to be complied with within one year of allocation of startup spectrum after excluding the period of average delay on account of SACFA clearance.

In para 7 of the said reply, it spoke of the average delay of three days only which was to be excluded.

As for example, in Petition No. 10 of 2011, the Start Up spectrum was granted on 22.4.2008 and the registration of completion of 10% of the DHQs having been done on 24.4.2009 which, according to the Respondent, was in

fact done on 19.02.2010. A delay of 44 weeks has, thus, been counted. In other words, the Petitioner was to complete its first phase of roll out of obligation by 21.04.2009 and as a period of three days was to be excluded, it could have done so by 24.4.2009.

40. We may notice that at page 43 of the petition, the Petitioner has annexed a chart, from a perusal whereof it would appear that the average delay was at least 58.8 days, although the highest delay is 167 days which should ordinarily be taken into consideration.

It reads as under :-

S. No.	*Location*	*Date of Application*	*Date of Approval*	*Days taken for clearance*
1.	*R.Sy No.825/1, D.No.5/17,18, 8/189-192, Pavadi Street & Palani andavar koilstreet, Bhavani Municipality limit, Erode District*	*28-Apr-10*	*2-Jun-10*	*35*
2.	*S.No.268/4, res.no.55/13, Metunasvam palayam, Bhavani Subdivision, Erode*	*01-Jul-09*	*05-Aug-09*	*35*
3.	*No.95, Ramanagar, Bhavani.*	*01-Jul-09*	*05-Aug-09*	*35*
4.	*No.13,Newno.32,Vizhalkattypiliayarko*	*30-Jun-09*	*05-Aug-09*	*36*
5.	*Sharjahan Complex No.56-A, Lalkhan street, Chidambaram*	*30-Jun-09*	*05-Aug-09*	*36*
6.	*No.7, Mariamman Koli Street,*	*03-Mar-10*	*23-Mar-10*	*20*

	Chidambaram			
7.	*35 Mi Nagar, pallipadhai, Chidambaram*	*18-May-10*	*01-Jul-10*	*44*
8.	*No.11,Mahaveer Ngr. Ammapetai post Nr. INDRA NGR, Chidambaram*	*18-May-10*	*01-Jul-10*	*44*
9.	*No.156/1 & 156A Nathan B Block vill, Chengalpattu T., Dist. Kancheepuram*	*03-Mar-10*	*17-Aug-10*	*167*
10.	*No.139, Old no.83,New no.51, B8, Maniyakarar St., Chengalpattu*	*09-Sep-09*	*02-Dec-09*	*84*
11	*No.65A, Alagasen Ngr., Chengalpattu*	*28-Apr-10*	*17-Aug-10*	*111*
	Avg days taken for clearance			*58.8*
	Total Sites			*11*

41. It is not in dispute that the aforementioned chart refers to the dates of application for allocation of start-up spectrum and the grant of approval, which process began from June 2009 and ended in May, 2010, the letters of approval having been issued during the period August 2009 and August 2010.

If the last date of filing of the application is taken to be 18.6.2010 and the last date of grant of approval is taken to be 17.8.2010, there was a delay of 60 days. However, as noticed heretobefore, only three days average delay has been reckoned for the purpose of considering the period which should be excluded for the said purpose.

42. Delay in the matter of grant of SACFA clearance must be a genuine actual delay and the same cannot be calculated in any other manner whatsoever.

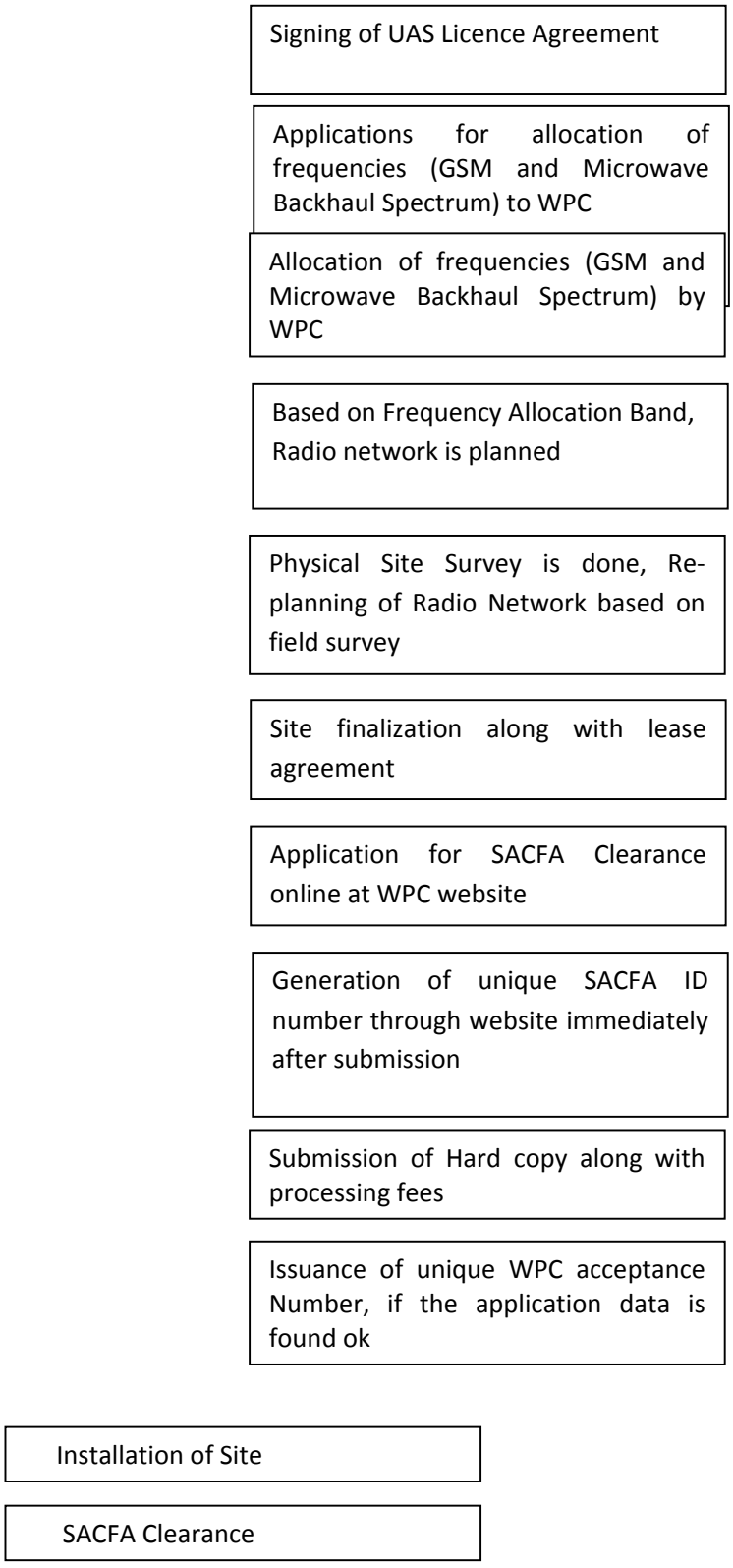
We may notice that in ground (R) of the Petition, where the Petitioner has brought out the aforementioned facts, the same has been traversed in the following term:-

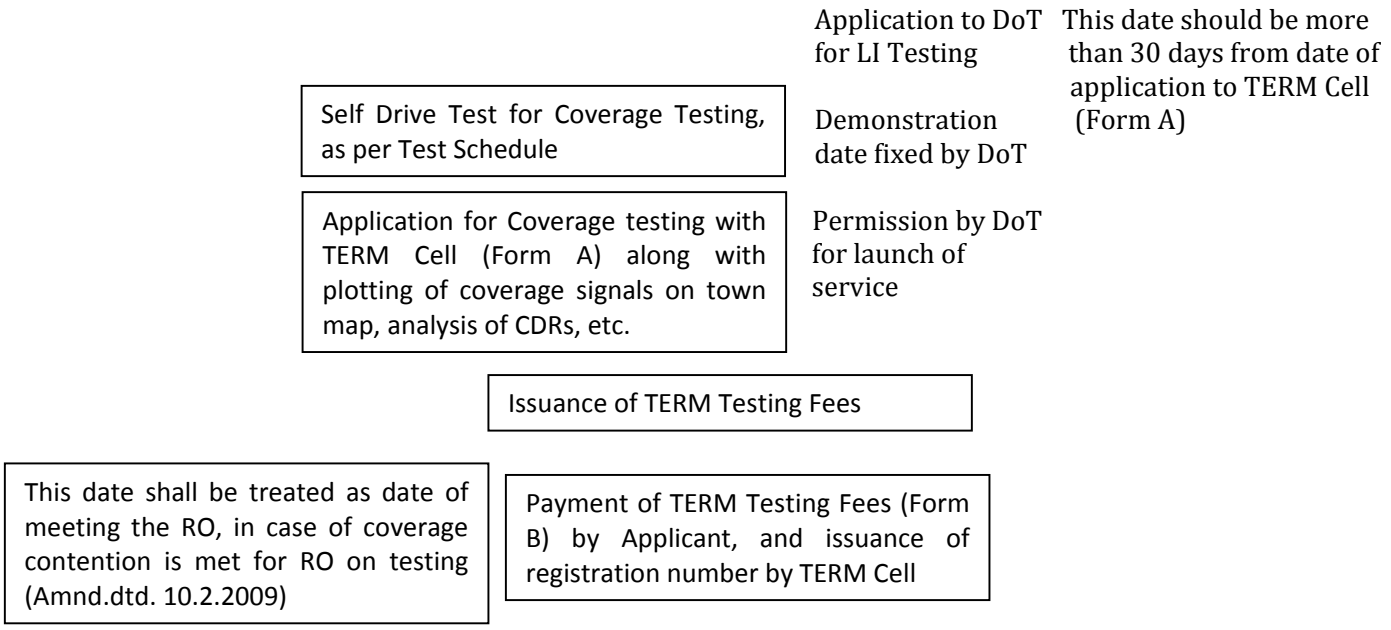
> *"That the contents of ground R are wrong and denied. It is denied that the contents of chart herein are correct. The Petitioner be put to strict proof thereof."*

43. The Respondent, therefore, had not contended that the respective dates of applications filed in respect of each of the site of the District Headquarter and/or the dates of approval are wrong, the purported denial being merely a general one.

44. The question, therefore, is whether exclusion of only three days' average delay is reasonable and/or in other words should be held to be an act of arbitrariness on the part of the respondent, whereby onerous conditions were imposed.

45. Before us, a Flow Chart has been submitted by Mr. Malhotra, which is as under :-





Another flow chart has been submitted by Mr. Kohli.

Basically, there is not much difference between the two flow charts except that in the second one it is stated that after signing of the UASL Licence agreement, network is planned by the licensees.

We would deal with this aspect of the matter a little later.

46. There exists a controversy as to whether the Petitioners could proceed to take the next step without a SACFA clearance.

47. Clause 43 of the conditions of licence provide for two factors :-

(i) Unless SACFA clearance is granted, antenna cannot be fixed; and

(ii) The same requires inter-departmental coordination.

48. We have also noticed heretobefore that in the Explanation appended to Clause 43.3 of the conditions of licence, the licensor thought that a delay of two to six months would occur for SACFA clearance.

At this stage, we may also notice that the Respondent has relied upon a Press Release dated 19.10.2007 from a perusal whereof it would appear that in respect of cross-over technology (which goes to show that the same was issued in different context), 60 days time was considered to be sufficient for the purpose of grant of SACFA clearance.

In our opinion the Press Release has no relevance having regard to the fact that the licences granted in favour of the operators herein were amended on 10.02.2009.

49. The question, which would arise, is whether the Petitioners could be saddled with the payment of the liquidated damages on the basis thereof?

In our opinion, it cannot be.

50. Reverting back to the aforementioned chart, which is at page 43 of the Petition, it would appear that in one case the delay is up to 35 days, in another case it is 167 days. It would also appear from item Nos. 6 and 9 thereof that whereas in the former, SACFA clearance has been granted within 20 days, is the case of the later 167 days delay has been caused although in both the cases, application therefor was filed on 30.03.2010.

51. To us it appears that the delay occasioned by the Union of India cannot be refused to be excluded and that too without assigning any reason.

Moreover, no explanation has been offered as to why the period of sixty days has to be excluded and in any event how three days delay has been reckoned. There is also no explanation with regard to the date of earmarking and date of allocation of frequency, the later being a relevant criteria.

52. There are various concepts of delay, so far as SACFA clearance is concerned. The situation was not clear. There were four parameters, viz. (i) 2 to 6 months delay, as envisaged in the licence agreement; (ii) Evolution of process of 60 days as contained in the Press Release of 2007; (iii) Average delay; and (iv) Factual delay.

53. The question with regard to the delay on the part of the parties to comply with their respective mutual obligations, were to be calculated having regard to the pragmatic aspect of the entire matter and not on the basis of the alternative(s); particularly in view of the fact that the licence agreement envisages that delay in SACFA clearance would be accounted for.

Apart from the delay in SACFA clearance, we may notice that the Respondent on or about 03.12.2009 i.e. long after the licences were granted and the MoM, amended the licence in the following terms :-

> *"41.6A The LICENSEE shall apply to the Licensor for security clearance, along with the details of the equipment(s) as well as details of equipment(s) suppliers and manufacturers including Original Equipment Manufacturers (OEM), before placement of the final purchase order for procurement/ up gradation of equipment/ software for provisioning of telecommunications services under the licence. In case no response is received from the Licensor within thirty working days, it shall be presumed that there is no objection to the procurement."*

54. A further circular letter was issued on 10.12.2009 clarifying the aforementioned letter dated 03.12.2009.

55. Yet again, another circular letter was issued on 25.02.2010, the relevant portion whereof reads thus :-

"3. Henceforth, all the Service Providers are further directed to furnish complete information as per revised proforma enclosed at annexure-1 while applying for security clearance for procurement of equipment. Time period of 30 working days would begin from the date on which the application complete in all respects is received in DOT. Applications for security clearance with incomplete information would be treated as invalid and any delay on the account of incomplete information would not be counted in the 30 working days mentioned in the above referred amendment."

56. Thus, if the licensee could not meet its roll out obligations by November, 2009, it was also obligatory to comply with the said requirements also.

57. In the matter of procurement of equipments, it was required to take at least 30 working days.

It is not in dispute that even the said delay for a period of 30 days has not been taken into consideration, apart from the delay in granting security clearance in appropriate cases.

Delay on the aforementioned counts on the part of the Respondent also was, thus, required to be taken into consideration.

58. The Respondent in calculating the quantum of liquidated damages purported to be in terms of Clause (iii) of the amendment dated 10.02.2009 failed to take into consideration six days delay in the matter of allocation of spectrum and furthermore calculated average delay for all the sites of three district headquarters/town therefor at the same time.

In the case of Aircel again, three days have been excluded in calculating the delay in grant of SACFA clearance, whereas in some cases four days' delay has been reckoned.

59. So far as the case of Siestema Shyam is concerned, it may be noticed that the delay for SAFCA clearance has been taken to be at zero.

60. In Petition No.48 of 2011 (Sistema Shyam Teleservices Ltd.), the following table has been furnished :-

ORISSA

	Revised Calculation considering delay in approval from SACFA (in 30 days after application) and actual delays in					
	Sl. NO.	*Name of the District*	*Particulars*	*Date of Application*	*Date of Clearance*	*No. of days of delays*
1	*As per DOT Letter dated 14th January 2011*					
	(a)	*Average SACFA Delays considered by DOT for LD*				*0*
	(b)	*Average Access Microwave Delays considered by DOT for LD*				*0*
	(c)	*Average Backbone Microwave Delays considered by DOT for LD*				*0*

	(d)	*Amount of Liquidated Damages (Rs Crore)*				*1.85*
2	*As per DOT Calculations Delays in Launch*					
	(a)	*Spectrum Allocation Date*				*29-May-08*
	(b)	*Revised date of TERM compliance considering 0 days SACFA Delay*				*28-May-09*
	(c)	*TERM Compliance Date basis registration of document*				*9-Nov-09*
	(d)	*Weeks delayed after considering SACFA Delays*				*25*
	(e)	*Amount of Liquidated Damages (Rs. Crore)*				*1.85*
3	*As per SSTL Calculation Delays in SACFA Approval*					
	(a)	*Banki*	*SACFA*	*13-Jul-09*	*7-Sep-09*	*56*
	(b)	*Banupur*	*SACFA*	*13-Jul-09*	*7-Sep-09*	*56*
	(c)	*Ganjam*	*SACFA*	*13-Jul-09*	*13-Aug-09*	*31*
		Total				*143*
		Average delay				*48*
	Delay in SACFA Approval as per SSTL calculation taking into consideration 30 days of SLA					*18*
	Revised Penalty amount after considering SACFA delays as per SSTL Calculation (Rs. Crore)					*1.65*
4	*As per SSTL Calculation Delays in allocation of Access Microwave*					
	(a)	*Orissa*	*Microwave*	*5-Mar-08*	*5-Nov-08*	*245*
	Delay in Microwave Approval as per SSTL calculation					*245*
	Revised Penalty amount after considering SACFA & & Microwave delays, as per SSTL Calculation (Rs. Crore)					*0.00*

Date of LOI	*10th January, 2008*	
Date of License	*3-May-08*	
Rollout Completed as per License	*20/11/2009*	
Commercial Launch	*Not launched*	
Spectrum	*Applied on*	*Granted on*
Backhaul microwave	*5th March 2008*	*5th Nov. 2008*
CDMA Frequency	*5th March 2008*	*29th May 2008*
Backbone	*5th March 2008*	*Not granted till date*
Payment of LD Under Protest	*NOT PAID"*	

61. Whereas the contention of the Petitioner is that keeping in view the fact that the longest delay caused by the Respondent in allocation of spectrum and/or SACFA clearance should be taken into consideration, that of the Respondent is that having regard to the provisions contained in the amendment in the license dated 10.2.2009, only an average delay is to be taken and furthermore having regard to the Explanation appended to Clause 43.3 (iii) wherein it was noticed that 2 to 6 months delay ordinarily is caused in grant of SACFA clearance which by reason of a press release dated 19.10.2007 has been reduced to sixty days, the same is not required to be taken into consideration.

62. In the case of 'Unitech' as noticed heretobefore, the longest delay is 167 days and the shortest delay is 20 days.

The three towns involved in the roll out obligations contain 11 sites. Before us, the SACFA siting procedure has been filed by Ms. Dhir to contend that the procedure laid down therein must be followed which resulted in causing delay in regard thereto. Our attention has also been drawn to an office memorandum dated 5.7.2006 in terms whereof the procedure for SACFA site clearance is said to have been simplified.

63. In this case we, as noticed heretobefore, are concerned with a contract providing for mutual obligations. Performances of the respective obligations on the part of the parties hereto are, therefore, essential. If that be so, the actual delay caused in the allocation of frequency and/or other requirements including L.D. testing as also the security conditions, in our considered opinion, are required to be taken into consideration.

64. The circular dated 10.2.2009 in no unmistakable term says that average delay shall be excluded for the purpose of computation of the delay in grant of SACFA clearance.

We fail to see any reason as to how the Explanation appended to Clause 43.3 of the conditions of licence and/or the press release dated 19.10.2007 can be of any assistance to the Respondent for the purpose of excluding a total period of sixty days.

65. We are not oblivious of the fact that the Respondent had adopted a procedure in relation to the applications of clearance of site which are beyond the seven kilometers from any airport and average mean height of 40 meters from the sea level in respect whereof clearance is granted on the same day. We may notice the following pleading of the Respondent in this behalf :-

> *"It is submitted that once the acceptance number is generated, SACFA sites can be cleared in two days/criteria like 7/40 criteria and Special Drive criteria. Under the 7/40 criteria, the SACFA sites which are more than 7 KM away from the nearest Airport & whose difference of Average Mean Sea Level (AMSL) with the nearest airport and the Tower height is less than 40 Mts., the same are cleared under 7/40 criteria of the WPC Wing. All other SACFA sites which do not fall under 7/40 category are cleared under Special Drive criteria (excluding the sites which are less than 3 km away from the nearest Airport). The SACFA sites under 7/40 criteria are cleared immediately and the SACFA sites under Special Drive criteria cleared after waiting for the comments from the SACFA members. The date on which the site is cleared is known as the Clearance date (C)".*

66. Ms. Dhir would contend that in the case of 'Unitech' out of 11 Circles, delay had been caused in respect of 9 sites and 72 days delay has been caused in clearance of the remaining two sites, the average delay should be calculated as under, viz. 72 + 72 divided by 11 i.e. about 13 days, which period should be excluded, if the 60 days' period is not taken into consideration.

It was furthermore submitted that if time taken for clearance of two sites covered the same period the same should be treated to be one.

We fail to appreciate the logic.

67. There may be a case, albeit a hypothetical one, where no delay at all is caused in respect of majority of the sites but delay may be caused of several hundred days in respect of one site. The licensee cannot carry out its roll out obligation for those days for which delay had been caused on the part of the Respondent even if that was for one site.

On the one hand, in terms of the license conditions for the purpose of levy of liquidated damages even a day in excess of one week or two weeks, as the case may be, is to be treated a week's delay, it is difficult to appreciate how even sixty days delay could be excluded from computing the entire period of delay.

If the said period is taken into consideration, the quantum of liquidated damages indisputably would be drastically reduced.

68. Coming to the question of average delay, to us it appears that the term `average' is a vague one, keeping in view serious civil consequences which may visit a licensee in a given case namely:

1. Payment of liquidated damages.
2. Imposition of penalty to the extent of Rs.50 crores.
3. In case of delay in complying with the roll out obligation beyond a period of 52 weeks, cancellation of license.

69. The Respondent, thus, ought to have clarified or issued guidelines as to how and in what manner the period of delay was to be reckoned.

In construing a provision of this nature the purpose and object should not be lost sight of.

In a given case the licensee may apply simultaneously or on different dates for clearance of all sites involved in the three towns. Whether delay in SACFA clearance for the sites in one town could first be taken into consideration for the purpose of calculating the average delay or whether all

sites in respect of all the three towns should be considered, is uncertain and vague.

In a case of this nature, keeping in view the purport and object thereof for which the terms have been used in the license agreement, we are of the opinion that the maximum period of delay should be taken into consideration. We say so because the parties hereto, keeping in view the mutual obligations, were entitled to a `level playing field' which in view of the decision of the Supreme Court of India in Reliance RG Ltd. vs. MSRC 2007 (8) SCC 1 is a facet of Articles 14 and 21 of the Constitution of India.

In a case like the present one, the contract contained in a standard form would require a commercial approach in preference to a literal approach.

Whether Time was of the Essence of Contract

70. Clause 35 of the license agreement provides that the time period of provisions of the service stipulated in this license would be deemed as essence of the contract and the service must be brought into commission not later than set specified time period. It was stated that no extension shall be granted.

71. The Supreme Court of India recently in a judgment dated 11.10.2011 in UOI & Anr. Vs. Association of Unified Telecom Service Providers of India & Ors. (since reported in 2011 (1) SCC Pg 543) opined that by reason of parting of

privilege, a license granted under this proviso appended to Sub-section 1 of section 4 of the Telegraph Act is in nature of a contract between the Central Government and the licensee and consequently the terms and conditions of the license become part thereof.

72. If that be so, we must notice the provisions of Section 55 of the Indian Contract Act, which reads as under:-

> *"55. Effect of failure to perform at fixed time, in contract in which time is essential.*
> *55. Effect of failure to perform at fixed time, in contract in which time is essential.-When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract. Effect of such failure when time is not essential. Effect of such failure when time is not essential.-If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure. Effect of acceptance of performance at time other than that agreed upon. If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other*

than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance he gives notice to the promisor of his intention to do so."

73. Generally speaking, whereas time would be the essence of contract involving mercantile contracts there is no such presumption in respect of an immovable property.

74. There can be a situation when a time may be fixed by the contract but the same may not originally be of the essence but subsequently it may become so. An initial contract may envisage extension of time and when the final extension is granted the extended time becomes the essence thereof.

(See Bharat Sanchar Nigam Ltd. vs. BWL Ltd. (2009) Vol 2 Arbitration Law Reports page 638).

75. In this case, however, Clause 35 of the Licence Agreement itself provides that if the commissioning of the services is effected within 15 calendar days of the expiry of the due commissioning date, the licensor would accept the service without levy of LD charges. These are cases where the services have been accepted by the Respondent without any demur long after the expiry of the

period stipulated under Clause 35 of the Licence and the demands have been raised for payment of liquidated damages and in some cases even after 52 weeks of the expiry of the original stipulation.

Before, however, we delve deep into the matter, it may be noticed that by reason of Clauses 8 and 34 of the conditions of license what is sought to be achieved is the performance of contract within the stipulated period.

Even in the Minutes of Meeting dated 27.04.2009, emphasis was not laid on imposition of penalty but utilization of spectrum.

There cannot, however, be any doubt or dispute that having regard to the fact that the license agreement provides for sharing of revenue on AGR basis, the Central Government would start earning revenue only after the services are provided.

Whereas in the first case it may not be possible to compute the quantum of damages which may be suffered by the licensor; in the later it may not be absolutely impossible.

76. Keeping in view the said principles in mind, we may notice a three judge bench decision of the Supreme Court of India in M/s Hind Construction Contractors vs. State of Maharashtra reported in (1979) 2 SCC 70.

In that case a building contract had been entered into by and between the parties. The Apex Court upon noticing paragraph 1179 of the 4th Edition of the Halsbury's Laws of England observed that where time has not been made of the essence of the contract or by reason of waiver, the time fixed has ceased to be applicable, the employer may by notice fix a reasonable time for the completion of the work and dismiss the contractor on a failure to complete on a date so fixed.

It was furthermore noticed : -

> *"Other provisions of the contract may, on the construction of the contract, exclude an inference that the completion of the works by a particular date is fundamental; time is not of the essence where a sum is payable for each week that the work remains incomplete after the date fixed, nor where the parties contemplate a postponement of completion."*

It was opined :-

> *"It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; for instance, if the contract were to include clauses providing for extension of time in*

certain contingencies or for payment of fine or, penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract."

In arriving at the aforementioned conclusion the Apex Court has inter alia relied upon Lamprell vs. Billericav Union, Webb v. Hughes (1849) 3 Exch 283, 308 and Charles Rickards Ltd. v. Oppenhelm (1950) 1 KB 616: (1950) ALL ER 420 (CA).

It was clearly held :

"9. Having regard to the aforesaid material on record, particularly the clauses in the agreement pertaining to imposition of penalty and extension of time it seems to us clear that time (12 months period) was never intended by the parties to be of the essence of the contract. Further from the correspondence on the record, particularly, the letter (Ex. 78) by which the contract was rescinded it does appear that the stipulation of 12 months' period was waived, the contractor having been allowed to do some more work after the expiry of the period, albeit at his risk, by making the rescission effective from August 16,1956."

77. In Building and Engineering contracts, graduated damages is not only permissible but if graduation is in the right direction, the sum fixed may not be held to be a penalty.

It has been so held in Phonographic Equipment (1958) Ltd. Vs. Muslu (1961) 1 WLR 1379 followed in Lambank Ltd. Vs. Excell (1964) 1 QB page 415. (See from page 1494 of Chitty on Contract, 29th Edn.). But, the same would not mean as Bingham, LJ puts it that there may not be a disguised penalty clause. (See Interfoto Picture Library Ltd. Vs. Stiletto Visual Programs Ltd. – (1988) 1 All ER page 348 at 358).

78. We are not entering into the debate as to whether having regard to the principles of freedom of contract, there is no principle of good faith of general application or there should be.

Bingham, L.J. states :-

> *"(i) In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognizes and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognize; its effect in perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table." It is in essence a principle of fair open dealing...English law has, characteristically,*

committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness."

79. We have referred to the aforementioned principle of law keeping in view the development thereof in the Modern Building Contracts.

80. Reliance has been placed by Mr. Malhotra on Peak Constructions (Liverpool) Ltd. Vs. Mc. Kinney Foundations Ltd. 1970 (1) BLR page 111, wherein Salmon, LJ speaking for the Courts of Appeal, opined :-

"In my judgment, however, the plaintiffs are not entitled to anything at all under this head, because they were not liable to pay any liquidated damages for delay to the corporation. A clause giving the employer liquidated damages at so much a week or month which elapses between the date fixed for completion and the actual date of completion is usually coupled, as in the present case, with an extension of time clause. The liquidated damages clause contemplates a failure to complete on time due to the fault of the contractor. It is inserted by the employer for his own protection, for it enables him to recover a fixed sum as compensation for delay instead of facing the difficulty and expense of proving the actual damage which the delay may have caused him. I cannot see how, in the ordinary course, the employer can insist on compliance with a condition if it is partly his own fault that it cannot be fulfilled. Wells v. Army & Navy Co-operative Society Ltd. (1902) 86 I.T. 764:

Amalgamated Building Contractors v. Waltham Libran District Council {1952} 2 All E.R. 452 : 501.G.R. 667 at pp. 455 and 670; and Holme v. Guppy (1838) 3 M & W. 387. I consider that unless the contract expresses a contrary intention, the employer, in the circumstances postulated, is left to his ordinary remedy; that is to say, to recover such damages as he can prove flow from the contractors' breach. No doubt if the extension of time clause provided for a postponement of the completion date on account of delay caused by some breach or fault on the part of the employer, the position would be different. This would mean that the parties had intended that the employer could recover liquidated damages notwithstanding that he was partly to blame for the failure to achieve the completion date. In such a case the architect would extend the date for completion, and the contractor would then be liable to pay liquidated damages for delay as from the extended completion date.

The liquidated damages and extension of time clauses in printed forms of contract must be construed strictly contra preferentem. If the employer wishes to recover liquidated damages for failure by the contractors to complete on time in spite of the fact that some of the delay is due to the employer's own fault or breach of contract, then the extension of time clause should provide, expressly or by necessary inference, for an extension on account of such a fault or breach on the part of the employer. I am unable to spell any such provision out of {12} Clause 23 of the contract in the present case. In any event, it is clear that, even if Clause 23 had provided for an extension of time on account of the delay caused by the contractor, the failure in this case of the architect to extend the time would be fatal to the claim for liquidated damages. There had

clearly been some delay on the part of the corporation. Accordingly, as the architect has not made "by writing under his hand such an extension of time", there is no date under the contract from which the defendants' liability to pay liquidated damages for delay could be measured. And, therefore, none can be recovered : see Miller v. London County Council (1934) 151 L.T.425."

The said decision has been followed in Trollope & Colls Ltd. Vs. North West Metropolitan Regional Hospital Board (H.L.(E.)) 1973 (1) WLR 601 and Percy Bilton Ltd. Vs. Greater London Council (H.L.(E.)) reported in 1982 (1) WLR 794.

81. We need not refer to a large number of decisions as the question has been considered in some details in Hudson's Building & Engineering Contract, 12th Edn. para 6-012 at page 869, stating :-

"Thus it would seem that an express "time of the essence" provision, if acted on in respect of a breach which would not otherwise justify rescission, may to that extent enhance the damages recoverable, since they will include any damages (as, for example, loss of profit) consequential on the termination itself. "Of the essence" wording is sometimes used to "overegg the pudding" in relation to obviously inappropriate contractual obligations , and should not be accorded the same weight as when used in a more considered way in more appropriate settings, it is submitted. Its extension from the more

appropriate setting of completion obligations in conveyancing transactions to the generally inappropriate setting of construction contractors' performance obligations reflects the historical origins of construction draftsmanship, and explains a number of the construction contract decisions, it is suggested.

Time can also be of the essence in the absence of express wording, as a result of interpretation of the contract as a whole together with its commercial background. As already foreshadowed above, not only have the courts abstained from such interpretation of the completion obligation in construction contracts, but they would appear to have effectively neutralized even express provisions designed to achieve that end by more than one route. These have been listed by a commentator as "looking at the whole agreement" (that is, interpretation of the commercial background and the effect of other clauses), as "the theory of election" (based on the Employer's conduct after the date for completion) and, as a third suggestion, the doctrine of substantial performance, which could be relied on in the rare case where an Employer sought to rescind immediately upon the passing of the completion date, so that an election or waiver finding would not be possible."

82. In Gail (India) Ltd. Vs. Paramount Ltd. (OMP No. 66 & 80 of 2004), Gita Mittal, J. of the Delhi High Court while considering an Arbitration Award, noticed Hind Construction (Supra) and Halsbury's Laws of England to observe :-

> *"8. It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is the essence of the contract such a stipulation will have to be read alongwith other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract."*

The learned Judge furthermore noticed a decision of the Supreme Court of India in Arosan Enterprises Ltd. Vs. Union of India (1999) 9 SCC 449, wherein it was held :-

> *"Thus, it is well settled that whether time is the essence would be essentially a question of the intention of the parties to be gathered from the terms of the contract. This intention can be inferred also from the responses, actions and state of readiness of the parties in the fulfillment of the contract."*

The said decision also takes into consideration the question of liquidated damages.

83. For the reasons aforementioned, we are of the opinion that in this case the time was not of the essence of contract.

Section 74 of the Contract Act/Liquidated Damages

84. Section 74 of the Indian Contract Act provides for liquidated damages. It reads as under :-

> *"Section 74. Compensation for breach of contract where penalty stipulated for – When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."*

85. Whereas under the common law a distinction is made between the liquidated damages and a penalty, ordinarily the provisions of Section 73 and Section 74 and illustration A & D appended thereto respectively ought to be construed conjointly. Whereas Section 73 postulates payment of compensation for actual loss of damages suffered in case of breach of contract, Section 74 of the Indian Contract Act postulates reasonable amount of genuine pre-estimated compensation not exceeding the amount named in the contract for breach of stipulation.

86. The Supreme Court of India in Fateh Chand Vs. Balkishan Das reported in AIR 1963 SC 1405 opined that the Parliament of India sought to eliminate the elaborate refinements made under the English Common Law between 'liquidated damages' and 'penalty', stating : -

> *"Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties; a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty."*

It was furthermore opined :-

> *"10. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach ofa stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable*

having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damage", it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach."

The aforementioned decision therefore, is an authority for the proposition that although a stipulation may exist in the contract for payment of damages or for payment of receiving compensation from the party who has broken the contract, the same must be determined or established as of fact.

It was clearly held :-

"15. Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not

confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a plaintiff or defendant in a suit. Use of the expression "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach."

In a case of this nature where performance of a contract would depend upon compliance of the terms and conditions of the contract mutually by the parties hereto and it being not a case of supply of goods, the same has to be certain and clear.

The question, therefore, is how one may come to the conclusion as to what would be the reasonable amount.

87. The question was considered again by the Supreme Court again in Maula Bux vs. Union of India, 1969 (2) SCC 554, wherein speaking for a three Judge Bench, J.C. Shah J. again opined :-

> *"Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty."*

It was observed :-

> *"6. It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But, the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him."*

Maula Bux (Supra), therefore, went a step further vis-a-vis Fateh Chand (Supra) in holding that the pre estimate of damage must be a genuine one and the same must provide for reasonable compensation on loss suffered.

88. Yet again, in Union of India vs. Raman Iron Foundry AIR 1974 SC page 1265, the Apex Court opined that in India there is no qualitative difference in the nature of the claim whether it be for liquidated damages or the un-liquidated damages.

In that view of the matter it was held :-

> *"A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled, in exercise of the right conferred upon it under clause 18, to recover the amount of such claim by appropriating other sums due to the contractor."*

89. The question, yet again, came up for consideration before the Supreme Court of India again in Oil and Natural Gas Corporation vs. Saw Pipes (2003) 5 SCC 705, whereupon learned counsel for both the parties placed reliance, wherein it was held :-

> *"If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach."*

90. Ms. Dhir, however, would contend that the Supreme Court having held that if the terms of the contract clearly point out that the parties had pre-estimated such loss and party is to pay compensation being in default and particularly in a case where the quantum of the pre-estimated damages has not been questioned as being not genuine or unreasonable, the same could not be treated to be a penalty.

91. In ONGC (Supra), apart from the fact that the same should be read in the context of the larger Bench decision in Fateh Chand (Supra) and the three Judge Bench decision in Maula Bux (Supra) and Coordinate Bench decision in Raman Iron Foundry (Supra), it itself has noticed that Section 74 must be read with Section 73 of the Contract Act and that the damage suffered by the

contracting party should be a genuine pre-estimated damage and the same must be a reasonable amount.

92. The determination, thus, which is required to be made as to whether in a case of this nature, the purported liquidated damages stipulated in Clause 35 of the Contract is automatically attracted.

Keeping in view the authoritative pronouncements of the Supreme Court of India, which has been noticed by this Tribunal in BPL Cellular vs. Department of Telecommunication, being Petition No.8 of 2003 decided on 11.02.2010, it must be held that the amount of damages mentioned in the contract must be a reasonable sum.

It was held therein:-

> *"The respondent being the licensor has, in terms of Section 4 of the Indian Telegraph Act, 1885, a special privilege in the matter of grant of license. The statute contemplates imposition of any term and condition therefor which, it may be assumed, would include a deterrent provision. It is, however, well settled that the State in all its actions, including contractual ones, must act fairly and reasonably. It is also bound to comply with the principles of natural justice.*
>
> *The action on the part of the State, in imposing penalty of a huge amount, thus, would deserve strict construction. The respondent, as a State, cannot indulge in unjust enrichment in terms*

of a contract qua contract. Its conduct cannot be arbitrary or capricious. Its conduct even in the matters involving contract qua contract should be just and proper. It should not take undue advantage of its superior position as a licensor.

All the petitioners were to receive a huge amount from the respondent. For all intent and purport, therefore, they were not defaulters. While imposing penalty on the petitioners, the respondent was required to keep this aspect of the matter in mind."

In the fact situation involving the present matter, it may be necessary to determine (i) the quantum of the compensation which would be reasonable, and (ii) whether the respondent has acted reasonably.

93. Only upon commencement of service, the licensee would expect to get subscribers. It may not earn the revenues for a few months even thereafter far less making any profit.

94. The Government parts with its exclusive privilege for consideration. It has a share in the revenue of the operator.

95. What was evidently uppermost in the mind of the Respondent was that it was to reach out to the maximum number of people.

Good communication is one of the essential factors so far as development of the country is concerned. Moreover, spectrum is a scarce commodity. It cannot be allowed to remain unutilised. It is from those angles only that the Union of India emphasizes that the roll out obligations on the part of the licensees should be met. The public interest by way of growth of sector was in the mind of the Respondent. Damages suffered by the public cannot be a factor which would come within the purview of Section 73 and consequently Section 74 of the Indian Contract Act. If that be so, keeping in view the decision of the Supreme Court of India in Fateh Chand (Supra), to our mind, Clause 35 should be treated to be a penalty.

In G.H. Treitel Law of Contract, it is stated :-

> *"a payment stipulated as in terrorem of the offending party to force him to perform the contract. If, on the other hand, the clause is an attempt to estimate in advance the loss which will result from the breach, it is a liquidated damages clause. The question whether a clause is penal or pre-estimate of damages depends on its construction and on the surrounding circumstances at the time of entering into the contract."*

96. The aforementioned principle has been noticed by the Supreme Court in the BSNL (Supra).

97. The Supreme Court in BSNL (Supra) also referred to paragraph 26-126 of Chitty on Contract, 30th edition. We may notice the relevant portion thereof:-

> *"whether a provision is to be treated as a penalty is a matter of construction to be resolved by asking whether at the time the contract was entered into the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent party for breach. The question to be always asked is whether the alleged penalty clause can pass muster as a genuine pre-estimate of loss".*

98. The said paragraph, therefore, would be applicable in a case where contracts are freely entered into between the parties having comparable bargaining power.

In any event, can it be a genuine pre-estimate of loss?

The loss referred to in the said paragraph refers to a genuine loss, which in view of Fateh Chand (Supra), Maula Bux (Supra), Roman Iron Foundry (Supra) would mean direct loss keeping in view the applicability of Section 73 of the Indian Contract Act also and not a loss to enforce a contract to achieve a

public purpose or in public interest. Public purpose indisputably must have been uppermost in the mind of the Central Government. It can and must enforce the performance of a contract, but for the said purpose having regard to the phraseology used in the Indian Contract Act, it must be a reasonable act on its part.

In a given case, thus, in law the amount of damages to be imposed upon the Petitioner may have to be pre-determined keeping in view the nature of the contract vis-à-vis the provisions thereof.

Re-Allocation of spectrum/ Estoppel Issue

99. Frequency authorization is dealt with in Part VII of the license agreement.

In terms of the conditions of license, the matter relating to allocation of spectrum was required to be taken into consideration for the purpose of construction of the relevant clauses.

100. The matter relating to authorization of frequency is governed by National Frequency Allocation Plan, 2002. It provides for allocation of a frequency band. Clause 3.1 provides for allotment of a radio frequency or radio frequency channel. Clause 3.2 provides for assignment of the radio frequency or radio frequency channel.

Clause 3.3 also provides for allocation in different regions and different lines. It also takes into consideration the cases relating to primary services and secondary services.

At the outset we may notice the following statement made by 'Unitech' in its petition :-

> *"50. The petitioner states that the relevance of the presence each of the constituents of the Spectrum bouquet, i.e. GSM Spectrum, Microwave Access Spectrum and Microwave Backbone Spectrum, is best explained pictorially hereunder :-*
>
> ***TOWN 1***
>
> *B*
> *T* *Access MW*
> *S* *B* *BSC_____MSC*
> *B* *T*
> *T* *S*
> *S*
> *Backbone*
>
> ***TOWN 2***
>
> *B*
> *T* *BSC_____MSC*
> *S*
>
> *Base Transceiver station ("BTS")*
> *Base Site Controller ("BSC")*
> *Main Switching Centre ("MSC")*

Whereas it is beyond any controversy that Access Spectrum (which according to the Respondent is GSM Spectrum or Startup Spectrum) is necessary for transmission of frequency from BTS to a mobile handset,

Microwave Access Spectrum and Microwave Backbone Spectrum may not be necessary to connect the BTS with BSC and MSC and vice versa.

101. According to the Petitioners, so far as new operators are concerned, they, in absence of microwave access spectrum and microwave backbone spectrum would not be able to plan the network or provide an effective, efficient and complete network which would benefit any subscriber in any real sense of the word, having regard to the fact that alternate arrangements are not easily available and may only be temporary in nature. The Respondent, however, contends that so far as microwave access spectrum and microwave backbone spectrum are concerned the same have not been guaranteed inasmuch as the same would be subject to availability and subject to the guidelines issued from time to time.

It is, however, not in dispute that allocation of GSM Spectrum is also subject to availability.

102. Our attention has been drawn to the fact that keeping in view the difficulties faced by the licensees in complying with its roll out obligations within one year from the effective date of the license, the amendment dated 10.02.2009 has been carried out. The said amendment has been given a retrospective effect and retroactive operation.

103. A meeting took place on or about 27.4.2009, wherein emphasis had been laid on carrying out the roll out obligations on the part of the licensees as early as possible. The concerned licensees were also asked to state about the respective status of their roll out obligations.

We may notice that the representatives of 'Aircel' and 'Dishnet' were not present in the said meeting. Representatives of different operators assigned different reasons as they were facing different problems.

We may furthermore notice that although the said minutes of meeting was referred to by Ms. Dhir for the purpose of raising a contention as to how the parties understood their respective obligations being aware of the directory nature of the burden on the part of the respondent to allocate Microwave Access and Microwave Backbone Spectrum as also the fact they were aware that in stead and in place thereof even 'lease line' could be taken to interconnect various BTSs and sharing of some active infrastructure vis a vis the contention of M/s Loop Telecom Ltd. however, from the chart which, we have noticed heretobefore that at least some of the licensees have already applied for SACFA clearance.

It would appear from the said minutes of meeting, to which we shall refer to at an appropriate stage, that what had been permitted was a recent phenomena, in so far as in paragraph 37 of the detailed reply filed by the

Respondent, it has not been stated as to when such permission had been granted.

104. Ms. Dhir would contend that the Petitioners having not raised any contention that in absence of the Backbone Spectrum, roll out obligations could not have been met they should not be permitted to approbate or reprobate and/or take advantage of their own wrong despite amendment in the license.

105. In the case of 'Unitech' our attention has been drawn to a large number of letters being dated 05.6.2008, 13.8.2008, 11.9.2008, 03.10.2008, 03.11.2008, 05.01.2009 to contend that the said licensee had all along understood that GSM Spectrum is the Startup Spectrum.

106. We may notice only the letter dated 05.01.2009 (as they are more or less on the similar terms) which reads as under :-

> *"As mentioned earlier, we have been allocated the startup spectrum of 4.4+4.4 MHz in 1800 MHz GSM band on trial basis, on April 22, 2008, while the Microwave Frequency spots for Access network were earmarked on June 30, 2008. However, we are still waiting earmarking of Microwave Frequency spot for Backbone network.*

Sir, you will appreciate that already more than eleven months have passed since effective date of the Licence Agreement for above service area and without receiving the Microwave Frequency spot for Backbone network, we cannot start basic activities like site survey, finalization of sites, finalization of vendor for supply & installation of equipments, application for grant of import licence and other associated works, keeping in mind the large geographical spread of the service area."

These letters were, thus, written prior to the amendment of the license.

They might have contended that the start-up spectrum is 4.4+ 4.4 but they have also been making grievances that microwave frequencies for backbone network having not been granted for 11 months, they have not been able to start basic activities like site survey, finalization of sites, finalization of vendors for supply and installation of equipments, application for grant of import license and other associate works keeping in mind the large geographical spread of the service area.

The Respondent did not respond to those letters. It did not contend that even in absence of allocation of spectrum, how it would have been possible for it to carry out other activities to commence grant of services.

107. Our attention has been drawn to the fact that microwave spectrum was allocated on 30.6.2008 in the following terms:-

	"Freq.	*Ch.Plan*	*Power*	*Ant.Gain (Minimum)*	*Area of Opn.*
(i)	*18140/19150MHz*	*27.5 MHz*	*20dBm*	*30dB*	*Tamilnadu telecom service area including Chennai*
(ii)	*21490/22722 MHz*	*28MHz*	*20dBm*	*30dB*	*for the cities/DHQs as per Annexure-I attached"*

108. It is contended by Ms. Dhir that the roll out obligations were completed on 19.2.2010, whereas Mr. Malhotra would contend that backbone frequency was allocated on 10.2.2009 and LD has already been deposited in respect of six or seven months delay.

The impugned order dated 23.12.2010 shows that 44 weeks' delay had been taken into consideration from the date of allocation of the start-up spectrum being dated 22.4.2008 and the average delay for SACFA clearance has been taken to be only three days.

109. The contract in question is neither a contract for sale of merchandise and in particular, nor a charter party contract.

110. We have no doubt in our mind that the licensor could not have avoided its responsibility from calculating the delay for which it was responsible, subject of course to explicit provision in the contract to the contrary.

111. A roll out obligation should ordinarily be met, but the basic question is, whether a delay on the part of the licensor, as a result whereof the licensee cannot fulfill its contractual obligations, should altogether be ignored.

112. We are of the opinion that it cannot be.

For the aforementioned purpose, it is difficult to lose sight of certain basic principles of construction of a document namely, a commercial document should receive commercial meaning.

113. Parties, for whatever reasons, have used certain terms and thus, for the purpose of construction thereof, the background of contract as also the purpose and object which it seek to achieve should be taken into consideration. The factual background would include the state of the law as was then prevailing as also the conventional usage of the terms.

114. It is trite that there should be vigilance in common law, while allowing freedom of contract which watches to see that it is not abused and the licensor is not free to exempt itself in the wide terms which are contended.

115. So construed, the Respondents, in our considered opinion, were bound to give effect to the entire delay attributed to it. More significantly when the licence was amended in terms of the circular letter dated 10.02.2009, the Respondent was bound to give effect thereto.

116. The term 'spectrum' and 'frequency' are not synonymous.

117. We may also notice that start up spectrum is not defined. We may, therefore, notice the dictionary meaning of the said words.

> *"The dictionary meaning of these terms as given in the Oxford English Mini Dictionary is recapitulated below: -*
>
> | | |
> |---|---|
> | ***Frequency (n) (pl- ies) -*** | *The rate at which something occurs or is repeated. Physics – the number of cycles of the carrier wave per second; a band or group of these.* |
> | ***Spectrum (n) (pl- spectra) -*** | *A bound of color or sound forming a source according to their wavelengths, on an entire range of ideas, etc.* |
> | ***#(the spectrum)*** | *the entire range of wavelengths of electromagnetic radiation # an image or distribution of components of any* |

electromagnetic radiation arranged in a progressive series according to wavelength # a similar image or distribution of components of sound, particles etc. arranged according to such characteristics as frequency, charge and energy."

NEWTON'S TELECOM DICTIONARY

Frequency - *The rate, at which an electrical current alternates, usually measured in Hertz. Hertz is a unit of measure which means, cycles per second." So, frequency equals the number of complete cycles of current occurring in one second. See Band, Frequency for a complete list of all the frequencies.*

Spectrum - *A continuous range of frequencies, usually wide in extent within which waves have some specific common characteristics. See SPECTRUM DESIGNATION OF FREQUENCY.*

ITU-ICT REGULATION TOOLKIT

Frequency - *The rate, at which an electrical current alternates, usually measured in Hertz (see Hz). It is also used to refer to a location on the radio-frequency spectrum, such as 800, 900 or 1'800 MHz.*

Spectrum - *the radio frequency spectrum of hertzian waves used as a transmission medium for cellular radio,*

radiopaging, satellite communication, over-the-air broadcasting and other services.

As can be seen above, in the Oxford Dictionary, the term frequency is shown as a noun. In common parlance/usage, when referred to the electromagnetic spectrum, the term frequency is normally being ascribed to the actual wave propagating at that frequency. The ITU ICT Regulation Toolkit also mentions that "frequency is also used to refer to location on the radio-frequency spectrum, such as 800, 900 or1'800 Mhz. The term Spectrum generally refers to a band of frequencies used for communications."

118. The terms spectrum/frequency having scientific/technical meanings, they, in absence of any special meaning ascribed thereto in the licence agreement, should as far as possible be assigned the same meaning. Respondent does not say that it does not allocate MW Access or MW Backbone Spectrum.

What it contends is that it was not mandatory on its part to do so.

119. It may be so.

But, it is one thing to say that allocation of backbone spectrum in the context of application of wireless technology is mandatory or directory, but it is

another thing to say as to whether the same having applied for and ultimately granted should be taken into consideration for the purpose of reckoning the delay on the part of the licensees before imposing liquidated damage.

In our opinion, the following situations should be borne in mind, while construing the licence agreement :-

(i) The licensees, who had used wireline technology or CDMA technology, were allowed to migrate to UASL regime in or about the year 2003;

(ii) The Union of India adopted a policy decision to issue a large number of new licences. Letters of Intent were issued to the new licensees sometimes in January, 2008;

(ii) Spectrum was applied for and allocated both to the new licensees and the existing licensees, the priorities wherefor having been fixed.

120. Pursuant to the aforementioned policy decision, about 132 new licences were granted in respect of various circles.

121. Only a few of them could comply with the roll out obligations as they stood under the original licence agreement namely, one year from the effective date of licence, if at all.

122. It was in the aforementioned backdrop, the industry made a representation. A meeting was held between some representatives of the industry and the authorities of the DoT including the WPC Wing on or about 27.4.2009.

123. The relevant passages of the said minutes of meeting, upon which strong reliance has been placed by Ms. Dhir may be noticed.

> *"A meeting under the chairmanship of Secretary, Telecom was held on 6th March, 2009 in Sanchar Bhavan, New Delhi with the Chief Executive officers of the Unified Access Service Licences who have been given the licenses in Jan. 2008 to discuss the Rollout plans and related matters. The list of participants is at Annex-1.*
>
> *3. He stressed the need for faster roll-out of services as it not only helps the operators to get back the return on their investments but also helps the consumers by way of competition. It was pointed out that the Department has already addressed the concerns by linking Rollout obligation with allocation of access spectrum. But, almost one year is going to be over after allocation of access spectrum and in the absence of rolling out of services as per the*

stipulations in the licence agreement, liquidity damages would have to be imposed. It was also pointed out that the Department would rather like to have roll-out prior to commencement of liquidity damages in stead of imposing and recovering such damage. He also mentioned that the access spectrum is a scarce resource and is to be utilized most efficiently in a timely manner and in case services are not rolled out in a reasonable time, the Government may consider to take back the spectrum so that the scarce resource is not wasted and hoped that such an eventuality never arises.

5. M/s Loop Telecom Pvt. Ltd. informed that they are planning to roll-out their services in the next three to four months and all the necessary ordering of the equipment has been completed and network installation is in advanced stage.

5.1 However, Wireless Adviser intervened and informed that still no SACFA clearance application has been applied by M/s Loop Telecom Ltd. Other operators are also in the same position. It was suggested to apply for the same wherever required to expedite the rollout of services. With reference to backhaul, it was clarified that there is no bar to take leased lines to interconnect various BTSs and sharing of some active infrastructure has been recently permitted. Initially, even first two cellular operators commenced their services by taking leased lines from erstwhile DoT. The backhaul cannot be termed as a bottleneck facility.

9. M/s Datacom Solutions Pvt. Ltd. informed that they have already placed the orders for the equipment and they are likely to receive the supplies by end of April, 2009. They have signed tower-sharing agreement for 2000 sites in Tamil Nadu, Kerala, Orissa and Andhra Pradesh and have applied SACFA clearance for 20 sites.

10. M/s Unitech Wireless (Tamil Nadu) Pvt. Ltd. and Group Companies informed about the arrangements they have made with M/s Telenor and planning to roll-out services as early as possible. They also informed that they have signed tower-sharing agreement for 2200 sites in all the service areas.

11. M/s. Shyam Telelink Ltd. informed that they will be able to meet the 10% rollout obligations in all the licensed areas with a few weeks delay in some service areas. They have pointed out the problems being faced in backbone due to non-availability of micro-wave access spectrum.

12. M/s. S. Tel Ltd. informed that they have already ordered the equipment and are likely to receive the equipment by end-April, 2009. They have already tied up for passive infrastructure sharing for all the service areas. They also informed that they will be able to start the services in June-July, 2009."

124. We must, at the outset, place on record the objections taken by the learned counsel of the Petitioner to take the same into consideration, stating that the Respondents have annexed the said documents with its replies filed only on 26.7.2011, to which the Petitioners could not file a rejoinder.

125. The rejoinder, which could be filed, was only to the short reply filed by the Respondent.

126. The said document, for reasons best known to the Respondent, has not been annexed to the short reply nor the same has been annexed with the other replies.

127. According to the learned counsel, if this Tribunal intends to consider the factual aspects of the matter, the Petitioner should also be granted an opportunity with regard thereto.

The learned counsel appears to be correct.

128. It may, however, be stated that we have referred to the said minutes of meeting not for the purpose of resolution of any disputed fact, but only for the purpose of showing that different operators had raised their own difficulties in the matter of meeting out their respective roll out obligations.

Even in the said minutes of meeting, it had not been pointed out that allocation of GSM only was imperative in character and others were not.

Although some suggestions as regards tower sharing and/or lease line method were given, whereto some of the Petitioners have resorted to, but the same would not by itself mean that the Respondent raised a categorical stand even at that point of time that MW Access Spectrum and MW Backbone

Spectrum would not be allocated and the licensee must take recourse to the alternate arrangement.

129. We have noticed that the said applications had never been rejected. It may not be mandatory but then the same would not mean that so far as the operators are concerned, they could have taken recourse to the alternate technology without being categorically told thereabout.

To be fair to the licensees, the Respondent before imposition of liquidated damages could have at least communicated its decision about its inability to allocate spectrum and/or the necessity thereof. We may, however, place on record that at least one licensee did meet its roll out obligations despite having not been allocated MW Backbone Spectrum.

130. Performance of the terms of a contract must be considered in a pragmatic manner. If the Respondent so desired, it could have, even in that meeting asked the licensees to take recourse to the alternate methods by starting digging the trenches for laying fibre cable or copper cable or start negotiations with the existing licensees to enter into lease line contract.

We are of the opinion that such a stand on the part of the Respondent could have been made clear and explicit. It is expected that in future it would do the same.

Adherence to meeting of the roll out obligations on the part of the licensee is a contractual one.

Performance of that part of the contract, however, depended upon fulfillment of some obligations on the part of the Respondent. In other words, the contract is not and cannot be treated to be a one sided one.

131. Ms. Dhir has placed strong reliance upon the decision of this Tribunal in Cellular Operators Association & Ors. Vs. Department of Telecommunications – being Petition No. 122 of 2007 disposed of on 27.4.2010, to contend that it was held therein that GSM spectrum is absolutely mandatory for operation of the Cellular Mobile Services, but it was not so, so far as Microwave Spectrum is concerned. This is so, but in that case this Tribunal was concerned with the levy of spectrum charges for Microwave Access and Microwave Backbone spectrum. It is not the case of the Petitioner that wireless services cannot be rendered at all without Microwave Access and Microwave Backbone spectrums, but for the purpose of considering the validity and/or reasonableness of the imposition of the liquidated damages, the least, which could have been done by

the Respondent, was to make its decision known to the operators and not take a decision involving grave civil consequences by keeping them in dark.

132. The question, which now arises for consideration is whether the GSM spectrum is synonym with frequency allocation and whether the delay in allocation of MW Access Backbone Spectrum should not be excluded?

For the aforementioned purpose, we may notice the statement made in paragraphs 15, 17, 19, 20, 21 and 22 of the Reply.

In para 15, the Respondent contends that in case of delay of 52 weeks, the licence will be terminated, in the event of the licensee's failure to bring the services or any part thereof into operation.

In para 16 of its reply, the Respondent states that allocation of frequency band envisages and initial allocation of maximum 4.4 MHz + 4.4 MHz of spectrum in any of the frequency bands of 824 to 844 MHz paired with 869 MHz to 890-915 MHz paired with 935-960 MHz and 1710-1785 MHz paired with 1805-1887 MHz to meet the roll out obligations. According to it, the said frequency bands are also used in most of the countries in the world which are of two types – TDMAT (Time Division Multiple Access Technology) popularly known as global system for mobile communication, (GSM) and CDMA system (Core Division Multiple Access Technology).

In para 17 of the Reply, the Respondent states that the said frequency band does not include the Microwave Access Spectrum and Microwave Backbone Spectrum, which are altogether different.

133. Submission of Mr. Malhotra is that there is nothing in the licence to show that one type of frequency is imperatively required to be allocated and the other is not. In any event, even if part of the service can be rendered on wire line technology for commercial reasons, the same by itself cannot be a ground to convert the wireless licence into a licence having wire line technology. In the licence itself, it could have been said that the one year's period of roll out obligation would be reckoned from the date of allocation of the GSM spectrum only.

Although the said question need not be finally determined, the licence agreement, to our mind, should have been made clear and explicit.

It is true that spectrum being a scarce commodity, it was obligatory on the part of the parties to the contract to see that it is utilized within a time frame, but for the said purpose, efforts were required to be made on both the parties thereto. Action on the part of the Respondent ought to have been fair and reasonable.

For allocation of frequencies, the DoT has a separate wing. It should have made known its stand to the licensees well in advance, being in possession of the relevant informations.

An advance information that it would not be able to allocate Microwave Spectrum shall have been communicated to the applicant, so that it could try the alternatives available to it.

134. We may, in the aforementioned situation, notice one communication of the DoT being dated 29.9.2009 :-

> *Sub : Regularisation of GSM spectrum earmarked for Unified Access Service in Tamilnadu (Incl. Chennai) Telecom service area.*
>
> *Ref : This office letter No.L-14047/10/2006-NTG dated 22.04.2008*
>
> *I am directed to refer your letter dated 17.08.2009 and this Ministry's letter No. L-14047/10/2006-NTG dated 22.04.2008 regarding earmarking of initial spectrum of 4.4+4.4 MHZ in the GSM 1800 MHz for Unified Access Services in Tamilnadu (Incl. Chennai) Telecom service area on trial basis.*
>
> *2. The above said earmarking is regularized with immediate effect. Other terms and conditions of the letter referred above remain unchanged.*
>
> *3. As a consequence upon the regularization of the GSM spectrum, MW Access and Backbone frequency spots earmarked on trial basis (for your GSM services in the service area stands regularized with immediate effect, if applicable otherwise.*

4. The deployment plan in the prescribed format may kindly be submitted within 15 days, if not submitted earlier."

135. We may also notice para 18 of the reply wherein the Respondent categorically stated that after the allocation of startup spectrum, the licensees were to apply for SACFA clearance for each tower established by it and after the SACFA clearance is granted, they were to register with the TERM Cell of Respondents for final approval.

136. From the letter date 23.9.2009, it is evident that only MW Access and Backbone Frequency, which were allotted on trial basis, were regularized from the date of issuance thereof.

137. It may, however, be noticed that in Petition No. 123 of 2011 – Videocon Vs. DoT as also in other cases (except 'Unitech') the licensees had applied for all three types of frequencies simultaneously, which were entertained by the DoT and the frequencies were granted one after the other.

Only in one case, it will bear repetition to state, a licensee has complied its roll out obligations although Microwave Spectrum has not been allocated.

138. According to Mr. Malhotra, from the conduct of the Respondent it is, therefore, evident that it did not perform its part of the contract, to which it was obligated under the licence agreement namely, grant of frequencies, not only the GSM one but also the MW Backbone Frequency and MW Access Frequency.

The very fact that some of the licensees had applied for grant of frequency simultaneously and they were entertained, clearly goes to suggest that only because one of the operators had asked for allocation of GSM frequency at the outset, the same would not mean that allocation of other types of frequencies were absolutely inconsequential. Even if that be so, it was to be made clear and explicit. We may, at the cost of repetition, also place on record that the Respondent had never communicated to the operators, although they had applied for MW Backbone Frequency and/or MW Access Frequency, that they could lay either optical fiber cable and/or take lease line services from other operators.

139. It may further be noticed that liquidated damages have been claimed on the premise that time was of the essence of the contract as envisaged under Clause 35 of the licence agreement.

140. At this stage, it must also be noticed that the Respondent so far as the petitions filed by 'Unitech' are concerned, relying on or on the basis of certain communications, extracts whereof have been reproduced in its reply contended that having regard to the admissions contained therein, the Petitioners are estopped and precluded from raising a contention that the startup spectrum also constituted by frequency other than the GSM Spectrum which was only to be granted as a matter of right but not the other types of spectrum.

141. We have, however, gone through the letters dated 05.6.2008, 13.8.2008, 11.9.2008 and 30.6.2008, from a perusal whereof it does not appear that the Petitioner consciously has given up its right, if any, to obtain the backbone spectrum/access spectrum.

142. The said letters are to be read as a whole. No express admission can be said to have been made by the Petitioners therein.

In fact, the Union of India in its letter dated 30.6.2008 while earmarking for Petitioner's GSM network has also spoken of MW Access Spectrum.

143. It is also of some importance to notice, as indicated heretobefore, Videocon and other operators indisputably had applied for not only GSM Spectrum but also other types of spectrum by its letter 10.01.2008 and 16.9.2008. We may notice the relevant paragraphs from the said communication:-

Frequency (ies)/Frequency band covered by the equipment proposed	*F1 & F2 in 7142-7296 MHZ; H-V (7 GHZ band)*
Frequency assigned for operation	*MW Link for Cellular Services for Backbone and Backhaul*
Type of equipment	*Point to Point Microwave*
Receiving station location with pin code	*Will be submitted later on after finalization of spectrum*

144. The conditions of license postulate that applications for grant of Spectrum were to be filed in prescribed proforma. We have been taken through the said applications forms, from a perusal whereof it appears that the operators other than 'Unitech' have applied for allocation of all types of spectrum at a time and nothing has been pointed out to show that exception has been taken thereto. It is, on the other hand an admitted fact that not only GSM Spectrum but also MW access and MW Backbone Spectrum have been allocated by the Union of India.

145. In the proforma prescribed by the respondent itself, it would appear that according to the Respondent the 'microwave link' and 'cellular' mean differently as they have used the word "microwave link for cellular". In fact, both types of spectrum are complimentary to each other (although not absolutely essential). By reason of a letter dated 24.12.2008, the Union of India allocated GSM frequency; whereas within a period of three months by another letter dated 09.3.2009 it was stated :-

> *"2. The link wise deployment plan may kindly be submitted in the prescribed format within 15 days from the date of this letter."*

146. The Respondent states that immediately after grant of license, the plan for operationlising the network could be made. The licensee could not plan its network without knowing as to what frequency bands would be allotted to it.

147. We have noticed hretobefore the flow chart for the purpose of considering as to how the entire operations were to be carried out.

In this case, the principle of 'Estoppel' will have no application. Rule of Estoppel is based on equity. It should not be applied in a manner as to violate the principles of right and good conscience.

(See Cauvery Coffee Traders Vs. Horns Resources (2011 (10) SCC 420).

Moreover, determination of contractual obligation of a party to the contract would depend upon the text and context thereof. In a case of this nature, construction of the document by a Court of Law will have universal application; it would not, thus, depend upon the contentions raised by only one of the licensees.

148. The Petitioner has further contended :-

> *"56. The petitioner submits that the delay caused in meeting the roll-out obligations, as calculated by the DoT, also purport to include a time period that Licencee like the Petitioner had to incur solely on account of the introduction of unforeseen, new and onerous conditions suddenly imposed by the DoT and their contributory effect on the timelines and performance. While the Petitioner appreciates that security of the Nation is paramount, yet the cascading effect of introduction of new, onerous obligations and conditions by the DoT has to be factored in for a judicious decision. The DoT cannot introduce new and arduous criteria for the Petitioner to meet and satisfy its roll-out obligations and yet visit it with allegations of delay in meeting such obligations and demand the Liquidated Damages.*
>
> *57. The new and onerous conditions imposed by the DoT are as follows :-*

a. *the DoT vide its letter dated 29.10.2009 imposed a mandatory condition of LI Testing for voice, SMS and Data Services. This further delayed/adversely impacted the time taken by the Petitioner to meet its roll out obligations.*

b. *the DoT, vide its letter dated 03.12.2009 amended the UASL Agreement by introducing a new Clause 41.6A. The said clause reads as follows :*

"the Licensee shall apply to the Licensor for security clearance along with detail of the equipment(s) as well as detail of equipment(s) suppliers and manufacturers including Original Equipment Manufacturer (OEM), before placement of the final purchase order for procurement/upgradation of equipment/software for provisioning of telecommunication service under the license. In case no response is received from the Licensor within 30 working days, it shall be presumed that there is no objection to the procurement."

Copy of the letter dated 03.12.2009 is annexed herewith and marked as Annexure P-24.

58. As regards the requirement of LI Testing, as stated hereinabove the Petitioner vide various letters, requested the DoT to arrange the demonstration of LI equipment network for Lawful Interception Monitoring Facilities for Voice, SMS and Data Services in the J&K Circle. These LI Testing have been completed by the DoT but the approval for the same is awaited."

In the case of Videocon also, delay has occurred for import of equipments which required a security clearance for which a provision had been subsequently introduced. Besides the same, even LI testing were also required to be carried out.

In its letter dated 13.7.2010, the Petitioner has summarized the reasons for delay, stating :-

> *"Due to frequent changes in the format approximate delay of six months have occurred in accordance of security clearance because of which we were unable to place final purchase order to our supplier for procurement of telecom equipments. It is also pertinent to mention that till date we have not been accorded security clearance for procurement of equipments for Huawei. Availability of ROW permissions etc., the only option open to the operators for roll-out is to realize the access transmission through microwave only.*
>
> *5. We would also like to submit that the availability of backbone transmission is an essential ingredient in the cellular network building. The architecture of MSC-S and MGW lends itself to a very efficient & flexible design and therefore for establishing the inter-core and access to core connectivity, microwave spectrum for backbone transmission is a compulsory requirement rather it is a pre-requisite.*
>
> *6. As may be seen from above, the roll-out of the network needs all the three component resources and therefore need to be linked with the availability of these resources to a licensee for rolling out of service. And thereby the frequency allocation for all three*

resources/components should be considered for roll obligation fulfillment."

Without determining the said issues, we think the DoT should take them into consideration having regard thereto as also its own stand in the matter.

Applicability of principles of natural justice

149. The principle of natural justice in a case involving imposition of liquidated damages is ordinarily not required to be complied with. The question, however, is as to whether an exceptional case has been made out in these matters.

150. The licence has been granted by the Respondent in exercise of its power conferred upon it under the Proviso appended to Section 4 of the Indian Telegraph Act. By reason thereof, however, the contact does not become a statutory one, the terms & conditions therefor having not been prescribed by reason of a statute.

By reason thereof merely an enabling power has been conferred upon the Respondent herein to part with its exclusive privilege, which is otherwise within its domain in terms of the main provision contained in Section 4 of the Act.

After coming into force of the Constitution of India, the said provision must be construed keeping in view the provisions thereof including Article 298.

151. A Licence agreement was entered into by the parties hereto.

For the purpose of grant of licence, the Central Government has laid down the policies. It has issued guidelines with regard to the mode and manner of grant thereof as also the fact that the priorities of grant of licence have been fixed by it.

In that view of the matter, it is a dominant party to the contract. The terms and conditions of the licence are contained in a standard format. The licensor, in terms of Clause 5 of the conditions of licence, is entitled to alter, amend or modify the terms & conditions thereof unilaterally for public interest, security of nation and for working out of the contract. Such unilateral exercise of power on the part of the Respondent must, therefore, be taken note while construing the provisions of the licence agreement.

152. The licence agreement, we have noticed heretobefore, contains mutual obligations. Both parties are required to comply with their respective parts of the contract. In the event of the licensee's failure to perform its obligations, the

Respondent is empowered to cancel the licence apart from imposing penalty to the extent of Rs.50 crores in terms of the provisions of Clause 10.2 (i) and 10.2 (ii) of the Conditions of Licence, besides imposition of liquidated damages and in the event the roll out obligations are not completed within a period of 52 weeks, even the licence can be cancelled.

153. Imposition of liquidated damages, thus, would also depend upon performance of obligations on the part of the Respondent. In a given situation like the present one, had an opportunity of being heard was given to the licensees, they could have shown that they could not perform its part of contract because of latches and/or omissions and commissions on the part of the Respondent itself.

154. Before us questions of seminal importance both legal as also technical aspects of the matter have been raised. The Respondent in the licence agreement itself contemplates some delay on its part. How far and to what extent the delay caused at its hands in grant of SACFA clearance, time taken of a L.I. testing and grant of security clearance for the purpose of import of equipment were, thus, required to be considered.

It is now a well settled principle of law that a dominant party cannot take advantage of one sided contract. It is equally well settled that a contract, which

confers some arbitrary and discretionary power at the hands of a party to the contract, must be construed strictly.

155. It is in that limited sense probably we may have to consider the question of applicability of the principle of natural justice.

156. Mr. Malhotra and other learned counsel have relied upon a large number of decisions in support of their contention that the principles of natural justice were required to be complied with.

We may at the outset notice that most of the cases relied upon by the learned counsel relate to the performance of statutory functions by the statutory authorities or role of the Government on its administrative side.

The said decisions, except a few, have no application to the fact of the present case.

157. In Commissioner of Coal Mines Provident Fund, Dhanbad Vs. J. P. Lala reported in (1976) 1 SCC 964 a statutory authority was to determine a matter involving rights of the parties judiciously and thus, it was held that the principle of natural justice is implied, if the decision of that body affects individual rights or interests, stating :-

"When a body or authority has to determine a matter involving rights judicially the principle of natural justice is implied if the decision of that body or authority affects individual rights or interests. Again, in such cases having regard to the particular situation it would be unfair for the body or authority not to have allowed a reasonable opportunity to be heard (See State of Punjab v. K. R. Erry & Sobhag Rai Mehta)."

158. In Mrs. Maneka Gandhi Vs. Union of India reported in (1978) 1 SCC 248, the right to go abroad was held to be a fundamental right and it was in that sense opined that the rules of natural justice would apply as much to administrative action which entail civil consequences as to quasi-judicial and judicial functions.

159. In S.L. Kapoor Vs. Jagmohan (1980) 4 SCC 379, the Supreme Court was dealing with a matter relating to supercession of a Municipal Committee, which had huge civil consequences. In that context, it was stated :-

"In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It all comes from a person who has denied justice that the person who has been denied justice is not prejudiced. As we said earlier where

on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs. We do not agree with the contrary view taken by the Delhi High Court in the judgment under appeal."

160. In Swadeshi Cotton Mill Vs. Union of India reported in (1981) 1 SCC 664 the Apex Court was considering the provisions of the Sections 18-AA (1)(a) of Industrial Development & Regulations Act, 1951.

In exercise of the said power, the management of the company was taken over by National Textile Corporation and in the aforementioned factual scenario, the principle of natural justice was held to be applicable even in a case of emergency, stating that a post-facto hearing may also be given, stating :-

"The phrase "natural justice" is not capable of static and precise definition. However, a duty to act fairly, i.e. in consonance with the fundamental principles of substantive justice, is generally implied, irrespective of whether the power conferred on a statutory body or tribunal is administrative or quasi-judicial."

161. In Olga Tellis Vs. Bombay Municipal Corporation reported in (1985) 3 SCC page 545, it was stated :-

"47. The proposition that notice need not be given of a proposed action because, there can possibly be no answer to it, is contrary to the well-recognised understanding of the real import of the rule of hearing. That proposition overlooks that justice must not only be done but must manifestly be seen to be done and confuses one for the other. The appearance of injustice is the denial of justice. It is the dialogue with the person likely to be affected by the proposed action which meets the requirement that justice must also be seen to be done. Procedural safeguards have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary action on the part of public authorities. The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to individuals or groups, against whom decisions taken by public authorities operate, to participate in the processes by which those decisions are made, an opportunity that expresses their dignity as persons.

Whatever its outcome, such a hearing represents a valued human interaction in which the affected person experiences at least the satisfaction of participating in the decision that vitally concerns her, and perhaps the separate satisfaction of receiving an explanation of why the decision is being made in a certain way. Both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with one. Justice Frankfurter captured part of this sense of procedural justice when he wrote that the "validity and moral authority of a conclusion largely depend on the mode by which it

was reached..... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done. At stake here is not just the much-acclaimed appearance of justice but, from a perspective that treats process as intrinsically significant, the very essence of justice.

The instrumental facet of the right of hearing consists in the means which it affords of assuring that the public rules of conduct, which result in benefits and prejudices alike, are in fact accurately and consistently followed.

It ensures that a challenged action accurately reflects the substantive rules applicable to such action; its point is less to assure participation than to use participation to assure accuracy."

162. In Mahabir Auto Stores & Ors. vs. Indian Oil Corporation & Ors. reported in (1990) 3 SCC 752, the doctrine of 'audi alteram partum' was put to service, stating the law thus :-

"*If a governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to E.P. Royappa v. State of Tamil Nadu, Maneka Gandhi v. Union of India, Ajay Hasia v. Khalid Mujib Sehravardi, R.D. Shetty v. International Airport Authority of India and also Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay. It appears to us that rule of reason and rule against arbitrariness and*

discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case."

However, in this case we are not concerned with such a situation.

163. In Cantonment Board, Dimapur & Ors. vs. Taramani Devi reported in 1992 Suppl.2 SCC 501 the principle of natural justice was held to be a facet of Article 14 of the Constitution of India.

In State of Bihar & Ors. Vs. Industrial Corporation Pvt. Ltd. reported in (2003) 11 SCC 465, the Supreme Court of India was dealing with a case where the Excise Commissioner had imposed penalty merely on the basis of audit report without application of mind and, thus, the same without giving any opportunity of hearing was held to be bad.

In Canara Bank vs. D. K. Awasthi reported in (2005) 6 SCC the Supreme Court opined as under :-

"11. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be

adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice."

Although the Respondent has invoked its contractual status, in a situation of this nature, where the default on its part is also in question, some of the principles laid down by the Apex Court may be held to be applicable even in contractual matters, it being a 'State' within the meaning of Article 12 of the Constitution of India.

164. Moreover, in Reliance Energy Ltd. & Anr. Vs. Maharashtra State Road Development Corporation & Ors., reported in (2007) 8 SCC 1, the Supreme Court opined that the principles of natural justice are required to be complied with in a case where the action on the part of the State is found to be unreasonable, unfair and contrary to equity.

In that case, it was held that the decisions or acts of the State resulted in unequal and discriminatory treatment in the level playing field. A level playing field was held to be a part of Articles 14 and 21 of the Constitution of India.

165. We may, furthermore, notice that in Kumari Srilekha Vidhyarthi & Ors. vs. State of U.P., 1991(1) SSC 221 the appointment and removal of the Law Officers in an

arbitrary fashion was held to be bad in law, although the same was governed by contract, stating :-

> *"22. There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.*

23. Thus, in a case like the present, if it is shown that the impugned State action is arbitrary and, therefore, violative of Article 14 of the Constitution, there can be no impediment in striking down the impugned act irrespective of the question whether an additional right, contractual or statutory, if any, is also available to the aggrieved persons.

24. The State cannot be attributed the split personality of Dr Jekyll and Mr Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfill the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in pubic interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity."

166. This Tribunal, furthermore, in BPL Mobile Cellular Ltd. Vs. Department of Telecommunication – Petition No.8 of 2003 disposed of on 11.02.2010, held as under :-

> *"It is also a trite law that only because certain conditions are incorporated in a contract, it would not be open to one of the parties thereto, presumably being in a dominant position, to take the attitude of "take it or leave it". When a contract is entered into as a result whereof one of the parties is put to a great deal of advantage and/or are exempted from performing its part of contract which was its solemn obligation to do in public interest, it cannot refuse to do so and for the said purpose it is possible to construe the contract accordingly.*
>
> *In John Lee (Grantham) Ltd. v. Railway Executive {1949} 2 All ER 581 which been followed by the Madhya Pradesh High Court in Smita Conductors Pvt. Ltd., Bombay and Anr. vs. Madhya Pradesh State Electricity Board reported in AIR 1984 MP 44, it has been observed that while allowing freedom of contract, there is vigilance of common law, which watches to see that it is not abused and that defendants therein were not free to exempt themselves in the wide term which are contended."*

The said decision has been noticed by us in Vodafone Essar Mobile Services Ltd. Vs. Mahanagar Telephone Nigam Ltd. disposed of on 04.02.2010 being Petition No. 32 of 2010, Clear Media Vs. Prasar Bharti – Petition No. 174 (C) of 2010 disposed of on 21.4.2011 and Clear Media Vs. Union of India.

Reference can also be made to Reliance Communication Ltd. Vs. BSNL – Petition No.264 of 2010 disposed of on 22.7.2011.

167. Reliance has been placed on V.K. Ashokan Vs. Asst. Excise Commissioner & Others reported in 2009 (14) SCC 85, wherein it has been held as under :-

> ***"49.*** *But there is no gainsaying that when a licence has been granted, which is subject to exercise of statutory power, the provisions of the statute must be complied with before a penal action thereunder is taken. The law provides for compliance with the principles of natural justice as a consequence flowing from an order of cancellation of licence has serious civil consequences and as such it was obligatory on the part of the Excise Commissioner to comply with the principles of natural justice. He has failed to do so. The submission of Mr Iyer that in few of the matters the Assistant Commissioner of Excise had served notices before the recovery proceedings had been initiated cannot be accepted for more than one reason. Such a notice had been issued only pursuant to the order passed by the higher authority, namely, the Commissioner of Excise. As the higher authority had already made up his mind and confirmed forfeiture of the security as also cancellation of licence, administrative discipline would require that it is complied therewith. Issuance of such notices was, therefore, a mere formality."*

168. Although in this case, the Respondent was not exercising a statutory power nor the security of the nation as also cancellation of licence is in issue, but the principles of natural justice may be held to be applicable not as a measure of statutory requirement but unless such an opportunity is granted, it would not be able to arrive at a correct decision.

Having regard to the provisions of the licence agreement, as noticed heretobefore, even a day's delay after one week is treated to be a week, wherefor a huge sum of money would be payable. There may be cases and indeed there are, where notices have been issued to the licensees to show cause as to why the licence should not be terminated for failure on the part of the licensee to meet its roll out obligations within a period of 52 weeks.

Had an opportunity been granted as contended by Ms. Dhir herself, that for determination of the issue it is necessary to enter into factual aspect of each and every case. If that be so, the respective licensees could have shown that no delay was attributed on its part. The delay, if any, at least to some extent is attributable on the part of the licensor itself, which must be taken into consideration for computing the amount of liquidated damages.

In given cases, it can also be shown that roll out obligation has been met much before the expiry of 52 weeks and, thus, licence cannot be cancelled.

169. We, therefore, are of the opinion that the Respondent should give opportunity of hearing to the petitioners for presenting its case and determine the same in the light of the decisions arrived heretobefore.

Issue No.5

170. So far as this Issue is concerned, we may notice the factual matrix involved in it.

The Petitioner was granted a license under Indian Telegraph Act, 1885 inter alia for the circle of Jammu & Kashmir on or about 04.03.2008.

The conditions of license which are applicable in this case are Clauses (iii) and (v) of the amendment of the said license dated 10.02.2009. Admittedly, Jammu & Kashmir service area has 22 districts.

The Petitioner admittedly was allotted startup spectrum for security reasons only in respect of the districts of Doda and Anantnag.

171. The question, which arises for consideration, is as to whether in the facts and circumstances of this case the roll out obligations in terms of Clause 34 of the condition of license as amended on 10.02.2009 could be carried out by the licensee.

Indisputably in terms of the original license, the licensee was to comply with its roll out obligations in respect of 10% of the District Head Quarters in the first phase i.e. within a period of one year, and 50% of the District Head Quarters within three years from the effective date of license.

The effective date of license in the instant case was 25.01.2008.

The Petitioner was allocated start up spectrum on or about 09.03.2009.

The Respondent on the premise the Petitioner has failed to comply with its roll out obligation has imposed a penalty of Rs.6.35 crores by an order dated 19.01.2011.

The said order is in question herein.

172. Mr. Dayan Krishnan, learned counsel appearing on behalf of the petitioner would contend that having regard to the Clauses (iii) and (x) of the said amendment, the impugned order is wholly unsustainable.

The said clauses have been noticed by us earlier. Since the spectrum had been granted in respect of two district headquarters only 10% whereof would be 0.2, it was not possible for the Petitioner to comply with its roll out obligation.

173. Ms. Manisha Dhir, learned counsel appearing on behalf of the Respondent, however, submitted that Clause (iii) of the amendment dated 10.02.2009 must be given a contextual meaning i.e. the roll out obligations on the part of the licensees are not necessary to be considered only when no spectrum is allocated. Learned counsel would contend that the Petitioner having accepted the benefit under the amendment cannot be permitted to question that portion of the agreement which is not favourable to it on the premise that it could not approbate and reprobate at the same time.

174. What would constitute 10% of the DHQs to be covered by the licensees in the first year to meet the roll out obligations in terms of Clauses (iii) and (x) of the amendment letter dated 10.02.2009 is the question.

The roll out obligations on the part of the Petitioner were required to be carried out so as to force it to perform its part of contract, inter alia, in public interest. In terms of the license agreement, inter alia, the licensees are to pay the Central Government:-

A. Non refundable entry fee of Rs.5 crores.

B. The annual license fee at the rate of 6% of the AGR.

C. Spectrum charges.

In regard to the performance of the conditions of license as also payment of the said fees, performance bank guarantees and financial bank guarantees are also required to be furnished.

The license agreement is contained in a document in writing. It provides for mutual obligations on the part of both the licensor and the licensee.

Failure to comply with the roll out obligations would not only entail payment of so called liquidated damages, the same has a cascading effect if more and more delay is caused and ultimately may result in termination of license.

If that be so the said provisions must receive strict construction. Submission of Ms. Dhir that the provisions contained in the Respondent's letter dated 10.02.2009 whereby the license agreement was amended should be assigned a meaning that once start up spectrum is allocated the 10% of DHQs the licensee must start rendition of service in 10% of DHQs cannot be accepted for more than one reason.

The license conditions and in particular clauses 8.1 and 34 and 35 of the license agreement have been amended by reason of the said circular letter. Indisputably such amendment was caused keeping in view the representations made by the industry and having regard to various reciprocal obligations to be performed by the licensor it was not found possible to comply with the roll out obligation.

Roll out obligations were to be carried out in two phases.

The first phase would be 10% of the DHQs where start spectrum has been allocated.

The 10% referred to coverage of service area within one year from the date of allocation of startup spectrum.

Clause (iv) provides that the licensee shall ensure that at least 50% of the DHQs where startup spectrum has been allocated are covered within three years of the date of allocation.

The Respondent in its reply contended that it was not obligatory on it to allocate start up spectrum in respect of all the DHQs.

It is difficult to conceive that for the purpose of interpretation of the said clause the situation as stood prior to amendment must be taken into consideration. If the mischief rule or rule akin thereto is to be applied, the purpose thereof must be considered, namely, that 10% of the DHQs were required to be covered from the date of allocation of spectrum and not from the effective date of license. It would mean that despite non-allocation of spectrum in respect of the concerned districts, the Petitioner was to start providing services in both the districts. It is not the case of the Respondent that spectrum has since been allocated to the rest of the districts, the Petitioner was not required to carry out any further roll out obligation. The two phases of roll out obligations in such an event would become meaningless.

The same would render the second phase of roll out obligations otiose.

In Krishi Utpadan Mandi Samiti & Ors. v. Pilibhit Pantnagar Beej Ltd. & Anr. 2004(1) SCC 391 the Supreme Court of India opined :-

> *"57. Although the dictionary meaning of business may be wide, in our opinion, for the purpose of considering the same in the context of regulatory and penal statute like the Act, the same must be read as carrying on a commercial venture in agricultural produce. The rule of strict construction should be applied in the instant case. The intention of the legislature in directing the trader to obtain license is absolutely clear and unambiguous insofar as it seeks to regulate the trade for purchase and sale. Thus a person who is not buying an agricultural produce for the purpose of selling it whether in the same form or in the transformed form may not be a trader. Furthermore, it is well known that construction of a statute will depend upon the purport and object of the Act, as has been held in Sri Krishna Coconut case itself. Therefore, different provisions of the statute which have the object of enforcing the provisions thereof, namely, levy of market fee, which was to be collected for the benefit of the producers, in our opinion, is to be interpreted differently from a provision where it requires a person to obtain a license so as to regulate a trade. It is now well known that in case of doubt in construction of a penal statute, the same should be construed in favour of the subject and against the State.*

58. In the case of London and North Eastern Rly. Co. v. Berriman, Lord Simonds quoted with approval (at All ER p. 270 C-D) the following observations of Lord Esher, M.R. in the case of Tuck & Sons v. Prieste, QBD at p. 638:

"We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections."

It is trite that fiscal statute must not only be construed literally, but also strictly. It is further well known that if in terms of the provisions of a penal statute a person becomes liable to follow the provisions thereof it should be clear and unambiguous so as to let him know his legal obligations and liabilities thereunder."

In that case the question which arose for consideration was as to whether the word `seed' would come within the purview of the expression `cereal' and if that was so by reason whereof the Appellant therein was entitled to collect market fee on the sale and purchase of agriculture produce.

It is also a well settled principle of law that if the terms used in a document are not clear, the same should be construed in favour of the grantee and against the grantor.

In United India Insurance Co. Ltd. v. Pushpalaya Printers, (2004) 3 SCC 694, it was held:

> *"Where the words of a document are ambiguous, they shall be construed against the party who prepared the document. This rule applies to contracts of insurance and clause 5 of the insurance policy even after reading the entire policy in the present case should be construed against the insurer. A Constitution Bench of this Court in General Assurance Society Ltd. v. Chandmull Jain has expressed that (AIR p. 1649, para 11)*
>
> *"in a contract of insurance there is requirement of uberrima fides i.e. good faith on the part of the assured and the contract is likely to be construed contra proferentem, that is, against the company in case of ambiguity or doubt".*

Yet again, in Bank of India vs. K. Mohandas reported in (2009) 5 SCC 313 the Supreme Court of India held:

> ***"32.*** *The fundamental position is that it is the banks who were responsible for formulation of the terms in the contractual Scheme that the optees of voluntary retirement under that Scheme will be eligible to pension under the Pension Regulations, 1995, and, therefore, they bear the risk*

of lack of clarity, if any. It is a well-known principle of construction of a contract that if the terms applied by one party are unclear, an interpretation against that party is preferred (verba chartarum fortius accipiuntur contra proferentem).”

175. Ms. Dhir would contend that the Petitioner is estopped from questioning its liability to carry out the roll out obligations having regard to doctrine of `Election'. We do not see as to how the said doctrine has any application in the instant case, keeping in view the limited application thereof as considered in Cauvery Coffee Trades (Supra).

It is not a case where a benefit has been taken under a contract and then a contention is raised that the contract is invalid or otherwise bad in law.

In Shyam Telelink Limited v. Union of India 2010 (10) SCC 165, whereupon reliance has been placed by Ms. Dhir, the Appellant therein migrated to UASL. In terms of its earlier license it was to pay a fixed license fee in terms of migration package. Fixed license fee was to stand replaced by a revenue sharing arrangement, subject to the stipulation at 35% of all outstanding dues including interest as on 31.7.1999 and liquidated damages is paid in full before 15.8.1999 the appellant was permitted to migrate. One of the conditions furthermore was that for all terms and conditions stipulated in such

migration packages were to be accepted and all proceedings must be withdrawn.

Demand of liquidated damage to the extent of Rs.7.30 crores was raised. A prayer for waiver of the said amount was made on the premise that it could not commence commercial operations for which it bound itself in terms of the old agreement. It, however, paid the said amount and started commercial production. Respondent raised a further demand of Rs.70.00 lakhs. That order was in question in the petition filed before this Tribunal. It was on the aforementioned premise the doctrine of election and/or the doctrine that a person cannot approbate and reprobate or accept and reject the same instrument was invoked. Such is not the position here.

176. It is true that ordinarily, a party to a contract having taken benefit thereunder, cannot be permitted to question another clause of the contract which is not in his favour and/or not so beneficial, as has been held by the Supreme Court of India in Shyam Telelink Vs. Union of India 2010 (10) SCC 164 but, in this case, the petitioners have not questioned the validity of any clause of the licence agreement. What falls for consideration of this Tribunal is the interpretation of the provisions of the contract.

It must, however, be noticed that the licence agreement in question is not a pricing contract, as was the case of Bharat Sanchar Nigam Ltd. (Supra).

No billing towards IUC charges is required to be made.

177. It is furthermore well settled principle of law that a decision is an authority for what it decides and not what can logically be deduced therefrom.

(See *Oriental Insurance Co. Ltd. v. Raj Kumari, (2007) 12 SCC 768*, at page 772 para 11 & 13)

(See also Shankara Cooperative Housing Society Ltd. Vs. M. Prabhakar & Ors. (2011) 5 SCC 607 Para 82)

Summary of Findings :

(i) Licence agreement, being a contract between the licensor and the licensee, should be given a commercial meaning.

The licence agreement having been entered into by way of parting of exclusive privilege on the part of the licensor and being in a standard format, the Respondent must be held to be in a dominant position.

(ii) In construing the contract of the present nature, in case of any ambiguity, the same should be construed in favour of the licensee and against the licensor.

(iii) Keeping in view the decision of the Supreme Court of India in Hind (Supra) 1979 2 SCC, it must be held that time was not of the essence of contract.

(iv) The licence agreement, if read as a whole coupled with the minutes of meeting dated 27th April, 2009, it must be held that for all intent and purport, Clause 35 of the licence agreement was inserted for the purpose of securing the performance of the contract and not by way of a fair/genuine/reasonable pre-estimate of damages.

(v) The purport and object of introduction of Clauses 34 and 35 being in public interest and for the purpose of ensuring proper utilization of spectrum, in respect whereof the Respondent does not suffer any direct damages in terms of Section 73 of the Indian Contract Act, the question of estimation of reasonable amount by way of pre-estimate of damages, as envisaged under Section 74 of the Indian Contract Act, must be ruled out. The law to enforce, the term of contract is public interest would not ordinarily come within the purview of liquidated damages, as envisaged under Section 74 of the Indian Contract Act.

(vi) Clauses 34 and 35 of the Conditions of Licence having essentially been dealing with enforcement of a contract and not for recovery of any genuine direct loss suffered by the Union of India, it must be held that it constitutes penalty and not liquidated damages.

(vii) Even if the principles of natural justice are not otherwise attracted having regard to mutual obligations of the parties, unless it is clearly established that the licensees alone were responsible for breaches of the contract, no penalty could be imposed.

(viii) The Respondent has acted illegally and without jurisdiction in refusing to give credit of delay on its part in the matter of grant of SACFA clearance relying on or on the basis of the Explanation appended to Clause 4.3 of the contract read with the Press Release of February, 2007.

(ix) The term 'average delay' being indefinite and having regard to the purpose and object, for which the amount of penalty is sought to be levied, the time taken for SACFA clearance being not workable in all cases, the maximum delay therefor should be taken into consideration.

(x) For the purpose of calculation of the exact amount of penalty vis-à-vis the conditions of licence, which are otherwise extraneous or irrelevant, licensees were entitled to be given an opportunity by the Respondent in order to arrive at a finding as to how much and to what extent it itself is responsible therefor and which cannot be attributed to the licensees.

(xi) The licensor, therefore, before imposing the actual amount of penalty, should allow the licensee to file documents to show as to how in terms of the conditions of licence, the delay, if any, is attributable to them.

(xii) The contract provides for graded damages. Provisions for such graded damages have been made presumably having regard to the public interest.

(xiii) We have no doubt in our mind that the licensor cannot shirk its responsibility from calculating the delay for which it was responsible, subject of course to explicit provisions in the contract to the contrary.

A roll out obligation should ordinarily be met, but the basic question whether a delay on the part of the licensor, as

a result whereof the licensee could not fulfill its contractual obligations, cannot altogether be ignored.

Conclusion

178. For the reasons aforementioned, these petitions are allowed to the extent mentioned heretobefore.

The Respondents are directed to consider the issues afresh in light of the observations made heretobefore, wherefor the Petitioners may be given an opportunity of hearing.

The Respondents are further directed for refund of the amount deposited by the Petitioner pursuant to our interim orders with interest at the rate of 12 percent per annum. The Petitioners shall, however, furnish Performance Bank Guarantees within two weeks from date to the extent of the impugned demand, if the same has been reduced or directed to be reduced by orders of this Tribunal in any proceedings. The Respondent should return the amount within four weeks.

179. Petition No. 58 of 2011 of S. Tel. Private Ltd. in respect of Jammu and Kashmir is allowed and the demand of liquidated damages is set aside.

180. In the facts and circumstances of the case, however, there shall be no orders as to costs.

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

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

P.K. Rastogi, Member

I agree with the draft judgment except the matter related to Issue 1 and 7 as well as conclusion prepared by Mr. Justice S. B. Sinha, Learned Chairperson, TDSAT. I have given my own findings with regard to these issues which were framed on 10.02.2011. These two issues are as follows :

"1. What would be the meaning of start up spectrum within the meaning of the provisions of clauses 8.1, 34 and 35?

7. Whether Microwave Access and Microwave Backbone frequencies having regard to Clauses 43 and 18.3.2 are a sine qua non for meeting the rollout obligations?"

2. Important issue for consideration before us is what constitutes start up spectrum. Whether the date of allocation of Microwave access and Microwave backbone frequencies should be considered for calculating the delay in meeting the roll out obligation.

3. Originally, the requirement of Condition 34.1 of the Licence was that the Licensee was to meet the roll-out obligations of covering 10% DHQ/TOWNs in one year of the effective date of License. The Licence defined effective date in this case as 25.01.2008. Hence, the requirement as per Condition 34.1 was that the Licencee was to cover 10% DHQ/TOWNs within first year of effective date, i.e. within one year of 25.01.2008. We may read the relevant clause :

> "8. Delivery of Service
>
> 8.1. The Licensee shall commission the Applicable System within one year from the effective date of the Licence. The date of Test Certificate issued by the Authorizing Testing Party of the Licensor as specified from time to time shall be reckoned as the date of commissioning of the service for the purpose of calculating liquidated damages in terms of Condition 35 of the License Agreement. However the Licensee may start providing service to the customers at anytime without the need of specific approval of the Licensor."

4. The DoT, however, vide its letter dated 10.02.2009 amended the timeline in terms of :

> "In non-metro service areas, the licensee shall ensure that in first phase of roll out obligation at least 10% DHQs where startup spectrum has been allocated are covered within one year of such spectrum. The date of allocation of frequency shall be considered for computing a final date of roll-out obligation."

5. The petitioner has submitted that :

(i) the roll out obligation was to be met within one year of the allocation of start up spectrum and unlike as stated in the Demand Notice, allocation of GSM spectrum is not the sine qua non of start up spectrum but is only a constituent of start up spectrum which is but a bouquet of GSM Spectrum; Access Spectrum and Backbone Spectrum. The complete start up spectrum with all its aforementioned constituents was allocated to the Petitioner on 10.02.2009 and the Petitioner completed its roll out obligation on 19.02.2010.

(ii) SACFA clearance is relatable to establishment and possession and operation of the wireless element of the telecom service including siting of towers each of which can be most efficiently planned once the service provider has knowledge of either availability of the entire bouquet of Spectrum or has worked out in the meanwhile as a protem

alternate plan of lease lines or fiber optics to connect the sites. It is the Petitioner's belief that any alternate worked out whilst awaiting the allocation of complete bouquet of spectrum is no substitute for allocation of the same.

(iii) It was important for a service provider to firstly have definitive details of the complete set of bouquet of spectrum/frequencies that would be allocated to it by the DoT and then plan its network layout in an area. Once the network layout is planned by the service provider, then the service provider seeks actual availability of tower(s) (either by taking it from infrastructure service providers or by acquiring its own locations) and then only, apply to DoT for SACFA clearances. In light of the above, the Petitioner rightfully waited for allocation of full bouquet of spectrum, then planned its network layout, then scouted for and procured physical towers and then applied to SACFA for siting clearances.

(iv) On 22.04.2008, the Petitioner was allocated only one of the constituents of the Spectrum bouquet, i.e. GSM Spectrum and it's a misnomer to state and term GSM Spectrum allocation as the allocation of the start-up Spectrum, as the DoT has done

in its impugned Demand Notice. The Petitioner was allocated complete start-up spectrum only on 10.02.2009 i.e. the date when it was allocated the last of the constituents of the Spectrum bouquet - Microwave Backbone Spectrum. The date of allocation of start up spectrum is of immense significance also for the reason as it is the said date from which the one year period for meeting the roll out obligation of covering 10% DHQ is to be reckoned with.

The relevant dates of the allocation of each of the constituents of Spectrum bouquet are as under:

Allocation Date of GSM Spectrum	Allocation Date of Microwave Access Spectrum	Allocation Date of Microwave Backbone Spectrum
22.04.2008	30.06.2008	10.02.2009

(v) Without availability of Microwave Access Spectrum and Microwave Backbone Spectrum, it would not be possible for a new telecom operator to plan the network or provide an effective, efficient and complete network that would bring benefit to any subscribe in any real sense of the word. Alternate

arrangements are not easily available and can only be temporary in nature and not an effective solution or substitute to the allocation of complete bouquet of spectrum.

(vi) Since geographical areas for covering the DHQ/TOWNs are quite large and consist of multiple cities and villages which are miles away from each other, Microwave Backbone Spectrum to carry communication services between the cities to MSCs. End to end communication services involve connectivity from mobile handset till MSC in the service area, which is spread across the large geographical area. If one doesn't have Microwave Access Spectrum, then it is not possible to connect BTSs and BSCs among each other in the city. Similarly connectivity between different towns/villages is not possible in absence of Microwave Backbone Spectrum.

(vii) However, in case of 3 metro service areas, Microwave Backbone Spectrum is not required for fulfilment of the roll-out obligations.

(viii) There can be no effective substitute for the whole bouquet of spectrum and it cannot be said that laying or use of optic fibers or any other similar media is an effective substitute.

Laying of optic fibers is fraught with huge and insurmountable challenges and impediments and is techno commercially not feasible. The laying of optic fibres envisages statuary approvals from various approvals from the municipal authorities for the right of way, a cumbersome and time taking process that may take up to six months and beyond. Moreover, the laying of optic fibre is generally restricted to period other than monsoon months and generally desired to be carried out at night hours. The issue of Right of Way has been recognized as a real impediment even by TRAI, the regulatory body.

(ix) In fact, it is an admitted position in public domain that even large incumbent operators have been able to connect only up to 30% sites through optic fibre even after more than 10 years of operations.

(x) Likewise dependency on taking lease lines from existing operators has its own inherent challenges. The Lease Lines of existing operators are limited in availability and delivery timelines of the same are unpredictable and economically unviable as one of its preconditions are “take or pay” as well as “lock-in” requirement. In any event its not an effective or permanent solution or alternative to the allocation of bouquet of

spectrum.

6. The respondents, on the other hand, submitted that :

(i) In terms of the aforesaid License Conditions and to meet the rollout obligations, the UAS License provided for allocation of initial Start-up Spectrum under License Conditions 43.5(i) and 43.5(ii). As per the said License Conditions a frequency spot of 4.4 MHz + 4.4 MHz in the any of the frequency bands of 824-844 MHz paired with 869-889 MHz, 890 – 915 MHz paired with 935 – 960 MHz and 1710 – 1785 MHz paired with 1805 – 1880 MHz is to be allotted to the Petitioner.

(ii) As per License Condition 14 of the UAS License Agreement, non-availability of the Right of Way (ROW) or delay in getting permission/clearance from any agency shall not be construed or taken as a reason for non-fulfillment of the rollout obligations and shall not be taken as a valid excuse for not carrying out any obligations imposed by the terms of the License.

(iii) The License Conditions 43.5(i) and 43.5(ii) of the License Agreement also envisage an initial allocation of maximum 4.4 MHz +

4.4 MHz of Spectrum to the Petitioner in any of the frequency bands of 824-844 MHz paired with 869-889 MHz, 890 – 915 MHz paired with 935 – 960 MHz and 1710 – 1785 MHz paired with 1805 – 1880 MHz to meet the rollout obligations. Therefore, the Petitioner was bound to rollout its services in 10% of total DHQs/Towns from the date of allocation of frequency spot in any of the above said frequencies.

The said frequency band does not include the Microwave Access Spectrum and Microwave Backbone Spectrum for which, all together different frequencies are used. The Microwave Access Spectrum and Microwave Backbone Spectrum are allotted in the frequency bands of 15/18/21 GHz and 7 GHz respectively, which is also a world standard for such type of frequency use. It is pertinent to mention that as per Condition 43.4 of the UAS License Agreement, there is no promise for providing point to point frequency bands i.e. Microwave Access Spectrum and Microwave Backbone Spectrum to the Petitioner to rollout its services, as said frequency spectrums are not a sine qua non for rollout obligations.

(iv) After the grant of the License on 28.02.2008, the Petitioner vide application dated 29.02.2008 applied to the Respondent No. 2 only for allocation of requisite spectrum in Tamil Nadu Service Area for providing Unified Access Services in the said service area. Therefore,

on request of the Petitioner and in terms of the License Conditions 43.4, 43.5(i) and 43.5(ii) of the UAS License Agreement entered into between the parties, the Respondents vide letter dated 22.04.2008 allocated total frequency spot of 4.4 + 4.4 MHz in frequency band of 1742.0 – 1746.2 / 1837.0 – 1841.2 MHz to the Petitioner.

(v) Microwave Access frequency is used for intercommunication between the Base Transceiver Stations and communications of Base Transceiver Stations with the Base Station Controller. The Microwave Backbone frequency is used to connect the Base Transceiver Stations, Base Station Controller and Main Switching Center from one city to another city. However, there are various alternatives available for such type of communications. It is submitted that the Base Transceiver Stations, Base Station Controller and Main Switching Center can be connected through a fiber optic network, which can be laid by the service provider on its own or a lease line can be obtained for the said purpose.

(vi) After issuance of the Start-up Spectrum on 22.04.2008, the Petitioner for the first time on 27.05.2008, after about 3 months from the date of grant of the License on 28.02.2008, applied to Respondent No. 2 for allocation of frequency spots in 15 GHz Band for Intra-City

Microwave Access and Inter-City across the service area vide application dated 08.05.2008. Vide another application dated 08.05.2008 filed only on 06.06.2008, the Petitioner requested for earmarking of frequency in 7 GHz frequency spot for Microwave Backbone.

(vii) In the letters dated 13.08.2008, 11.09.2008, 03.10.2008, 03.11.2008, 05.01.2009 and 17.09.2010, the Petitioner has admitted that earmarking of GSM frequency in the Frequency Band of 1800 MHz is the Startup Spectrum. The Petitioner itself has admitted that the startup spectrum is the GSM Spectrum, the Petitioner is now estopped from alleging that Start-up Spectrum includes the bouquet of spectrums i.e. GSM Spectrum, Microwave Access and Microwave Backbone.

(viii) The said frequency bands are a standard for mobile technology world over and the same does not include point to point frequency bands i.e. Microwave Access Spectrum and Microwave Backbone Spectrum for which all together different frequencies are used.

7. In its further submission the petitioner reiterated that the cumulative reading of all the clauses 43.1, 43.4 and 43.5 makes it clear that the start up spectrum includes the whole bouquet. According to it :

- Clause 43.1 of the UASL mandates a Licensee to approach the WPC Wing for specific authorization and License permitting it to utilize appropriate frequencies/bands for the establishment and possession and operation of Wireless element of Telecom Services. It is an established position that the term 'Band' includes and comprises 'Frequency' and frequency is a composite collective of GSM; Microwave Access and Microwave Backbone spectrum. In fact the GSM Group check list for applicants before submission of the application for frequency assignment/ Wireless Operating Licenses (WOL) in respect to GSM Access/ Microwave Access/ Microwave Backbone itself is self speaking as it categorizes all the three aspects of frequency as initial spectrum.

- The mandate of Clause 43.1 is continued in letter and spirit by Clause 43.4 which provides that for establishing various point to point radio links the frequency bands earmarked for various agencies has been indicated in the National

Frequency Allocation Plan (NFAP-2002) as amended from time to time. It may be noted that point to point wireless radio link can only be established if backbone and access spectrum is allocated and not otherwise. Thus Clause 43.4 imposes an obligation on the Respondent to allocate the Microwave Access and Microwave Backbone Spectrum.

- Clause 43.5 (i) thereafter in continuation mandates that frequencies shall be assigned by the WPC Wing of the DoT from the applicable National Frequency allocation Plan and initially a cumulative maximum of up to 4.4 mhz + 4.4 mhz shall be allocated in the case of TDMA based system @ 200 KHZ per carrier. The frequency band indicated in the clause is GSM spectrum.

8. The petitioner and the respondent have taken a diametrical opposite views regarding the definition of start up spectrum. The stand of the petitioner is that the start up spectrum includes Microwave access frequency and Microwave backbone frequency whereas the respondent's contention is that the start up spectrum defined here is only GSM spectrum.

9. From the submissions of the parties, it is admitted that in the first phase the licensee was to ensure roll out obligation of at least 10% DHQs

where startup spectrum had been allocated are covered within one year. However, dispute has arisen about the definition of start up spectrum.

10. It will of immense help to understand the use of GSM frequency and Microwave frequencies. Indisputably, GSM is used for connecting mobile phones with Base Transceiver Station (BTS). Microwave Access frequency are used for point to point connectivity i.e. intercommunication between the Base Transceiver Stations to Base Transceiver Stations and communication between Base Transceiver Stations with the Base Station Controller (BSC), while the Microwave Backbone frequency is used to connect the Base Station Controller (BSC) & Main Switching Center (MSC) and between MSC & MSC. While there is no other alternative between the mobile phone and BTS, other alternatives are available to have connectivity between the BTS & BTS and BTS & BSC ; between BSC and MSC or inter MSC. The cellular services basically means providing wireless connectivity to the user which is achieved after allocation of GSM frequency to the service provider for establishing the connectivity between BTS and the subscriber.

11. The petitioner has taken a stand that without the allocation of MW access frequency and MW backbone frequency it will not be possible for a new operator to plan network to provide effective, efficient and complete network and alternative arrangement can only be a temporary in nature and

not an effective solution. Laying of optic fibers is fraught with huge and insurmountable challenges including getting statuary approvals from the municipal authorities for the right of way and time consuming taking process even taking up six months and beyond. However, according to it that even large incumbent operators have only been able to complete up to 30% sites through optic fibre even after 10 years of operations.

12. Under the condition of licence of frequency authorisation clause 43.4 indicates that for establishing point to point links, the frequency bands earmarked for various agencies has been indicated in the National Frequency Allocation Plan (NFAP). However, mere indication of the band does not guarantee availability of the frequency spectrum, which has to be coordinated on case to case basis.

13. In Clause 43.5(i) and (ii) quantity of spectrum in case of TDMA and CDMA system has been indicated. This does not include microwave frequencies.

14. In this particular case, it will be of interest to note that the petitioner itself did not apply for allocation of MW access frequency and MW backbone frequency. The plan defined start up spectrum is the frequency which has been allocated initially. It is not a case that the cellular services cannot be

started without the allocation of MW frequency. However, it is essential to have allocation of GSM spectrum for starting the mobile services without which it is not possible to start the services.

15. The learned counsel for the petitioner has argued that it was DOT's own understanding that the Spectrum allocation means a bouquet of GSM Spectrum, Microwave Access Spectrum and Microwave Backbone Spectrum, which can be ascertained from its own letter dated 29.09.2009. We may notice this letter :

> "M/s Unitech Wireless (Tamilnadu) Private Limited,
> Basement, 6, Community Centre,
> Saket, New Delhi-110017
>
> Sub : Regularisation of GSM spectrum earmarked for Unified Access Service in Tamilnadu (Incl. Chennai) Telecom service area.
>
> Ref : This office letter No.L-14047/10/2006-NTG dated 22.04.2008
>
> I am directed to refer your letter dated 17.08.2009 and this Ministry's letter No. L-14047/10/2006-NTG dated 22.04.2008 regarding earmarking of initial spectrum of 4.4+4.4 MHZ in the GSM 1800 MHz for Unified Access Services in Tamilnadu (Incl. Chennai) Telecom service area on trial basis.
>
> 2. The above said earmarking is regularized with immediate effect. Other terms and conditions of the letter referred above remain unchanged.

3. As a consequence upon the regularization of the GSM spectrum, MW Access and Backbone frequency spots earmarked on trial basis (for your GSM services in the service area stands regularized with immediate effect, if applicable otherwise.

4. The deployment plan in the prescribed format may kindly be submitted within 15 days, if not submitted earlier."

According to the petitioner, the earmarking of initial spectrum of 4.4 + 4.4 MHz for GSM Spectrum on 30.05.2008 is regularized and MW Access and Backbone frequency for the services were also regularized with immediate effect. This letter merely indicates that MW access and Back Bone frequency which were earlier earmarked on trial basis to the petitioner were allotted / regularized with immediate effect as there could not have been any MW allocation without GSM spectrum allocation. It does not indicate that MW access frequency and MW backbone frequency are necessary according to the Frequency Allocation Plan. Neither MW access frequency & MW backbone frequencies are guaranteed to be allocated nor essential for starting up the cellular services. However, there is no doubt that it can be said if these frequencies are allotted for inter connectivity of BTS, BTS to BSC & BSC to MSC and inter MSC, the roll out would be much faster than in the case of providing laying the optical fiber and other infrastructure.

16. The respondent in its reply dated 22.07.2011 submitted that initially even the first two cellular operators commenced their services by taking lease lines from the erstwhile DOT. The backhaul cannot be termed as bottleneck facility. The minutes of the said meeting is reproduced below :

"MINUTES OF THE MEETING

Subject : Minutes of the Meeting on Roll out Plan of new licensees

A meeting under the chairmanship of Secretary, Telecom was held on 6th March, 2009 in Sanchar Bhavan, New Delhi with the Chief Executive officers of the Unified Access Service Licences who have been given the licenses in Jan. 2008 to discuss the Rollout plans and related matters. The list of participants is at Annex-1.

2. Secretary, Telecom welcomed the participants for the meeting.

3. He stressed the need for faster roll-out of services as it not only helps the operators to get back the return on their investments but also helps the consumers by way of competition. It was pointed out that the Department has already addressed the concerns by linking Rollout obligation with allocation of access spectrum. But, almost one year is going to be over after allocation of access spectrum and in the absence of rolling out of services as per the stipulations in the licence agreement, liquidity damages would have to be imposed. It was also pointed out that the Department would rather like to have roll-out prior to commencement of liquidity damages in stead of imposing and recovering such damage. He also mentioned that the access spectrum is a scarce resource and is to be utilized most efficiently in a timely manner and in case services are not rolled out in a reasonable time, the Government may consider to

take back the spectrum so that the scarce resource is not wasted and hoped that such an eventuality never arises.

4. All the participants were asked to indicate the status of their roll out.

5. M/s Loop Telecom Pvt. Ltd. informed that they are planning to roll-out their services in the next three to four months and all the necessary ordering of the equipment has been completed and network installation is in advanced stage.

5.1 However, Wireless Adviser intervened and informed that still no SACFA clearance application has been applied by M/s Loop Telecom Ltd. Other operators are also in the same position. It was suggested to apply for the same wherever required to expedite the rollout of services. With reference to backhaul, it was clarified that there is no bar to take leased lines to interconnect various BTSs and sharing of some active infrastructure has been recently permitted. Initially, even first two cellular operators commenced their services by taking leased lines from erstwhile DoT. The backhaul cannot be termed as a bottleneck facility.

6. M/s Tata Teleservices Ltd. informed that they have commissioned the services in all the three service areas for which they have got the licenses last year.

7. M/s Idea Cellular Ltd. informed that they are ready to commission the services in Orissa and Tamil Nadu service areas that they will be able to meet the 10% roll out obligations in the stipulated time-frame in other service areas.

8. M/s Swan Telecom Pvt. Ltd. informed that they have received spectrum in all the service areas and they are in advanced stage of network commissioning. They further

informed that they will be able to meet the 10% roll out obligations with a one to two months' slippage. They pointed out about the problem of interconnect agreement with incumbent private operators though they are not facing any problem with BSNL.

8.1 It was clarified that interconnect is a matter between two operators and normally TRAI intervenes in case of problems. For adjudication of any dispute, TDSAT can be approached.

9. M/s Datacom Solutions Pvt. Ltd. informed that they have already placed the orders for the equipment and they are likely to receive the supplies by end of April, 2009. They have signed tower-sharing agreement for 2000 sites in Tamil Nadu, Kerala, Orissa and Andhra Pradesh and have applied SACFA clearance for 20 sites.

10. M/s Unitech Wireless (Tamil Nadu) Pvt. Ltd. and Group Companies informed about the arrangements they have made with M/s Telenor and planning to roll-out services as early as possible. They also informed that they have signed tower-sharing agreement for 2200 sites in all the service areas.

11. M/s. Shyam Telelink Ltd. informed that they will be able to meet the 10% rollout obligations in all the licensed areas with a few weeks delay in some service areas. They have pointed out the problems being faced in backbone due to non-availability of micro-wave access spectrum.

12. M/s. S. Tel Ltd. informed that they have already ordered the equipment and are likely to receive the equipment by end-April, 2009. They have already tied up for passive infrastructure sharing for all the service areas. They also informed that they will be able to start the services in June-July, 2009.

13. The meeting concluded with a vote of thanks to Chair."

From the above minutes of meeting, it can be seen that the DOT representatives made it clear that there was no bar to take leased lines to interconnect various BTS and even sharing of infrastructure was permitted. Even the petitioner in this case informed that they have signed tower sharing arrangement. M/s Shyam Telelink although pointed out the problems in roll out due to non-availability of microwave access spectrum, but informed that they will be able to roll out obligations in all the licensed areas with few weeks delay in some service areas. M/s S.Tel Ltd. informed that they have already tied up for passive infrastructure sharing for all the service areas.

In fact no licensee has mentioned that the roll out service cannot be done in absence of backhaul frequencies.

17. The petitioner had written letter to the respondent on 05.06.2008; where it had mentioned that start-up spectrum of 4.4 + 4.4 MHz were allotted and applied for frequency spots for MW access on 27th May 2008 for 1 spot. The petitioner requested for 2 spots of microwave access network in view of the reason that they were new operators and have not OFC network established. We may record the relevant portions :

"Subject : Earmarking of Frequency spots for MW-access for Unitech Builders and Estates Private Limited – Tamil Nadu (including Chennai) Telecom Circle

At the outset we would like to thank you for allocating the startup spectrum of 4.4+4.4 MHz in 1800 MHz GSM band for Tamil Nadu (including Chennai) service area. In continuation to the above allocation, we had submitted our application on 27th May 2008 for Earmarking of Frequency spots for MW-access network for Tamil Nadu (including Chennai) service area.

Further to the said application for Earmarking of Frequency spots for MW-access network, we have inadvertently asked for 1 spot of 34 Mbps carrier instead of 2 spots of 34 MBps carriers.

Sir, as you will kindly agree that deployment of GSM network with 1 carrier (of 34 MBps) of access microwave spot is technically not possible due to following reasons :

1. We are new operator in the Telecom Sector and have no OFC network established across the service area. Hence, we have to deploy our access network on mainly on microwave system.

2. We have to install large number of BTSs across various cities for providing coverage, due to shorter HOPs nature of 1800 MHz GSM Band.

3. Further to above, with large number of links, we shall be facing interferences within our own network incase we do not have adequate access spots, thereby delivering the cellular service above the established Quality of Service standards becoming near impossible.

It is necessary for systems operating in SHF to have an unobstructed propagation path (Line of slight) otherwise tall buildings may cause many shadow regions. In cities having mixed path unobstructed /obstructed propagation parth, hilly regions, spur route, isolated

segment, for full coverage to all customers; we certainly need two carriers having bandwidth of 28 MHz each.

In rural areas, some diffraction loss is generally allowable and unobstructed propagation path is available, we can manage with one carrier of 28 MHz bandwidth.

In view of the above, the allocation of two spots of Microwave access network is very critical and necessary to commence our cellular operations. We now hence request your kind office to earmark two frequency spots for MW access network in 15 GHz Band across the service area. However, in case frequency in 15 GHz is not available, our case may be favorably considered in 18 GHz or 23 GHz band."

This letter shows that the petitioner itself understood that the start-up spectrum was GSM spectrum. The microwave frequencies were required as it was having difficulties being new operator.

18. It is not a case where all the incumbent operators or the new operators have been allotted all the frequencies i.e. GSM, MW access and MW backbone for all the networks. It is not possible. The petitioner himself has admitted that incumbent operators have laid the optical fibers only upto 30% of its services.

19. It is also admitted that some of the operators have completed their roll out obligations even without allocation of any MW access and MW backbone frequency.

20. Therefore, I am of the opinion that start up spectrum should be read as initial spectrum allotted to the service provider and the date of allocation for MW access and backbone frequency should not be considered for the purpose of calculating the delay in roll out obligation by the petitioner.

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(P.K. Rastogi)
Member

rkc