

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 6TH JANUARY 2012

Petition No.452 of 2011

(M.A. No.310 of 2011)

Etisalat DB Telecom (P) Ltd. ... Petitioner

Vs.

Union of India ... Respondent

BEFORE:

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

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

For Petitioner : Mr. Ramji Srinivasan, Sr. Advocate
Mr. T. Srinivasa Murthy, Advocate

For Respondent : Mr. R.N. Singh, Advocate
Mr. A.S. Singh, Advocate

ORDER

The Petitioner, a licensee under Section 4 of the Indian Telegraph Act, has, in this petition, prayed for the following reliefs :-

- “1. Declare the failure on the part of the respondent in permitting the petitioner to withdraw the financial bank*

guarantees for all the telecom Service Areas and replace the same with revised financial bank guarantees as violative of Clause 21.2 of the license;

2. *Direct the respondent to accept from the petitioner FBGs for the purposes of Clause 21.2 read with Clause 21.4 of the UASL for a quantum of money equivalent to the estimated sum payable equivalent to license fee for two quarters.”*

2. The matter relating to furnishing of Bank Guarantee is covered by the Licence Agreement entered into by and between the parties hereto.

3. In this petition, we are concerned with furnishing of Bank Guarantee by the Petitioner herein as laid down in Clause 21.2 of the Licence Agreement, which reads as under :-

“21.2 Financial Bank Guarantee :

The LICENSEE shall submit a Financial Bank Guarantee (FBG), valid for one year, from any Scheduled Bank or Public Financial Institution duly authorised to issue such Bank Guarantee, in the prescribed Proforma annexed. Initially, the financial bank guarantee shall be for an amount of Rs.50/25/5 Crore (for Category ‘A’/’B’/’C’ service areas respectively), which shall be

submitted before signing the Licence agreement. Subsequently, the amount of FBG shall be equivalent to the estimated sum payable to license fee for two quarters and other dues not otherwise securitised and any additional amount as deemed fit by the Licensor. The amount of FBG shall be subject to periodic review by the Licensor and shall be renewed from time to time till final clearance of all dues.”

4. We may also notice that the Petitioner has also furnished separate Bank Guarantees towards spectrum charges and royalties for the use of spectrum as provided under Clause 21.3 of the said Licence Agreement.

5. Mr. Srinivasan, learned senior counsel appearing on behalf of the Petitioner would contend that Petitioner, a licensee in respect of 16 circles, had paid licence fees for the quarter ending June 2011 and quarter ending September 2011 for a sum of Rs.1,54,46,306/- only.

It has furnished, according to Mr. Srinivasan, Bank Guarantee to the extent of Rs.330 crores.

The Financial Bank Guarantees, which have been furnished by the Petitioner for various circles, are as under :-

<i>LSA (Cat)</i>	<i>Bank</i>	<i>FBG Date</i>	<i>Exp Date</i>	<i>FBG (Rs. Cr.)</i>
<i>AP ('A')</i>	<i>PNB</i>	<i>18.1.2008</i>	<i>9.1.2009</i>	<i>50</i>
<i>Gujarat ('A')</i>	<i>SBI</i>	<i>10.1.2008</i>	<i>9.1.2009</i>	<i>50</i>
<i>Mumbai ('A')</i>	<i>PNB</i>	<i>10.1.2008</i>	<i>9.1.2009</i>	<i>50</i>
<i>MH ('A')</i>	<i>SBI</i>	<i>10.1.2008</i>	<i>9.1.2009</i>	<i>50</i>
<i>TN ('A')</i>	<i>SBI</i>	<i>10.1.2008</i>	<i>9.1.2009</i>	<i>50</i>
<i>UP(W) ('B')</i>	<i>SBI</i>	<i>10.1.2008</i>	<i>9.1.2009</i>	<i>25</i>
<i>UP(E) ('B')</i>	<i>SBI</i>	<i>10.1.2008</i>	<i>9.1.2009</i>	<i>25</i>
<i>Haryana ('B')</i>	<i>SBI</i>	<i>10.1.2008</i>	<i>9.1.2009</i>	<i>25</i>
<i>Kntk ('A')</i>	<i>SBI</i>	<i>10.1.2008</i>	<i>9.1.2009</i>	<i>50</i>
<i>Rajas ('B')</i>	<i>SBI</i>	<i>10.1.2008</i>	<i>9.1.2009</i>	<i>25</i>
<i>Punjab ('B')</i>	<i>SBI</i>	<i>10.1.2008</i>	<i>9.1.2009</i>	<i>25</i>
<i>Kerala ('B')</i>	<i>SBI</i>	<i>10.1.2008</i>	<i>9.1.2009</i>	<i>25</i>
<i>Delhi ('A')</i>	<i>SBI</i>	<i>10.1.2008</i>	<i>9.1.2009</i>	<i>50</i>
<i>Bihar ('C')</i>	<i>ICICI</i>	<i>29.7.2008</i>	<i>28.07.2009</i>	<i>5</i>
<i>MP ('B')</i>	<i>ICICI</i>	<i>29.7.2008</i>	<i>28.07.2009</i>	<i>25</i>

6. It has renewed the bank guarantee for similar sums for the year 2011 also upto 09.01.2012, except in the case of Bihar and Madhya Pradesh, where the Bank Guarantees are valid up to 24.02.2012.

The Respondent herein has filed a short reply wherein, inter-alia, it has been contended :-

“4. That presently AS branch of DOT is issuing notice to Access Service licensees for non fulfillment of eligibility criteria

and rollout obligations. As a matter of caution to ensure that the other dues are secured instructions were issued to the CCA offices to keep any downward revision of FBG in abeyance till further orders vide letter No.24-01/2009-LF dated 28.12.2010. Moreover, the licensor is authorized under clause 21.2 of the license agreement to levy any additional amount as deemed fit as FBG.

5. *That as a matter of abundant caution, till such time 'other dues' are secured, it was proposed by LF-II Branch, DoT (HQ) that instruction be issued to the CCA offices to keep any downward revision of FBG in abeyance till further orders and accordingly issued the instruction with the approval of MOC&IT on 28.12.2010 to all the Pr. CCAs/CCA that any downward revision of the FBG be kept in abeyance on the grounds that 'AS Branch of DoT is issuing notices to access service licensees for non fulfillment of eligibility criteria and roll out obligations'. The copy of the instruction dated 28.12.2010 is annexed hereto as Annexure R-1.*

6. *That the FBG is obtained not only for LF dues and also it covers the dues, if any, due for Microwave usage charges, spectrum charge, Subscribers verification penalty charges, WPC charges and any other dues payable to the Department of Telecommunications."*

7. It may be placed on record that the matters relating to compliance of the roll out obligations vis-a-vis the liquidated damages imposed on the

Petitioner, so far as reduction and/or return of the Performance Bank Guarantees are concerned, the same are subject matter of a different petition, with which we are not concerned herein.

8. From a bare perusal of the short reply of the Respondent, it would appear that non-payment of Microwave Usage Charges, Spectrum Charges, WPC Charges, as stated heretofore, are subject matter of separate bank guarantees furnished by the Petitioner. It, furthermore, has not been stated that any demand has been raised on the Petitioner with regard to other dues nor any reason has been assigned as to why any additional bank guarantee should be directed to be furnished.

9. Mr. Srinivasan, learned senior counsel appearing on behalf of the Petitioner would contend that the issues raised by the Respondent are covered by a judgment of this Tribunal in *Sistema Shyam Tele Services Ltd. Vs. Union of India* in Petition No. 314 of 2011 disposed of on 28.9.2011.

In that petition, the effect of application of a circular letter dated 28.12.2010, whereupon strong reliance has been placed by Mr. Singh appearing on behalf of the Respondent, has been considered by this Tribunal, opining :-

“It is not denied or disputed that no demand has yet been raised on the petitioner. Before an amount becomes due and payable, a demand must be made and/or otherwise must become payable. It must be a legally recoverable amount.”

10. It was held :-

“So far as the financial bank guarantees are concerned, the interim order dated 9.8.2011, is made absolute. The financial bank guarantees should be reviewed. Periodic review indisputably would not mean downward review but also upward review. In terms of the provisions of the license, the petitioner is bound to furnish financial bank guarantees, strictly in terms of Clause 21.2 of the license.”

11. Mr. Singh, however, would contend that Clause 21.4 of the Licence Agreement mandates the licensee to renew the bank guarantees on their own.

Prima facie, we are of the view that Clauses 21.2 and 21.5 are required to be read harmoniously so as to give effect to both the aforementioned clauses; in terms whereof a contractual obligation has been cast on the Respondent to make periodic reviews, which is imperative in character.

12. There is absolutely no reason as to why such periodic review could not be conducted for more than a year.

However, keeping in view the other statements made in the short reply, we are of the opinion that at this stage interest of justice will be subserved if the Petitioner is directed to renew the Bank Guarantee to the extent of 25% of the present amount of bank guarantee, subject of-course, to the condition that in the event the Petitioner is asked by the Respondent herein to furnish Bank Guarantee of any specific amount, which is not otherwise securitised, it would be bound to do the same, if the amount of the bank guarantee already furnished does not cover the said demands.

13. We, however, direct that the Petitioner shall furnish an undertaking supported by an affidavit that it would, in the event this petition is dismissed or this order is otherwise modified or varied, furnish appropriate bank guarantees.

14. We must furthermore place on record that the views, we have taken, are prima facie in nature and we have passed this interim order keeping in view the question of 'balance of convenience' and 'irreparable injury' on the part of both the parties as also to protect their respective interests.

The Petitioner may furnish the renewed bank guarantees within a period of one week from date. However, the said bank guarantees must be operative from the date of the expiry of the existing bank guarantees.

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(S.B. Sinha)
Chairperson

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(P.K. Rastogi)
Member

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