

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated : July 26, 2012

Petition No. 443 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.Divyakant Lahoti & Mr. Sidharth
Yadav, Advocate

For Respondent

: Mr.K.P.S. Kohli, Mr.Tarveen Singh Nanda
Advocates

J U D G M E N T

The Petitioner herein is a licensee within the meaning of the provisions of Section 4 of the Indian Telegraph Act, 1885.

As many 13 service licenses were granted to its predecessor in interest namely Swan Telecom Pvt. Ltd. sometimes in February-March, 2008. Licenses were also granted in favour of one

Alliance Infrastructure Ltd. in respect of Bihar and Madhya Pradesh service areas. The said company, however, merged with the Petitioner pursuant to an order of the Bombay High Court dated 26.3.2010 granting sanction to the scheme of merger filed by the said licensee with Petitioner.

The Petitioners although, thus, were licensees in respect of 15 circles, these petitions are confined to 11 circles only.

5 of the aforementioned circles fall within category `A' and the rest six fall in the category `B' as envisaged under the guidelines issued by the Respondent herein on or about 14.12.2005 relating to the Unified Excess Service License.

Indisputably, the Petitioner has, inter alia, furnished performance bank guarantees of Rs.20.00 crores each for the circles of Andhra Pradesh, Maharashtra, Tamilnadu, Gujarat and Karnataka circles; whereas it furnished bank guarantees of Rs.10.00 crores each in respect of the circles of U.P. (West), U.P. (East), Haryana, Rajasthan, Punjab and Kerala. The said bank guarantees were to remain valid upto 9.1.2012.

This petition, however, was filed on or about 21.11.2011 wherein the following reliefs are prayed for:

"1. Declare the failure on the part of the respondent to release the performance bank guarantee in respect of Andhra Pradesh, Gujarat, Karnataka, Kerala, Punjab, Rajasthan, Uttar Pradesh (East), Uttar Pradesh

(West), Maharashtra, Haryana and Tamilnadu telecom circles where Phase II roll out obligations have been fulfilled by the petitioner, as violative of Clause 21.1 of the UAS License;

2. Direct the respondent to forthwith and without demur release the performance bank guarantees referred to in Table 2 in paragraph 10 of the petition;

3. Award compensation for losses incurred by petitioner towards the additional bank charges incurred by the petitioner as well as opportunity cost on account of the money locked up as 100% margin in keeping the performance bank guarantees valid and subsisting beyond the legally required term;

4. Award costs;”

The interim prayer made by the Petitioner was heard by this Tribunal and by an order dated 10.1.2012 it was directed as under:

“32. We, therefore, are of the opinion that interest of justice would be subserved if an order of injunction in mandatory form is issued in favour of the Petitioner directing the Respondent herein to return the Performance Bank Guarantees subject to the condition that in the event this Petition is ultimately dismissed, the Tribunal shall adjust the equities between the parties and/or pass such order or orders which would take into consideration the interest of the Respondent.

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, shall furnish appropriate Bank Guarantees. The Bank Guarantees must be furnished with effect from the date of expiry of the earlier bank guarantees. This order, however, it goes without saying being interim in nature, only a prima facie view has been taken by us and thus, it would be without prejudice to the rights and contentions of the

parties and subject to any other or further order that may be passed by this Tribunal.”

The Petitioner is said to have furnished the bank guarantees and undertakings in terms of the said order. The Respondent, however, filed an application for modification thereof which was marked as MA No.102 of 2012.

By reason of an order dated 15.5.2012, while noticing the relevant data with regard to completion of roll out obligations on the part of the Petitioner herein, it was directed:

“13. Therefore, we modify our order dated 10.01.2012 to the extent that petitioner shall reduce the PBG to the extent of 50% in respect of these 11 circles within two weeks. This order is subject to any other or further orders passed by this Tribunal.

14. The final hearing will be expedited. Let these matters be posted for hearing in the 1st week of July 2012. However, pendency of this petition shall not stand in the way of the respondent to take suitable decisions on the question as to whether the petitioner has fulfilled its roll out obligations or not.

There cannot, be any doubt or dispute that if the respondent arrives at the conclusion that the roll out obligations have been complied with by the petitioner, the Performance Bank Guarantees have to be returned.”

It is not disputed that the Petitioner has complied with the said order also.

Mr. Yadav, learned counsel appearing on behalf of the Petitioner submitted that keeping in view the obligations on the part of the Respondent herein as contained in Clause 21.1 of the conditions of license, the performance bank guarantees furnished by the Petitioner ought to have been returned.

Mr. Kohli, learned counsel appearing on behalf of the Respondent on the other hand, urged:

- (i) Having regard to the different nature of bank guarantees as provided for in Clauses 21.1, 21.2 and 21.3; it must be held that they are subject to renewal as provided for in Clause 21.4 and 21.5 thereof.
- (ii) Having regard to the provisions of Clause 21.5 of the said license it must be held that the bank guarantees can be invoked in the event any violation of any of the conditions of the license by the licensee takes place and, thus Clause 21.1 cannot be read in isolation.
- (iii) Clause 21.1 having referred to the roll out obligations on the part of the licensees as contained in clause 34 thereof, it would be evident that roll out obligations on the part of the licensee would be in respect of the entire circle for which licenses have been granted and not in respect of 50% thereof only.

- (iv) The bank guarantee which is a tripartite agreement and being an independent one, the same could be invoked in case of any breach of the license agreement on the part of the Petitioner.

Before, however, we deal with submissions of Mr. Kohli, we may notice the following chart wherefrom it would appear that the Petitioner has not only complied with phase I of the roll out obligations but also phase II thereof.

S. No.	CIR CLE	Total No of DHQs	10% (on round logic basis)	40 % (on round logic basis)	50% /Phase 2 Roll Out Obligation	DISTRICT	TOWN	MRO_CATEGORY	Date of Spectrum Allocation	TC-Registration Date	TC-Approval Date	Page No.
1	HARR	20	2	8	10	KARNAL	Assandh	MRO 10	4-Dec-08	4-Mar-10	25-May-10	546-561(Vol-3)
						JIND	Narwana	MRO 10	4-Dec-08	4-Mar-10	25-May-10	
						HISAR	BARWALA	MRO 40	4-Dec-08	12-Aug-10	11-Nov-10	
						KURUKSHE TRA	SHAHBAD	MRO 40	4-Dec-08	10-Feb-11	16-May-11	
						BHIWANI	CHARKHI DADRI	MRO 40	4-Dec-08	10-Feb-11	16-May-11	
						Sonipat	KHARKHODA (MC)	MRO 40	4-Dec-08	24-Mar-11	16-May-11	
						MAHENDRA GARH	MAHENDRAG ARH	MRO 40	4-Dec-08	24-Mar-11	6-Jun-11	
						KAITHAL	CHEEKA	MRO 40	4-Dec-08	12-Aug-10	15-Nov-10	
						FATEHABA D	Tohana	MRO 40	4-Dec-08	12-Aug-10	3-Nov-10	
						JHAJJAR	JHAJJAR	MRO 40	4-Dec-08	12-Aug-10	15-Nov-10	
2	PUNJ	21	2	9	11	NAWANSHA HR	Nawanshahr	MRO 10	10-Sep-08	24-Feb-10	5-Apr-10	479- 502(Vol-3)
						FIROZPUR	ZIRA	MRO 10	10-Sep-08	24-Feb-10	5-Apr-10	
						GURDASPU R	QADIAN	MRO 40	10-Sep-08	13-Dec-10	28-Jan-11	
						AMRITSAR	JANDIALA	MRO 40	10-Sep-08	13-Dec-10	28-Jan-11	
						FARIDKOT	JAITU	MRO 40	10-Sep-08	13-Dec-10	5-Jan-11	
						PATIALA	SAMANA	MRO 40	10-Sep-08	13-Dec-10	5-Jan-11	
						AMRITSAR	PATTI	MRO 40	10-Sep-08	13-Jan-11	28-Feb-11	
						MANSA	BUDHLADA	MRO 40	10-Sep-08	3-Aug-10	30-Dec-10	

3	UPE	47	5	19	24	RUPNAGAR	MORINDA	MRO 40	10-Sep-08	3-Aug-10	20-Sep-10	411-458(Vol-2)
						JALANDHAR	KARTARPUR	MRO 40	10-Sep-08	16-Aug-10	20-Sep-10	
						LUDHIANA	RAIKOT	MRO 40	10-Sep-08	3-Aug-10	20-Sep-10	
						GORAKHPUR	KHALILABAD	MRO 10	10-Sep-08	1-Apr-10	5-Aug-10	
						LUCKNOW	Jais	MRO 10	10-Sep-08	1-Apr-10	5-Aug-10	
						LUCKNOW	GOLA GOKARANNATH	MRO 10	10-Sep-08	1-Apr-10	5-Aug-10	
						LUCKNOW	Beligram	MRO 10	10-Sep-08	1-Apr-10	5-Aug-10	
						GORAKHPUR	Tetri Bazar	MRO 10	10-Sep-08	1-Apr-10	5-Aug-10	
						Unnao	BANGARMAU	MRO 40	10-Sep-08	3-Feb-11	5-May-11	
						Fatehpur	BINDKI	MRO 40	10-Sep-08	3-Feb-11	5-May-11	
						Sitapur	BISWAN	MRO 40	10-Sep-08	3-Feb-11	5-May-11	
						Kanpur Nagar	GHATAMPUR	MRO 40	10-Sep-08	3-Feb-11	5-May-11	
						Kannauj	Gursahaiganj	MRO 40	10-Sep-08	31-Jan-11	5-May-11	
						Farukhabad	KAIMGANJ	MRO 40	10-Sep-08	3-Feb-11	5-May-11	
						Jaunpur	MOGRA BADSHAHPUR	MRO 40	10-Sep-08	3-Feb-11	28-Apr-11	
						Kushinanagar	PADRAUNA	MRO 40	10-Sep-08	31-Jan-11	28-Apr-11	
						Kanpur Dehat	Pukhrayan	MRO 40	10-Sep-08	31-Jan-11	5-May-11	
						Deorai	GAURA BARHAJ	MRO 40	10-Sep-08	3-Feb-11	25-Apr-11	
						MIRZAPUR	AHRAURA	MRO 40	10-Sep-08	3-Feb-11	25-Apr-11	
						Jhansi	GURSARAI	MRO 40	10-Sep-08	3-Feb-11	28-Apr-11	
						Jalaun	JALAUN	MRO 40	10-Sep-08	3-Feb-11	28-Apr-11	
						Ghazipur	MOHAMMADABAD	MRO 40	10-Sep-08	3-Feb-11	25-Apr-11	

						Ballia	RASRA	MRO 40	10-Sep-08	3-Feb-11	5-May-11	
						Gonda	NAWABGANJ	MRO 40	10-Sep-08	3-Feb-11	28-Apr-11	
						Balrampur	UTRAULA	MRO 40	10-Sep-08	3-Feb-11	25-Apr-11	
						Shahjahanpur	Jalalabad	MRO 40	10-Sep-08	3-Feb-11	25-Apr-11	
						Hamirpur	RATH	MRO 40	10-Sep-08	3-Feb-11	28-Apr-11	
4	UP W	38	4	15	19	MEERUT	MAWANA	MRO 10	25-Sep-08	22-Feb-10	5-Apr-10	360-378(Vol-2)
						BIJNOR	AFZALGARH	MRO 10	25-Sep-08	22-Feb-10	5-Apr-10	
						ETAH	JALESAR	MRO 10	25-Sep-08	22-Feb-10	5-Apr-10	
						MUZAFFAR NAGAR	KANDHLA	MRO 10	25-Sep-08	22-Feb-10	5-Apr-10	
						Hardwar	MANGLORE	MRO 40	25-Sep-08	6-Dec-10	21-Feb-11	
						Ghaziabad	PILKHUWA	MRO 40	25-Sep-08	9-Dec-10	21-Feb-11	
						Dehradun	VIKASNAGAR/ HWY26	MRO 40	25-Sep-08	9-Dec-10	21-Feb-11	
						Moradabad	BAHJOI	MRO 40	25-Sep-08	9-Dec-10	21-Feb-11	
						JYOTIBA PHULE NAGAR	BACHHRAON	MRO 40	25-Sep-08	10-Jun-10	21-Feb-11	
						BUDAUN	BILSI	MRO 40	25-Sep-08	6-Dec-10	21-Feb-11	
						PILIBHIT	BISALPUR	MRO 40	25-Sep-08	6-Dec-10	21-Feb-11	
						ETAWAH	JASWANTNAG AR	MRO 40	25-Sep-08	10-Jun-10	21-Feb-11	
						SAHARANP UR	NAKUR	MRO 40	25-Sep-08	10-Jun-10	21-Feb-11	
						BAREILLY	NAWABGANJ	MRO 40	25-Sep-08	6-Dec-10	21-Feb-11	
						AGRA	SHAMSABAD	MRO 40	25-Sep-08	10-Jun-10	21-Feb-11	
FIROZABAD	SIRSAGANJ	MRO 40	25-Sep-08	6-Dec-10	21-Feb-11							
UDHAM SINGH	SITARGANJ	MRO 40	25-Sep-08	6-Dec-10	21-Feb-11							

						NAGAR							
						RAMPUR	TANDA	MRO 40	25-Sep-08	6-Dec-10	21-Feb-11		
						BULANDSH AHR	DIBAI	MRO 40	25-Sep-08	6-Dec-10	21-Feb-11		
5	AP	23	2	10	12	KURNOOL	YEMMIGANUR	MRO 10	27-May-08	10-Feb-10	29-Apr-10	592-615(Vol-3)	
						VIZIANAGA RAM	SALUR	MRO 10	27-May-08	10-Feb-10	29-Apr-10		
						ANANTAPU R	KADIRI	MRO 40	27-May-08	5-Aug-10	15-Nov-10		
						KARIMNAG AR	KORATLA	MRO 40	27-May-08	5-Aug-10	8-Sep-10		
						EAST GODAVARI	MANDAPETA	MRO 40	27-May-08	5-Aug-10	15-Nov-10		
						CHITTOOR	NAGARI	MRO 40	27-May-08	5-Aug-10	29-Nov-10		
						ADILABAD	NIRMAL	MRO 40	27-May-08	5-Aug-10	15-Nov-10		
						KRISHNA	NUZVID	MRO 40	27-May-08	20-Jul-10	7-Sep-10		
						WEST GODAVARI	PALACOLE	MRO 40	27-May-08	17-Jun-10	14-Jul-10		
						GUNTUR	REPALLE	MRO 40	27-May-08	17-Jun-10	14-Jul-10		
						NALGONDA	SURYAPET	MRO 40	27-May-08	20-Jul-10	29-Nov-10		
						RANGARE DI	TANDUR	MRO 40	27-May-08	5-Aug-10	11-Oct-10		
6	KER	15	2	6	8	ERNAKULA M	PARAVUR	MRO 10	15-May-08	11-Feb-10	31-Mar-10	521-528(Vol-3)	
						THIRUVANA NTHAPURA M	VARKALA	MRO 10	15-May-08	11-Feb-10	31-Mar-10		
						Thrissur	GURUVAYOO R	MRO 40	15-May-08	21-Dec-10	10-May-11		
						Alappuzha	KAYAMKULA M	MRO 40	15-May-08	20-Jan-11	10-May-11		
						Kollam	PARAVOOR	MRO 40	15-May-08	21-Dec-10	27-Apr-11		
						Malappuram	TIRUR	MRO 40	15-May-08	21-Dec-10	27-Apr-11		
						Kottiyam	Vaikom	MRO 40	15-May-08	21-Dec-10	27-Apr-11		

7	KT K	30	3	13	16	KASARAGOD	KASARAGOD	MRO 40	15-May-08	9-Aug-10	20-Dec-10	529-543(Vol-3)
						TUMKUR	KUNIGAL	MRO 10	30-May-08	19-Feb-10	5-May-10	
						MANDYA	MALAVALLI	MRO 10	30-May-08	19-Feb-10	5-May-10	
						KOLAR	GAURIBIDANUR	MRO 10	30-May-08	19-Feb-10	30-Apr-10	
						RAICHUR	MANVI	MRO 40	30-May-08	21-Sep-10	22-Mar-11	
						CHAMARAJANAGAR	GUNDLUPET	MRO 40	30-May-08	21-Sep-10	22-Mar-11	
						CHIKMAGALUR	BIRUR	MRO 40	30-May-08	6-Aug-10	22-Mar-11	
						GADAG	NARGUND	MRO 40	30-May-08	21-Sep-10	22-Mar-11	
						BELGAUM	NIPANI	MRO 40	30-May-08	21-Sep-10	22-Mar-11	
						HASSAN	CHANNARAYAPATTANA	MRO 40	30-May-08	6-Aug-10	22-Mar-11	
						BIJAPUR	SINDGI	MRO 40	30-May-08	21-Sep-10	22-Mar-11	
						MYSORE	KRISHNARAJANAGAR	MRO 40	30-May-08	2-Sep-10	22-Mar-11	
						HAVERI	SAVANUR	MRO 40	30-May-08	6-Aug-10	22-Mar-11	
						GULBARGA	SEDAM	MRO 40	30-May-08	16-Nov-10	22-Mar-11	
						BIDAR	CHITGOPPA	MRO 40	30-May-08	16-Nov-10	22-Mar-11	
						CHICKBALLAPUR	BDINAPUR	MRO 40	30-May-08	16-Nov-10	22-Mar-11	
BELLARY	KAMPLI	MRO 40	30-May-08	16-Nov-10	22-Mar-11							
8	TN	33	3	15		MADURAI	THIRUMANGALAM	MRO 10	22-Apr-08	15-Feb-10	4-Aug-10	459-478(Vol-3)
						THENI	CHINNAMANUR	MRO 10	22-Apr-08	15-Feb-10	4-Aug-10	
						PATTUKKOTTAI	PATTUKKOTTAI	MRO 10	22-Apr-08	15-Feb-10	4-Aug-10	
						Tiruppur	DHARAPURAM	MRO 40	22-Apr-08	16-Aug-10	15-Nov-10	
						NAMAKKAL	NAMAKKAL	MRO 40	22-Apr-08	16-Aug-10	4-Aug-11	

				18	SALEM	EDAPPADI	MRO 40	22-Apr-08	16-Aug-10	4-Aug-11		
					THIRUVARUR	MANNARGUDI	MRO 40	22-Apr-08	16-Jul-10	23-Sep-10		
					DINDIGUL	PALANI	MRO 40	22-Apr-08	16-Jul-10	23-Sep-10		
					RAMANATH APURAM	KEELAKARAI	MRO 40	22-Apr-08	16-Aug-10	9-Jun-11		
					TIRUNELVELI	SHENKOTTAI	MRO 40	22-Apr-08	16-Aug-10	4-Mar-11		
					VELLORE	TIRUPATHUR(VELLORE)	MRO 40	22-Apr-08	16-Aug-10	22-Sep-11		
					KANNIYAKUMARI	COLACHEL	MRO 40	22-Apr-08	16-Aug-10	4-Mar-11		
					ARIYALUR	ARIYALUR	MRO 40	22-Apr-08	16-Aug-10	23-May-11		
					Karur	KULITHALAI	MRO 40	22-Apr-08	16-Aug-10	23-May-11		
					VIRUDHUNAGAR	SATTUR	MRO 40	22-Apr-08	16-Aug-10	9-Jun-11		
					TIRUVANAMALAI	TIRUVETHIPURAM	MRO 40	22-Apr-08	16-Aug-10	21-Jul-11		
					THANJAVUR	PATTUKKOTTAI	MRO 40	22-Apr-08	15-Feb-10	4-Aug-10		
					VILUPPURAM	KALLAKKURICHI	MRO 40	22-Apr-08	16-Aug-10	4-Aug-11		
					9	GUJ	25	3	11	14		SURENDRA NAGAR
AHMADABAD	SANAND	MRO 10	25-Sep-08	22-Feb-10							21-May-10	
BANASKANTHA	DHANERA	MRO 10	25-Sep-08	22-Feb-10							16-Apr-10	
JUNAGADH	MANAVADAR	MRO 10	25-Sep-08	22-Feb-10							16-Apr-10	
PANCHMAHALS	KALOL-PANCHMAHAL	MRO 40	25-Sep-08	20-Sep-10							5-Jan-11	
JAMNAGAR	DHROL	MRO 40	25-Sep-08	20-Sep-10							3-Jan-11	
ANAND	UMRETH	MRO 40	25-Sep-08	20-Sep-10							5-Jan-11	
BHAVNAGAR	GARIADHAR	MRO 40	25-Sep-08	20-Sep-10							4-Jan-11	
GANDHINAGAR	MANSA	MRO 40	25-Sep-08	20-Sep-10	5-Jan-11							

10	MAH	35	4	14	18	PORBANDAR	RANAVAV	MRO 40	25-Sep-08	20-Sep-10	4-Jan-11	503-520(Vol-3)
						MAHESANA	VADNAGAR	MRO 40	25-Sep-08	20-Sep-10	5-Jan-11	
						Patan	Radhanpur	MRO 40	25-Sep-08	24-Dec-10	27-Jan-11	
						Amreli	Bagasara	MRO 40	25-Sep-08	24-Dec-10	27-Jan-11	
						Kheda	Chaklasi	MRO 40	25-Sep-08	24-Dec-10	18-Feb-11	
						Dohad	Zalod	MRO 40	25-Sep-08	24-Dec-10	27-Jan-11	
						SOLAPUR	MANGALVEDHE	MRO 10	10-Sep-08	11-Mar-10	8-Sep-10	
						BULDANA	BULDANA	MRO 10	10-Sep-08	11-Mar-10	13-Sep-10	
						NANDED	KINWAT	MRO 10	10-Sep-08	11-Mar-10	8-Sep-10	
						OSMANABAD	KALAMB	MRO 10	10-Sep-08	11-Mar-10	13-Sep-10	
						BID	AMBEJOGAI	MRO 40	10-Sep-08	15-Nov-10	11-Feb-11	
						YAVATMAL	DIGRAS	MRO 40	10-Sep-08	15-Nov-10	11-Feb-11	
						SATARA	PHALTAN	MRO 40	10-Sep-08	6-Sep-10	28-Apr-11	
						JALGAON	FAIZPUR	MRO 40	10-Sep-08	15-Nov-10	11-Feb-11	
						AURANGABAD	GANGAPUR	MRO 40	10-Sep-08	25-Nov-10	11-Feb-11	
						PARBHANI	PATHRI	MRO 40	10-Sep-08	25-Nov-10	11-Feb-11	
						BHANDARA	PAUNI	MRO 40	10-Sep-08	8-Oct-10	11-Feb-11	
						LATUR	AHMADPUR	MRO 40	10-Sep-08	25-Nov-10	11-Feb-11	
JALNA	AMBAD	MRO 40	10-Sep-08	25-Nov-10	11-Feb-11							
GONDIYA	TIRORA	MRO 40	10-Sep-08	25-Nov-10	11-Feb-11							
WASHIM	MANGRULPIR	MRO 40	10-Sep-08	15-Nov-10	11-Feb-11							
KOLHAPUR	KURUNDVAD	MRO 40	10-Sep-08	13-Sep-10	11-Feb-11							

						RAIGARH	KARJAT	MRO 40	10-Sep-08	6-Sep-10	28-Apr-11	
						NASHIK	YEVLA	MRO 40	10-Sep-08	15-Nov-10	11-Feb-11	
11	RAJ	33	3	13	16	CHURU	BIDASAR	MRO 10	23-Dec-08	16-Feb-10	2-Aug-10	379-410(Vol 2-3)
						BARAN	ANTAH	MRO 10	23-Dec-08	16-Feb-10	2-Aug-10	
						KARALI	HINDAUN	MRO 10	23-Dec-08	16-Feb-10	2-Aug-10	
						SIKAR	LOSAL	MRO 40	23-Dec-08	16-Feb-10	2-Aug-10	
						BHILWARA	SHAH PURA, BHILWARA	MRO 40	23-Dec-08	18-Aug-10	24-Mar-11	
						AJMER	KEKRI	MRO 40	23-Dec-08	16-Jul-10	24-Mar-11	
						BUNDI	LAKHERI	MRO 40	23-Dec-08	23-Dec-10	24-Mar-11	
						JHALAWAR	JHALRAPATAN	MRO 40	23-Dec-08	6-Jul-10	1-Feb-11	
						DHAULPUR	BARI	MRO 40	23-Dec-08	6-Jul-10	1-Feb-11	
						PALI	SADRI	MRO 40	23-Dec-08	29-Jul-10	24-Mar-11	
						DAUSA	SAGWARA	MRO 40	23-Dec-08	6-Jul-10	1-Feb-11	
						CHITTAURGARH	NIMBAHERA	MRO 40	23-Dec-08	6-Jul-10	1-Feb-11	
						BANSWARA	KUSHALGARH (M)	MRO 40	23-Dec-08	9-Feb-11	19-Apr-11	
						JHUNJHUNUN	NAWALGARH	MRO 40	23-Dec-08	9-Feb-11	19-Apr-11	
						KOTA	SUKET (CT)	MRO 40	23-Dec-08	9-Feb-11	19-Apr-11	
RAJASMAND	DEOGARH (M)	MRO 40	23-Dec-08	9-Feb-11	19-Apr-11							
TONK	NIWAI	MRO 40	23-Dec-08	9-Feb-11	19-Apr-11							

It is trite that a contract has to be read in its entirety.

It must be assigned a meaning which would render the mutual obligations contained in the contract to be performed in a fair and reasonable manner.

Clause 21 deals with bank guarantees. Clause 21.1 deals with the performance bank guarantee. It reads as under:

"21.1 Performance Bank Guarantee: Performance Bank Guarantee (PBG) in prescribed format shall be submitted for amount equal to Rs.20 crores (for category 'A' service area) before signing the Licence Agreement.

Further on completion of one year from the effective date of licence and after meeting the coverage criteria stipulated for first year, the PBG shall be reduced to Rs.10/5/1 crores for category 'A' / 'B' / 'C' service areas on self-certification provided by the Licensee.

Further on fulfilling the roll out obligations as stipulated in Clause 34, the balance PBG shall be released on receipt of test certificates/test certificates issued by TEC in respect of coverage."

Reliance having been placed by Mr. Kohli also on Clauses 21.3, 21.4, 21.5 as also Clause 34 thereof; we may notice the same also:

"21.3. The Fees, charges and royalties for the use of spectrum and also for possession of Wireless Telegraphy equipment shall be separately securitized by furnishing FBG of an amount equivalent of the estimated sum payable annually in the proforma annexed, to WPC, valid for a period of one year, renewable from time to time till final clearance of all such dues.

21.4 Initially, the Bank Guarantees shall be valid for a period of one year and shall be renewed from time to time. The Licensee, on its own, shall extend the validity period of the Bank Guarantees for similar terms at least one month prior to date of its expiry without any demand or notice from the Licensor on year to year basis. Any failure to do so, shall amount to violation of the terms of the licence and entitle the licensor to encash the Bank Guarantees and to convert into a cash security without any reference to the Licensee at his risk and cost. No interest or compensation whatsoever shall be payable by the licensor on such encashment.

21.5 Without prejudice to its rights of any other remedy, Licensor may encash Bank Guarantee (FBG as well as PBG) in case of any breach in terms and conditions of the Licence by the Licensee.”

“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) At least 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-blinding coverage within one year of the effective date.

Clause 21.4 mandating the licensee to extend the validity period of the bank guarantee for similar terms; must, however, be read keeping in view the obligations on the part of the licensor to reduce or return the bank guarantee, as the case may be.

The said Clause uses the term `shall'; it is, thus, imperative in character.

It was obligatory on the part of the Respondent herein to reduce the quantum of bank guarantee in the event the coverage criteria stipulated for the first year has been complied with and return the same after the roll out obligations as stipulated in Clause 34 are complied with.

Clauses 21.4 and 21.5, therefore, cannot be read so as to enable the licensor to take advantage of its own wrong.

In this case, the first year roll out obligation was not completed within a period of one year wherefor penalties have been levied on the Petitioner and deposited. The penalties levied on the Petitioner having been paid the licensor was required to reduce the quantum of bank guarantee. The Petitioner wrote several letters to that effect but no response thereto has been made.

By way of example, we may notice that by reason of a letter dated 26.5.2011, the Petitioner informed the Respondent about its completion of second phase of roll out obligations. Several reminders were given, one of them being dated 23.8.2011 reads as under:

“Your attention is invited to our afore cited letters (acknowledged copies enclosed as Annex-I,II & III) whereby we had requested DoT to release our PBGs in view of successful completion of our third year (50%) coverage roll-out obligations for the service areas of Andhra Pradesh, Gujarat, Karnataka, Kerala, Punjab, Rajasthan, UP East, UP West, Haryana and Maharashtra. Copies of the Service Test Results duly issued by respective TERM Cells for the aforesaid service areas were also submitted to DoT along-with letters.

However, we have not yet received any response from your office in this regard. We again request you to release our PBGs for the above stated LSAs in accordance with 21.1 of the UAS license(s) granted to us.”

The Petitioner has also furnished the details of its roll out obligations in the following terms:

“6. EDB has also fulfilled phase-2 (50% coverage) Rollout obligation in 11 LSAs. Service Test Results

issued by respective TERM Cells certifying successful completion of phase-2 rollout obligations were submitted to DoT vide below-mentioned letters with a request to release the PBG in accordance with Clause 21.1 of the UAS License:

- (a) EDB's letter NO.Dot/Regu/957/11 dated 26-May-2011 for **AP, Gujarat, Karnataka, Kerala, Punjab, Rajasthan, UPE and UPW.**
- (b) EDB's Letter No.DoT/Regu/958/11 dated 27-May-2011 for **Maharashtra**
- (c) EDB's Letter No.DoT/Regu/973/11 dated 09-Jun-2011 for **Haryana**
- (d) Reminder 1 - EDB's Letter No. Dot/Regu/1071/11 dated 23-Aug-2011 for **AP, Gujarat, Karnataka, Kerala, Punjab Rajasthan, UPE, UPW, Maharashtra & Haryana**
- (e) EDB's Letter No.Dot/Regu/1099/11 dated 10-Oct-2011 for **Tamil Nadu**

The Respondent has never raised any contention that the Petitioner has failed to perform its roll out obligations or committed breach of any other terms of the license agreement which is not otherwise securitized. The aforementioned chart shows that the obligations have been complied with by the Petitioner. No demand has been made. No additional amount has been specified for which other and further bank guarantees were to be furnished.

In the judgment of this Tribunal in Aircel Ltd. vs. Union of India, Petition No.491 of 2011 wherein the ratio of the judgment in Sistema Shyam to the following effect has been noticed:

"A bare perusal of Clause 21.1 would clearly go to show that at the first instance i.e. after one year the same has to be reduced to 50%. The period of one year has been fixed keeping in view only the roll out obligations on the part of the licensee, sofar as the coverage of the license areas are concerned.

The interest of public has been kept in view therefor. The extent of damages by way of liquidated damages have been quantified on the basis of length of delay caused by the licensee in providing for the telecom service contemplated under the licenses.

Upon successful completion of the roll out obligations, the performance bank guarantees are to be released."

It was further opined:

"If Mr.Mishra's submissions are to be accepted, no occasion would arise for reduction of the amount of the performance bank guarantee and ultimate release thereof. It cannot, therefore, be given any effect. Performance bank guarantees would, therefore, have to be kept alive for the entire term of the license i.e. 20 years.

This Tribunal in this case would assume that failure on the part of the licensee to abide by its obligation in Clause 34.1 may entail civil consequences but the amount due therefor were required to be calculated.

Such dues, if any, may fall within the purview of the financial bank guarantee as contemplated under Clause 21.2 of the license and not 21.1."

Clause 34 along with Clauses 8 and 35 have been amended by the Respondent in terms of a circular letter dated 10.2.2009, the relevant portions whereof read as under:

“(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.

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

(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.”

Clause 34 speaks of compliance in two phases of roll out obligations. There is no roll out obligation for the third phase, having not been prescribed by the licensor.

The first phase providing of covering 10% of the District Headquarters in the first year and the second phase completion of services of 50% of the District Headquarters within three years from the “effective date of licenses”.

Clause V of the circular dated 10.02.2009 clearly states that the choice is of the licensee so far as the District Headquarter/towns to be covered is concerned and the choice of further expansion beyond 50%

thereof shall lie with the licensee, wherefor it shall have to take a commercial decision.

Moreover, there is no provision whereby the licensee is required to cover any rural areas.

If the submission of Mr. Kohli is to be accepted, the roll out obligations would not only be confined only to the 10% and 50% of the towns/District Headquarters in the circle but would be the entire service area, which would not only consist of the municipal towns but also rural areas.

If that was the intention of the licensor it could have said so explicitly.

The interpretation of Clause 34 has been considered in *Sistema Shyam* (supra) and other cases following the same.

We, therefore, are of the opinion that keeping in view the provisions of Clause 34.2(a) and the amendment dated 10.2.2009, the submissions of Mr. Kohli cannot be accepted.

So far as the submission of learned counsel with regard to scope of bank guarantee is concerned, we may notice that clauses contained therein referred to Clause 34 of the license.

The bank guarantee despite being a tripartite document must be construed having regard to the provisions of license.

We have no doubt in our mind that the contents of the bank guarantees are required to be considered having regard to provisions of Clause 21.1 and 34 of the licenses.

We furthermore place on record that the Respondent has not complied with the directions contained in our order dated 10.1.2012 and 15.5.2012. It is now well settled that compliance with the order of a competent court of law is a facet of rule of law. The same cannot be ignored or violated.

Last but not the least we may notice the submissions of Mr. Kohli that the licenses of the Petitioner have been directed to be quashed by the Supreme Court of India in Center for Public Interest Litigation vs. UOI (2012) 3 SCC 1 and in that view of the matter we need not pass any order at this stage. The said submission is stated to be rejected.

The TRAI as also the DoT, on the one hand say that the licenses having been kept valid till 07.09.2012 and thus, the same is binding on the licensee, on the other hand, it can contend that it need not comply with its obligations. It, therefore, does not lie in the mouth of the licensor that although the licenses are valid, it need not perform its part of contractual obligations.

In this view of the matter, the Respondent is hereby directed to return the performance bank guarantees in respect of the circles in question within one week from date.

This petition is allowed to the aforementioned extent. There shall, however, no order as to costs.

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

July 26, 2012
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