

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**

**NEW DELHI**

**Dated 2.11.2012**

**Petition No.136/2012**  
**With MA Nos.320/2011 & 91/2012**

Inactive Net Pvt Ltd. ... Petitioner

Vs.

Union of India ... Respondent

**Petition No.194 of 2012**  
**(With M.A. No. 149 of 2012)**

Inative Network Pvt. Ltd., Karnataka ... Petitioner

Vs.

Union Of India ... Respondent

**Petition No.195 of 2012**  
**(With M.A. No. 150 of 2011)**

Inative Network Pvt. Ltd., M.P. ... Petitioner

Vs.

Union Of India ... Respondent

**Petition No.196 of 2012**  
**(With M.A. No. 151 of 2012)**

Inative Network Pvt. Ltd., U.P. West ...Petitioner

Vs.

Union Of India ...Respondent

**Petition No.197 of 2012**  
**(With M.A. No. 152 of 2012)**

Inative Network Pvt. Ltd., Punjab ...Petitioner

Vs.

Union Of India ...Respondent

**Petition No.226 of 2012**  
**(With M.A. No. 155 of 2012)**

Inative Network Pvt. Ltd., Rajasthan ...Petitioner

Vs.

Union Of India ...Respondent

**Petition No.227 of 2012**  
**(With M.A. No. 156 of 2012)**

Inative Network Pvt. Ltd., Orissa ...Petitioner

Vs.

Union Of India

...Respondent

**Petition No.228 of 2012**  
**(With M.A. No. 157 of 2012)**

Inative Network Pvt. Ltd., Bihar

...Petitioner

Vs.

Union Of India

...Respondent

**Petition No.229 of 2012**  
**(With M.A. No. 158 of 2012)**

Inative Network Pvt. Ltd., A.P.

...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.Jayant Mehta, Advocate

Mr.Sukant Vikram, Advocate

For Respondent

: Mr.Ruchir Mishra, Advocate

Mr.Mukesh Kumar Tiwari, Advocate

# **J U D G M E N T**

**S.B. Sinha**

## **Introduction**

Interpretation of some terms of the license vis-à-vis the mutual obligations on the part of the parties hereto arise for consideration in this petition.

## **Factual Backdrop**

2 The Respondent, in exercise of its power conferred upon it under Section 4 of the Indian Telegraph Act, 1885, (hereinafter called and referred to for the sake of brevity as `the said Act'), granted several licenses in favour of the Petitioner for providing services commonly known as Public Mobile Radio Tanking Services (hereinafter called and referred to for the sake of brevity as `PMRTS').

3 The said licenses had been granted in two lots, that is to say the license dated 10.12.2007 was granted in respect of six

circles, namely, Maharashtra, Karnataka, Gujarat, Haryana, Andhra Pradesh and Bihar and the license dated 14.8.2008 was granted in respect of 11 circles including Madhya Pradesh, Uttar Pradesh (West), Rajasthan and Orissa.

4 According to the Petitioner, on receipt of the Letters of Intent, the Respondent in terms of its letter dated 4.12.2007, was requested by the Petitioner to prepare the TSTP (Testing Parameters meant to be followed for testing Tetra based PMRTS sites) which may be offered for inspection thereof.

5 The terms and conditions contained in the said licenses provided commissioning of the services by the Petitioner within one year from the effective date of grant of licenses.

6 Indisputably, sofar as the license dated 10.12.2007 is concerned, the Petitioner prayed for and was granted extension for a period of one year w.e.f 9.12.2008 i.e. upto 9.12.2009.

7 A second extension was also granted on or about 27.9.2010 upto 9.12.2010, but the Petitioner was not asked to stop its activities thereafter.

8 Sofar as the license dated 10.12.2007 is concerned although the Petitioner had sought for extension the same was not expressly granted.

9 According to the Petitioner, it had made huge investments by way of importing equipments after the frequencies were allocated to it by the WPC Wing of the Respondent.

10 In some cases, however, like Punjab and Orissa Circles, it was not allocated any frequency.

11 Furthermore SACFA clearance had not been granted to the Petitioner in respect of the circles of Karnataka, Haryana, Bihar and Gujarat.

12 It is furthermore stated that in most of the circles, it was ready for commissioning the services and in fact commercial operations inter alia in the circles of Karnataka, Maharashtra, Madhya Pradesh, Gujarat and Haryana have already been launched.

13 We may notice the fact of the matter involved in Petition No.136 of 2012 which is in respect of the Maharashtra circle.

14 At the outset, we may, with a view to appreciate the fact of the matters, notice the status of the sites, as contended by the Petitioner from the following table:-

Monthly Status Report  
(May 2009)

S . N o.	Name of Licensee	PMRT S License No. & Date	Service Area	Assessment of customer requirement	Identification of base site	Field radio coverage Assessment	Finalization of network fragment (NF) design	Installation of network fragment (NF)	Optimization of network fragment (NF)	Commissioning of network fragment (NF)	SACFA Approval	WPC spectrum allocation	Date of Commissioning	No. of frequency channels assigned	Report for the month	No. of subscribers (as on last day of the month)
1	M/s Inactive Networks Pvt. Ltd	311-108/2007-CS/1 10.12.2007	Karnataka (Bangalore)	Completed	Completed	Completed	Completed	Completed	Completed	Completed	Under process	Done	Yet to be commissioned	10 pairs	Upto May 2009	Nil
2	(do)	311-108/2007-CS/2 10.12.2007	Maharashtra (Pune)	Completed	Completed	Completed	Under process	To be done	To be done	To be done	Under process	Done	Yet to be commissioned	10 pairs	Upto May 2009	Nil
3	(do)	311-108/2007-CS/3 10.12.2007	Andhra Pradesh (Hyderabad)	Completed	Under Process	To be done	To be done	To be done	To be done	To be done	Under process	Done	Yet to be commissioned	10 pairs	Upto May 2009	Nil
4	(do)	311-108/2007-CS/4 10.12.2007	Gujarat (Ahmadabad)	Completed	Completed	Completed	Completed	Completed	Completed	Completed	Under process	Done	Yet to be commissioned	25 pairs	Upto May 2009	Nil
5	(do)	311-108/2007-CS/5 10.12.2007	Haryana (Panipat)	Completed	Completed	Completed	Completed	Completed	Completed	Completed	Under process	Done	Yet to be commissioned	25 pairs	Upto May 2009	Nil
6	(do)	311-108/2007-CS/6	Bihar (Ranchi, Jams)	Completed	Completed	Completed	Completed	Completed	Completed	Completed	Under process	Done	Yet to be commissioned	25 pairs	Upto May 2009	Nil

		10.12.2007	hedpur)									oces s		oned		9	
7	(do)	311-110/2007-CS/1 14.08.2008	Rajasthan	Completed	Under process	To be done	To be done	To be done	To be done	To be done	To be done	To be done	To be done	Yet to be commissioned	Yet to apply	Upto May 2009	Nil
8	(do)	311-110/2007-CS/2 14.08.2008	Madhya Pradesh	Completed	Completed	Completed	Completed	Completed	Completed	Completed	Under process	Under process	Under process	Yet to be commissioned	Under process	Upto May 2009	Nil
9	(do)	311-110/2007-CS/3 14.08.2008	Himachal Pradesh	Completed	Completed	Under process	To be done	To be done	To be done	To be done	To be done	To be done	To be done	Yet to be commissioned	Under process	Upto May 2009	Nil
10	(do)	311-110/2007-CS/4 14.08.2008	Punjab	Completed	Under process	Under process	To be done	To be done	To be done	To be done	To be done	To be done	To be done	Yet to be commissioned	Yet to apply	Upto May 2009	Nil
11	(do)	311-110/2007-CS/5 14.08.2008	Kerala	Completed	Completed	Completed	Under process	To be done	To be done	To be done	To be done	To be done	To be done	Yet to be commissioned	Yet to apply	Upto May 2009	Nil

15 The Petitioner has provided to the Respondent the said detailed status report in respect of all the circles on or about 13.8.2009.

16 It offered three sites for testing of the equipments installed by it to the Respondent/TEC, namely, Panipat in the State of Haryana, Hazira in the State of Gujarat and 'Pune' in the State of Maharashtra.

17 On or about 7.12.2009, the Petitioner submitted another progress report which reads as under:-

“Sub : **Extension for Delivery of Service**”

Ref : PMRTS License Agreements No.311-108/2007  
-CS/1 up to 6 dated 10.12.2007 for  
Six Telecom Circles

Dear Sir,

Reference is made to the subject License Agreements for providing PMRTS Services in six telecom circles namely Karnataka, Maharashtra, Andhra Pradesh, Gujarat, Haryana and Bihar wherein, the commercial services were to be commissioned by 10.12.2009. However, despite progress on various activities, we could only manage to successfully commission services in one of the telecom circle namely Haryana at Panipat. Details of various activities completed by us in other service areas are as given below :

1. Spectrum for all the 6 telecom circles has been obtained.
2. Site Survey has been completed.
3. Purchase Order placed for qty 164 Nos. of Infrastructure equipment. Copy of the order acknowledgement by our principal M/s DAMM Cellular dated 25<sup>th</sup> April 2008 is enclosed.
4. Qty 11 Nos. of Infrastructure equipment was received during Nov 2008 against Import License Nos. NR-IMP/1127 dated 05.08.2008 and NR-IMP/1148 dated 19.8.2008 (copies of the import licenses are enclosed).
5. The Equipment has been installed in four telecom circles namely Haryana, Gujarat, Maharashtra and Karnataka. We are now in the process of completing the remaining two circles as well.

6. The SACFA clearance for our Panipat site has been obtained vide letter dated 12.11.2009 whereas for another three sites, it is 'under process'. Copies of WPC letter and acknowledgements are enclosed.

7. The testing by TEC at Panipat site is under process. Copy of the receipt dated 7<sup>th</sup> Dec 2009, for the fee deposited to TEC, is enclosed.

An undated status report for all the 6 telecom circles is enclosed herewith as Annexure 1. We would now request you to kindly extend the date for 'Delivery of Service' for the subject License Agreements for another period of one year. We assure you that we shall start to deliver commercial services within this extended period for 'Delivery of Service'."

18 It deposited the requisite fees with the WPC Wing of the Respondent on or about 8.3.2010 and 15.3.2010. The Respondent was informed that SACFA clearance has already been accorded in regard to some of the sites and in that view of the matter, it was prayed that time for commissioning the services be extended by one year.

19 The Respondent by a letter dated 15.4.2010 sought for informations inter alia with regard to the progress of the sites made by the Petitioner for processing its request for extension of the commissioning date of PMRTS service; in response whereto a status report was supplied on 20.4.2010 to it,

containing almost the same informations as noticed hertobefore.

20 According to the Petitioner, it by a letter dated 7.5.2010 further informed the Respondent that it's sites at Haryana, Maharashtra and Gujarat were ready for TEC clearance, whereby a request was made for extending the date for 'Delivery of Service' for the subject license dated 10.12.2010. However, there was no response thereto from the side of the Respondent.

21 The Petitioner by another letter dated 23.8.2010 made a request for extension of the date of commissioning of services as SACFA clearance had been received in respect of the Bangalore circle in Karnataka and it had been pursuing the matter with W.P.C. for the Bihar Telecom circle although the sites were ready to be referred to TEC.

Extension of the date for commissioning of the site was granted for a period 2-1/2 months i.e. upto 9.12.2010.

22 An offer of inspection of its site for the approval of TEC in respect of its Pune site at Maharashtra was made on 25.10.2010.

23 Yet again it offered its site at Bangalore in the circle of Karnataka for approval of the TEC by a letter dated 8.11.2010. The Respondent by letters dated 1.12.2010 and 3.12.2010 contended that the Petitioner had not provided the requisite informations as per the revised version of digital PMRTS, as a result whereof it could not be registered and its case was not processed for `service approval`.

24 The Petitioner, however, contends :-

- (i) The final TSTP was never provided to it;
- (ii) The extension of commissioning date was coming to an end on 9.12.2010.

25 The Respondent by a letter dated 1.12.2010, stated :-

“ Sub: - Service Approval case - PMRTS site at Pune in Maharastra.

Dear Sir,

Kindly refer to your letter received in this office on 29.11.2010 regarding above subject. It is intimated that documents indicated vide above letter appendix A to appendix L are not attached. Also the municipality/District map of Pune in not

attached. Further the checklists as per service approval test schedule are not attached as per the latest revised version of digital PMRTS issued from DDG (N-Group) TEC HQ.

In view of above discrepancies we are unable to register and process the case for service approval.

The DD of Rs.1,40,000/- (Rs. One Lac and Forty Thousand only) DD No. 005465 dated 23.11.2010 submitted along with above document is also returned herewith with request to submit the same only when asked to do so after verification of all the documents as per the checklist/test schedule of latest version of digital PMRTS.

Sd/-"

26 Yet again by a letter dated 3.12.2010, the Respondent pointed out :-

" Kindly refer our letter dated 01/12/2010 regarding above subject wherein it was mentioned that appendix A to appendix L, the Municipality/District map of Pune & the checklist as per service approval test schedule as per the latest revised version of digital PMRTS issued from DDG (N-Group) TEC HQ is not attached. However with reference to your letter dated 01.12.2010, without submission of the above required documents, case cannot be registered and processed for service testing.

Therefore you are once again requested to submit the required documents to process the case at our end."

27 The Petitioner by a letter dated 7.12.2010 pointed out that there existed a difference between the TSTP provided to it by TEC at the time of their visit for testing the site at Hazira, Gujarat and the TSTP of 1998, which was provided initially to it during the testing of it's Panipat site, stating :-

"... It is pertinent to mention here that both documents are quite different from each other and we need to have the final TSTP meant for TETRA based PMRTS networks for future references. It is therefore requested that a joint meeting may please be convened at your end to discuss and finalize TSTP prior to resuming the testing of our site at Hazira."

28 The Petitioner is said to have received the 2010 TSTP only on 30.12.2010.

29 On 3.1.2011, the Petitioner informed the Respondent that it was provided with the 2010 TSTP on 30.12.2008 which contained a professional test schedule for service testing of digital PMRTS. According to it even the same required revision in respect whereof comments were offered by it.

30 The southern region of the TEC, namely, Bangalore circle informed the Petitioner by its letter dated 18.2.2011 that it had

sought for some clarifications from the headquarters with regard to the applicability of TSTP 2010.

31 According to the Petitioner, as no final TSTP was prepared; by a letter dated 1.3.2011 it informed the Respondent that only after the final TSTP was put in place, a formal request for extension of the date of commissioning of the service would be made.

32 Further comments as regards the revised TSTP were made by the Petitioner by its letter dated 2.5.2011.

33 By a letter dated 11.8.2011, a request was made by the Petitioner to the Respondent for issuance of a test certificate for its Hazira site. In terms of a letter dated 12.9.2011, the Respondent asked the Petitioner to depute a technical team.

### **Process of termination**

34 The Respondent, however, issued a show cause notice as to why the licenses granted in favour of the Petitioner be not terminated, it having failed to commission the services within the period prescribed under the license.

35 Similar show cause notices were also issued in respect of Gujarat and Haryana circles.

36 Reply to the said notice was given by the Petitioner on 10.10.2011.

37 The Petitioner by a letter dated 21.10.2011 stated as under :-

“ With reference to your letter referred above and your testing at Hazira site between 26.09.2011 to 28.09.2011, we wish to confirm that as per clause 1.1(b) on page 8 of the TSTP, it is possible to make calls to the connected Public network from our Test Mobile. However, this feature has not been implemented at Hazira as the customer has not insisted for the same.

We are willing to demonstrate this feature at our office in Faridabad. You may kindly depute your officials tentatively on 31.10.2011 or 01.11.2011 as may be convenient to you.

Furthermore, copy of the consolidated Test Report of Hazira site along with all the supporting documents is enclosed herewith for your acceptance and we keenly look forward to issuance of Service Approval Certificate at the earliest.”

38 It does not appear from the record that the said request was acceded to by the Respondent.

39 By a letter dated 4.11.2011, the Petitioner sought for an opportunity of being heard.

40 By another letter dated 28.11.2011 the Petitioner informed the Respondent about the alleged misuse of the CMTRSs as a result whereof it had not been getting its revenues.

41 By two letters dated 6.12.2011 and 22.12.2011 the Petitioner further requested the Respondent to provide the final TSTP so as to enable it to reoffer the sites for the approval of TEC.

42 By reason of the impugned order dated 18.1.2012 the licenses of the Petitioner were terminated.

The said order reads as under :-

"Subject: Termination of License Agreement for operation of Public Mobile Radio Trunking Services (PMRTS) for Maharashtra service area vide License agreement No.311-108/2007-CS/2 dated 10.12.2007.

This has the reference to the above-mentioned license agreement entered into by M/s Inative Networks Pvt. Ltd with the Department of Telecommunications for operation of Public Mobile Radio Trunking Service (PMRTS).

2. The effective date of the licenses for the Maharashtra service area was 10<sup>th</sup> December, 2007.

Accordingly, M/s Inative was required to commission the services by 9.12.2008. However, the company did not commission the network within the stipulated period and requested for extension. Accordingly, the commissioning date was extended two times i.e. upto 9.12.2009 and further upto 9.12.2010 based on company's request.

3. Accordingly, as per condition 7.1 of the License Agreement, the company was required to commission the applicable systems within the extended date i.e. upto 9.12.2010. The company however did not commission the network even after grant of two extensions for the commissioning date.

4. Your request for further extension of the commissioning date has been considered by the competent authority, however, the same has not agreed to. Accordingly, the PMRTS license agreement No. 311-108/2007-CS/2 dated 10.12.2007 for Maharashtra service area stands terminated with immediate effect.

5. The PBG amounting Rs One lakh for the service area would be *encashed* by LF Cell due to *non-fulfillment* of obligation of commissioning the network as per license condition 7.1.

Please acknowledge receipt."

### **The present proceedings**

43 This petition was filed on or about 15.3.2012, inter alia, praying for the following reliefs:-

- (i) Declare the impugned letter dated 18.1.2012 (Annexure P-1) to be null, void and inoperative;
- (ii) Set aside and quash the impugned letter dated 18.1.2012 (Annexure P-1) and enjoin the Respondent from terminating the License dated 10.12.2007;

(iii) Direct the Respondent to forthwith finalize the TSTP and to test the equipment and services of the Petitioner in accordance with the terms and conditions of the License dated 10.12.2007;

(iv) Direct the Respondent to restore the performance bank guarantee submitted by the Petitioner in accordance with the terms of the License dated 10.12.2007; and

44 The Respondent in its reply, inter alia, contended:

(i) It is not correct that it defaulted in preparation of the TSTP. It, however, accepted that the same was provisional in nature and the TSTP in its revised form was supplied to the Petitioner on or about 22.12.2010.

(ii) TSTP was a technology neutral document. TSTP 98 was applicable for testing of services offered by the Petitioner and in fact two of the sites offered for testing by the Petitioner were cleared on the basis thereof.

(iii) The Petitioner at the time of filing of the application for grant of license itself furnished all their technological and operational details and, thus,

were aware of the requirements of fulfilling the conditions of license to commission the services.

(iv) The Petitioner did not supply the technical details of the sites to the Respondent.

45 We may also place on record that the hearing of the matter was over on 12.7.2012, on which date, judgment was reserved.

46 The learned counsel for the parties were asked to submit their written arguments, if any, within two days therefore.

47 The Respondent, however, submitted their written argument only on 9.8.2012 with an application for condonation of delay, from a perusal whereof it appears that various new grounds/ points had been raised which had not been raised during hearing.

The matter was, therefor, placed for hearing again. It was furthermore heard on 30.08.2012 and this judgement was reserved.

### **License Agreement**

48 Before considering the rival contentions of the parties; some of the provisions of the license agreement may be noticed.

The third paragraph of the license agreement reads as under:

“The LICENSEE hereby agrees and unequivocally undertakes to fully comply with all terms and conditions stipulated in Schedule-II appended hereto in this License Agreement without any deviation or reservations of any kind.”

49 Clause 1 of the said agreement reads as under:-

“1. In consideration of the payment of the license fee, and due performance of all the terms and conditions mentioned in this license agreement on the part of the LICENSEE, the LICENSOR does, hereby grant under section 4 of the Indian Telegraph Act, 1885 on a non-exclusive basis, this license to set up and operate the Digital Public Mobile Radio Trunk Service in the licensed service area, described in Schedule-I appended hereto.

50 The term mentioned in the said agreement is for the period 10.12.2007 and 10.12.2027; the licenses having been granted for a period of 20 years.

51 Clause 1.2 provides that the spectrum would be allocated subject to its availability and the licensee may not be allocated the same frequency throughout the State.

52 The said agreement provides that for each district licensee has to apply for allocation of frequency separately.

We may also notice the following clauses of the license agreement :-

"2.1 The LICENSE is granted to provide service and capital on a non-exclusive basis and others can be granted licenses for the same service in the designated SERVICE AREA by utilizing any type of network equipment, including circuit and/or packet switches, that meet the relevant International Telecommunications Union (ITU)/Telecommunications Engineering Center (TEC)/international standardization bodies such as 3GPP/3GPP-2/ETSI/IETF/ANSI/EIA/TIA/IS. Provided further that the LICENSOR, on its own or through a DESIGNATED OPERATOR, shall always have a right to operate the SERVICE anywhere in India including the service area for which the license is granted.

xxx

## **6. Provision of Service :**

**6.1** The LICENSEE shall be responsible for, and is authorized to own, install, test and commission all the Applicable system for

providing the Public Mobile Radio Trunking Service under this license agreement.

## **7. Delivery of Service:**

7.1 The LICENSEE shall commission all the Applicable system within one year from the effective date of the License. Commissioning of service shall mean providing of an effective commercial service to customers and due intimation to the licensor. The date of Test Certificate issued by TEC of DoT will be reckoned as the date of Commissioning of Service. However, the Licensee may start providing service to customers at any time without specific approval of the licensor."

53 Clause 9 deals with suspension, revocation or termination of license.

54 We may, for this purpose, notice sub-clauses (a) and (b) of Clause 9.2 and Clause 9.4 of the License Agreement:-

"9.2 The LICENSOR may, without prejudice to any other remedy available for the breach of any conditions of LICENSE, by a written notice of 60 Calendar days from the date of issue of such notice to the LICENSEE at its registered office, terminate this LICENSE under any of the following circumstances:

If the LICENSEE:

(a) fails to perform any obligation(s) under the LICENSE including timely payments of fee and other charges due to the LICENSOR;

(b) fails to rectify, within the time prescribed, any defect as may be pointed out by the LICENSOR.

9.4 The LICENSOR reserves the right to revoke the LICENSE at any time in the interest of public by giving a notice of 60 calendar days from the date of issue of such notice."

55 The license agreement furthermore provides for commercial terms and technical terms.

Some of the relevant provisions thereof are as under:-

#### **"Part- IV TECHNICAL CONDITIONS**

##### **22.3 TRANSMISSION CHARACTERISTICS:**

The system installed for providing service should be designed in such a way so as to provide good radio coverage inside the buildings within the service area. The system will be designed to cover a radio distance of maximum 30 kms from the base station except where larger distance has been allowed in respect of any individual license.

**22.4 FREQUENCY BAND:** The frequency band and permissible power limits from the base stations are as per details given below. Only available frequency slots in these bands shall be considered for allotment to the licensee as per NFAP-2002, revised from time to time-

##### **a) Frequency band:**

(i) 811-814 MHz paired with 856-859 MHz for Digital PMRTS

(ii) 814-819 MHz paired with 859-864 MHz for Analogue PMRTS

**b) Max RF output -** Base station upto 100 Watts  
- Vehicle mobile upto 30 Watts

- Hand-held upto 03 Watts

**c) Adjacent channel spacing**      800 MHz band  
25 KHz (11KOF3E)

**d) Duplex spacing**      800 MHz band  
**(Tx Rx Spacing)**      45 MHz

22.5 Only real time voice and message communication among the users of the service is permissible. Following are the some of the optional services which may be provided in the licensed network. Any other optional services may be listed in the proposal:

- i) Group calling
- ii) Priority call override
- iii) Fleet/ Dispatch call
- iv) Mobile to mobile and mobile to fixed direct communication by passing the base station without exceeding the maximum RF power limits specified in clause 20.6.1 above
- v) Closed user group.

A mobile station is authorised to transmit any frequency assigned to the associated base station(s).

## **22.6 CHANNEL ASSIGNMENT AND LOADING:**

22.6.1 No interconnection among two separately licensed systems will be permissible.

22.6.2 Separate license will be required for operating in another frequency band irrespective of same base station / repeater station sites being used for the new system.

22.6.3 Initially, not exceeding five channels (frequency pairs) will be assigned for PMRTS analogue system and for Digital system upto 30

frequency channels (25KHz each) depending on the availability, justification and the actual usage of the same. Further additional channels will be considered subject to availability of frequency spectrum in the designated frequency bands in the particular service area and after taking into account growth of service. This will include the control channels also.

22.6.4 The mobile trunked radio channels must have a minimum numbers of mobile on a per channel basis with 90 mobiles being considered as acceptable usage for analogue system. The loading per channel for digital system will be much higher in comparison to analogue system. The minimum numbers of mobiles on a per channel basis for digital system will be decided in consultation with TEC. The licensor reserves right to withdraw the assigned channels if subscriber based criteria is not met or the channels are not used as per the assigned technical parameters.

#### **24. Engineering Details:**

(a) The licensee shall furnish to the licensor or its authorised representative(s), in such manner and at such times as may be required, to complete technical details with all calculations for engineering, planning and dimensioning of the system/network, concerned relevant literature, drawings and installation materials regarding the applicable system.

(b) Licensee shall supply all tools, test instruments and other accessories to the resting party of licensor and /or TEC for conducting tests, if it so desires, prior to commissioning of the service or at any time during the currency of the license.

#### **32. Inspection and Testing of Installations:**

32.1 The Licensor will also carry out all performance tests required for checking quality

of Service, if it so desires. The LICENSEE shall supply all necessary literature, drawings etc. regarding the equipment installed and shall also supply all the tools, test instruments and other accessories to the testing party of the LICENSOR for conducting all the tests. The list of performance tests will be furnished by the LICENSEE one month prior to the date of commissioning to the Licensor. In case the Licensor chooses to conduct performance test and some deficiency is found therein by the licensor, the delay caused for rectification of the deficiencies, if any, will be entirely on account of the Licensee.

32.2 The Acceptance Testing for each and every interface with the BSNL/MTNL/ or Other Service Provider may be carried out by mutual agreements between the licensee and the other party involved. The Acceptance Testing schedule shall be mutually agreed.

56 The definitions of different terms used in the license are contained in Annexure-7 appended to the license.

57 We may notice some of the definitions:

1. **Applicable systems** – The “applicable System” means all the necessary equipment/ sub-systems engineered to provide Public Mobile Radio Trunk Service using analogue/ digital technology in accordance with operational/technical and quality requirements and other terms and conditions of the license agreement.

2. **Quality of service** – is evaluated on the basis of observable measure on the grade of service, calls lost due to wrong processing, the bit error rate or the response time and also included acceptable grade of number of faults per

unit population of the subscriber served, the mean time to restore (MTTR), faults carried over beyond the MTTR and the satisfactory disposal thereof.”

### **The grant of License**

58 Indisputably the Petitioner, claiming itself to be the provider of a new breed of digital wireless service, commonly known as Tetra Based Digital Mobile Radio Trunking Services applied for grant of license, in terms of its letter dated 18.6.2007.

59 In the said application, inter alia, details of the technical, commercial proposal/business plan for the purpose of providing the proposed service as contained in Annexure-II thereof were provided.

60 By its letter dated 5.7.2007 the Respondent asked for the following informations from the Petitioner:

“d) Detailed calculation against requirement of spectrum Minimum and Maximum radius of proposed cell sites, frequency reuse pattern, Traffic/Subscriber assumptions, QOS etc.

e) Handset details such as type, Tx Power and sensitivity etc.”

61 The Petitioner by its letter dated 13.7.2007 furnished the detailed calculations as regards its requirements of spectrum and also furnished the details of the handsets such as Tike, Tx Power and sensitivity etc. by annexing thereto the relevant documents marked as Annexures 3 and 4. It furthermore supplied coverage diagram as well as network diagram for the cities of Bangalore, Hyderabad, Ahmadabad, Pune, Panipat, Ranchi and Jamshedpur as well as network diagram of its entire network.

62 Annexure-III appended to the said letter contained the traffic/subscribers assumptions.

63 It also furnished the requisite details with regard to the quality of service parameters.

64 Steps with regard to the test procedure required to be followed as laid down by the Respondent read as under :-

## **"TEST PROCEDURE**

### **STEP 1**

Application to DOT for obtaining PMRTS license giving details of the equipments (model of the

base station, handheld, service box, antenna etc.), installation site, technology to be used/adopted, frequency band to be used, network diagram, copy of the MoU etc.

### **STEP 2**

Based on the technical details submitted in the application form by the applicant to the TEC/DoT, TEC provides its technical comments to DoT. Thereafter, DoT in consultation with WPC issues the PMRTS license.

### **STEP 3**

Applicant then starts the procurement of equipment/s, process/s for obtaining the required frequency band from WPC/DoT, SACFA clearance etc.

### **STEP 4**

After getting the desired equipments tools, software, trainings etc. from the collaborator/manufacturer, the applicant begins the installation of the equipment/s at the proposed service area as per license.

### **STEP 5**

After the complete set up of the equipments, the applicant starts self testing the service quality with their technical team. This is done as per the prevailing testing procedures of TEC i.e. TSTP No. TS/PMRTS-02/03JAN98 Issue 2 or TSTP No. TEC/TSTP/SR/PMRTS-001/01 DEC-10 as the case may. The applicant has to ensure that the results i.e. efficiency of the system, coverage, technical parameters are within the permissible/specified limits as per license and to the complete satisfaction for providing service to the customers.

### **STEP 6**

Now the applicant applies to TEC in Form A along with the Form C (compliance report of the system) for offering the testing of the launched service.

### **STEP 7**

Thereafter TEC verifies the application Form A, Form C and other related documents viz digital map of the offered service area, network diagram of the area, validity of the SACFA clearance/license. If all the documents submitted are found satisfactory, then TEC requests the applicant to deposit the required testing fee in Form B for further processing of the case for testing.

### **STEP 8**

Thereafter TEC team visits the site and starts testing and verifies the service parameters as per the application i.e. coverage area, efficiency, site location, model/s of the equipment/s etc. Following this a service test certificate is issued if all the results are found as per TSTP standards.”

## **The Issue**

65 The short question which arises for consideration is as to whether the Respondent, in the facts and circumstances of this case was entitled to terminate some of the licenses of the Petitioner by its letter dated 18.1.2012 on the ground of non-commissioning of the licensed services by 9.12.2010.

## **Nature of the PMRTS License**

66 We have noticed heretobefore that the said order of termination has been issued inter alia on the premise that in

terms of Clause 7.1 of the license agreement, the Petitioner made itself bound to commission the applicable system within the extended date i.e. upto 9.12.2010 but despite grant of two extensions it failed to do the same. It was furthermore stated that the Petitioner's request for extension of commissioning date could not be agreed to.

67 It is not in dispute that the licensees are bound to comply with the terms and conditions of the license.

68 However, the license agreement being contractual in nature and not a statutory one, there cannot be any doubt or dispute that the Respondent had also its obligations thereunder.

69 It may, however, be placed on record at the outset that the license was granted for Digital "Public Mobile Radio Trunk Services" (Digital PMRTS). A specified technology known as Tetra based technology was to be provided by the Petitioner.

70 We may notice the pleadings of the parties.

In paragraphs 6 and 7 of the petition, it is stated :-

"6. The Petitioner submits that it is important to set out the details of TETRA based PMRTS, which the Petitioner is commissioning. This is a kind of Public Mobile Radio Trunking Services. The TETRA based PMRTS is the state of the art, sophisticated, customizable and secure mode of communication. This technology is intended for use in niche areas/industries/ customers in order to meet the requirements which the other mobile technologies like GSM/CDMA are unable to meet or where such services are unviable namely the following:

- (i) point to multi point communications;
- (ii) push to talk, release to listen;
- (iii) closed user groups;
- (iv) broadcast calls, etc.

PMRTS achieves efficient use of the spectrum and has its utility to industries like mining, steel, cement, public safety, construction, event management, ports etc. To put it in simpler words PMRTS is useful in a designated area where immediate communication is required either point to point or point to multi point securely and immediately. To illustrate, the police authorities use a dedicated wireless network and not the GSM/CDMA technologies since, given their peculiar needs and requirements, their wireless network is more useful, secure and effective mode of communication. Similarly, some of the heavy industries like mining etc. use conventional wireless communications since GSM/CDMA based communication do not serve their needs and requirements or that such technology may not be effective in the typical topography etc. The TETRA based PMRTS is a similar but far more sophisticated and secure technology, which enables and ensures instant, better, secure and seamless communication by

most efficient use of the spectrum. The Petitioner is annexing herewith as ANNEXURE P-3 a brief note on the TETRA based PMRTS technology to assist this Hon'ble Tribunal.

(underlining is ours)

7. The distinction between TETRA based PMRTS and other existing technologies like GSM and CDMA becomes more relevant since, in India, TETRA based PMRTS is a greenfield technology. As a matter of fact, no other entity except the Petitioner had applied for a License for PMRTS since it is required to be tested not only in its efficacy in the Indian conditions but also for its commercial viability. In other words, unlike GSM which has a ready market of users, PMRTS is a service *with* specialized features *and provided with* coverage as per the requirement of *users*. To put it loosely the TETRA based PMRTS would be akin to a small local exchange where one person within the user group is able to securely, regularly and effortlessly communicate with another person or with several persons with ease of a push of button on his wireless handset without having to rely on the GSM or CDMA or fixed line telephony. On account of its sophistry, the TETRA is also an expensive technology and, therefore, unlike GSM or CDMA technologies, it does not have general usage. Its utility is only in niche areas and industries, which require regular, seamless and secure communication within a group. Therefore, in order to commission this service, the Petitioner is required to first find the customers who are willing to *subscribe to this* technology and then customize and commission it for them for without a willing customer, thus service would be of absolutely no use."

71 In its reply, the Respondent stated :-

“Save and except what are the matter of record and what would appear therefrom each and every statement made in para-5,6,7 of the petition contrary thereto and inconsistency therewith is denied.”

The Respondent therefore did not deny the manner in which the system operates.

72 A question has been raised in this petition as to whether the digital PMRTS is technology neutral?

73 It can be both analog and digital. The digital technology, however, cannot be used for analog technology and vice versa. The terms of license having clearly stated that the Petitioner is to render digital PMRTS services and not the analog one.

74 The form of license granted to the Petitioner provides for both analog and digital. The word `analog` has, however, been deleted. The Petitioner, therefore, was granted license for use of digital technology only.

### **QOS Standard Issue**

75 The principal controversy between the parties is as to whether for the purpose of commissioning the service, it was obligatory on the part of the Respondent to prescribe QOS standard separately as is provided for in Clause 27 of the conditions of the license.

76 We have noticed heretobefore that Clause 27.5 clearly states that it is for the licensee to enforce and ensure QOS as prescribed by the licensor/ TRAI.

77 It is in that context that a question has arisen as to whether the 1998 TSTP could have been put to use, although, in 2010 a TSTP for digital technology has been issued.

78 Step 5 as noticed heretobefore speaks of both the tests as the case may be, meaning thereby that for digital technology a different test procedure would apply. It is also evident that rights and obligations laid down under both the systems are distinct and separate.

79 Submission of Mr.Mishra that having regard to the Clause 7.1 of the license, the Petitioner was bound to commission the applicable system within one year from the effective date of

license cannot be accepted as that would mean that the Petitioner as a licensee was to provide an effective commercial service to its customers, wherefor due intimation was required to be given to the licensor.

80 It is, not in dispute that for the purpose of issuance of such a certificate the TEC is required to formulate the basis in terms whereof the testing of equipments vis-à-vis the provisions of quality of service (QOS) could be tested; the date of test certificates issued being the date of commissioning of service.

81 It is difficult to conceive as to on what basis the licensee shall maintain the quality of standard (QOS) unless the norms/standards therefor are laid down.

82 Indisputably, the licensee has a duty to observe the standards and quality of service as envisaged under Clauses 27 and 32 of the License Agreement.

83 Concedingly any standard relating to quality of service must be commensurate with the conditions of license.

84 According to the Petitioner the 1998 TSTP does not satisfy the requirements of Clause 27 in as much as it does not lay down the QOS standard and cannot be said to be applicable in respect of the licenses granted to it; digital technology having come into being only in the year 2001.

85 In the 1998 TSTP, coverage criteria has been prescribed. The service area is defined as the geographical area covered by a radius of 30 k.m. from the base station or the city limits whichever is bigger.

86 We may also notice Clause 6 which reads as under :-

**"6. Coverage Test**

Testing party shall check that the system installed be designed in such a way so as to cover the service area. The service area is defined as the geographical area covered under the radius of 30 km from the base station or the city whichever is bigger. TEC shall take up tests only necessary tests indicating coverage tests are completed by operator and results submitted.

- a) Licensed area = 100%
- b) Area under receive level (street level) below 12dB above the sensitivity of the mobile station = x%
- c) Coverage area = (100-x)%

d) Max radial coverage distance (within the radius of 30 km or the city limits whichever is bigger)= km

e) Check that there is no spill over of signal at Indian side of International border.

(Map showing the field strength at different location actual street coverage both for mobile and hand-held ... based on the tests, shall be attached)”

87 Mr.Ruchir Mishra would contend that commissioning of service would not depend on TSPT prescribed in as much as the Petitioner cannot be permitted not to provide any effective service to the customers within one year from the date of grant of license.

88 On the other hand, Mr.Mehta submitted that keeping in view the nature of the conditions of license the definition of service area is alien to the license of the Petitioner.

89 In a given case the entire city may have to be covered as for example where the PMRTS is put in use by the police authorities but in another, it may not be necessary.

90 In a case where PMRTS is put in service for the purpose of use by a closed circuit group, within an establishment, it cannot

be expected that the coverage shall extend to 30 km beyond the entire city limit.

91 A licensee, Mr.Ruchir Mishra would urge must keep itself in readiness to render the services whenever a customer calls upon it to do so. The said contention leads to an impractical result, keeping in view the purport and object of the PMRTS license.

92 Submissions of Mr.Mishra that the difference in the percentage of coverage applicable to 1998 TSTP in respect of Panipat and Hazira, it cannot be said that the Respondent had in mind that the services had to be rendered in an area covering a distance of 30 km from the entire city and in the testing report submitted by the TEC in respect of Haryana circle contains an error which should mean that 30 km from the area shown by the Petitioner itself. This submission is contrary to record. No where the Respondent has taken the said stand.

It is not possible to accept the submission of Mr.Mishra.

93 Apart from the fact that the TSTP 1998 specifically mentions the city limits and furthermore such a criteria having

been specifically provided for therein and moreover; a large number of documents brought on record by the parties clearly go to show that 30 km from the city limit would be considered for the purpose of area of coverage, which term is inconsistent with the relevant terms of the license contained therein and in particular Clause 22.3 thereof.

94 It is, thus, not correct to contend that such a criteria had never been adopted.

95 It is only in this regard that this Tribunal is required to consider the interpretation of the license agreement.

### **Interpretation of the License Agreement**

96 It is now a trite law that a document, particularly, a contract must be interpreted having regard to the purpose and object for which it was entered into. It is also well settled that with a view to construe a commercial contract, commercial meaning to the words are required to be assigned.

The service area is stated to be the geographical boundary of the area within a metro/service area, services more specifically described in Annexure 1 which clearly means that the service area need not cover a distance of 30 km from the city limits.

97 It is also necessary to consider the scope of license. The Petitioner is required to utilize any type of network equipments, which must mean the relevant criteria laid down by the international standardization bodies.

98 Clause 6.1 obligates the licensee to be responsible for and is authorized to own install test and commission on the applicable system for providing the Public Mobile Radio Turnking Service under the license agreement.

99 Indisputably, under Clause 7.1 the licensee is to commission the applicable system within one year from the effective date of license. Commission of service would mean providing of an effective commercial service to the customers and due intimation thereof to the licensor.

100 Clause 27 obligates licensee to maintain the quality of services prescribed by the licensor/TRAI. Prescription of QOS, therefore, is imperative in character.

101 Clause 27.4 obligates the licensor/TRAI to carry out performance tests on licensee's network and evaluate QOS parameters in the network prior to grant of permission for commercial launch of the service.

102 Clause 32.1 obligates the licensee to supply the list of performance tests one month prior to the date of commissioning to the licensor which implies that within the aforementioned period the tests would be conducted. It is in the aforementioned context, we may notice as to how the TETRA services work for the purpose of rendition of PMRTS services.

103 We have no doubt in our mind that the standards of quality of services were required to be specified. It is, therefore, not correct to contend that QOS were not required to be specified nor the standards therefor were required to be laid down.

104 The Petitioner has pleaded with regard thereto in paragraph 6 of the petition. It has also explained in details as to what is PMR, trunking, PMRTS and for what it is required, particularly, the digital version. It has furthermore been pointed out as to what are the typical requirements regarding digital PMRTS services of the user and who are the potential customers of the PMRTS.

105 It has also specified as to how PMRTS in certain respects is different from Cellular in the following terms:-

<b>Features/Facilities</b>	<b>Cellular</b>	<b>PMRTS</b>
One to One Calls	Yes	Yes
One to Many Calls	No	Yes
Broadcast Calls	No	Yes
Coverage	National/Regional	Specific requirement as per operational requirements of organization
Reliability	Low	High
Call Setup time	Greater Than 300 ms	Lower than 300 ms with Instant Push to Talk
Priority Calls	No	Yes
Handsets	Hand portables for general use	Multiple configuration for specific use

		in industrial and harsh environments
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106 It also states as to what TETRA is in the following terms:-

## "TETRA

**Terrestrial Trunked Radio (TETRA)** (formerly known as Trans-European Trunked Radio) is an OPEN Professional Mobile Radio technology. TETRA was specifically designed for use by government agencies, emergency services, (police forces, fire departments, ambulance) for public safety networks, rail transportation staff for train radios, transport services, military and the Public Mobile Access Networks (PAMR).

TETRA is an European Telecommunications Standards Institute (ETSI) standard, first version published in 1995.

Advantages of TETRA :

- Spectrum Efficiency
- Digital Codec for Clear Voice
- Instant Push to Talk
- Security features
- Reliable Communication
- OPEN Standard – Allows Any TETRA end user devices to be deployed
- Voice and Non-Voice Services
- Available in harmonized frequency

band worldwide.”

107 We may also notice the definition of ‘services’ as contained in the License Agreement.

The same definition was assigned in the TRAI consultation paper.

It reads as under :-

“(i) A two way land mobile service in which users communicate among themselves through a pair of radio frequencies out of a pool in a designated frequency band, assigned to the system using and

(ii) the pair of frequencies is allocated on placement of call request and returned to the pool on completion of call and

(iii) the communication usually takes place through repeater through repeater station (also called base station). Once user is assigned a channel (a pair of frequencies) by the system, no one else can interfere with the communication.”

108 Clause 23 defines ‘customer’ to mean :-

“Customer means any person or legal entity, which avails of the Public Mobile Radio Trunk Service from the LICENSEE.”

109 On the other hand 'Captive Mobile Radio Trunking License' (CMRTS) Service is defined as meaning the license for those networks in which equipment and facilities are owned and operated by licensee itself for own use and does not include third party ownership and provision of services by or for third party.

110 The DoT itself has made a distinction between the terms CMRTS and PMRTS, the details whereof are available in its website. The distinction between the two types of services is obvious i.e. one where the customer itself is the licensee and the other where the services can be sought for by 'Public'.

111 The term PMRTS has been defined in Clause 21 of Annexure 7 appended to the license. The definition of the said term therefore, must be given effect to i.e. which inter alia is used as a two way mobile service in which users communicate amongst themselves.

112 Sub clause 3 of Clause 21 clearly states that no one else can interfere with the communication other than those which has been assigned a channel (a pair of frequencies).

113 We may also notice the Newton's Telecom Dictionary 26<sup>th</sup> Edition, wherein the terms PMR, SMR and TETRA are defined as under:-

**Public Mobile Radio (PMR)** – The European term for what we call Specialized Mobile Radio (SMR) or Trunk Mobile Radio (SMR) in the US.

**Specialized Mobile Radio (SMR)** - Also known as PAMR (Public Access Mobile Radio), PMR (Private Mobile Radio), TMR (Trunked Mobile Radio), and TRS (Trunked Radio System). A two-way radio telephony service making use of macrocells covering an area of up to 50 miles in diameter. The first SMR system was placed in service by the Detroit police department in 1921. The first commercial SMR service was offered in 1946 in St. Louis by AT&T. Subsequently, private SMR was widely used, and still is, in dispatch applications by truck and taxi fleets. Eventually, SMR took the form of IMTS (improved mobile telephone service), which used smaller frequency channels in support of many more conversation through improved efficiency. Many SMR operators have converted their SMR network to digital so they can deliver both voice and data to a single device with improved efficiency and security, and thus compete with cellular and PCS radio providers. SMR systems have far less radio spectrum than cellular has, but the signal can reach 25 times farther, which means it's cheaper to build a national network. In the U.S., the frequency bands used by SMR include 220 MHz, 800 MHz and 900 MHz.

**Terrestrial Trunked Radio (TETRA)** - An European Telecommunication Standards Institute (ETSI) standard for the type of mobile radio known variously in the US as TMR (Trunk Mobile Radio) and SMR (Specialized Mobile Radio). The typical application for such system is in local

communication with fleets of vehicles, such as taxicabs, fire trucks, police cruiser, and emergency vehicles. TETRA divides these applications into PAMR (Public Access Mobile Radio) and PMR (Private Mobile Radio). PAMR includes applications such as fleets of taxicabs, delivery vehicles and utility vehicles. PMR applications include fleets of public service and emergency vehicles. TETRA combines the features of mobile cellular telephony, fast data communication and the workgroup capabilities of mobile radio. A measure of the reliability and range of functions of the TETRA standard is that it has already been adopted by many public safety and emergency organizations. The technology behind TETRA creates new standards of network service and functionality at a cost effective price. It gives you "press-to-talk" instant call set-up for individual and group calls as well as the expected added value features found in any advanced mobile network. TETRA operates on a simplex (one way communication) basis, making use of TDMA (Time Division Multiple Access) for digital communications over 25 kHz channels in the 400MHz frequency band. The 400MHz frequency band supports good signal propagation over relatively long distances, compared with the GSM band of 900MHz. TETRA's packet data transfer operates at up to 28.8 kbps through the concatenation of four digital time slots. This, together with the short data service (text and numeric messaging), provides the fastest and a flexible mobile data transfer capability available. SDS allows the transmission of four different message types, with Type 4 supporting data transfers up to 2047 bits, which is approximately 256 bytes (i.e., characters). Advanced TETRA technology delivers great voice quality which is especially impressive in noisy industrial environments and in – car, hands-free operation. TETRA operates in both the "open channel" mode and the Direct Mode. The open channel allows all terminals to hear all communications, which are handled through a centralized dispatcher. The Direct

Mode is a “walkie-talkie” mode that allows direct operation between terminals. The TETRA Memorandum of Understanding (MoU) was established in December 1994 to create a forum which could act on behalf of all interested parties, representing users, manufactures, operators, test houses and telecom agencies. Today the TETRA MoU represented 58 organizations, from 19 countries.

114 It is axiomatic that it cannot be used by a person who don't form part of the group. It is, thus, also incorrect to contend that any person i.e. even a single person within the circle area can demand the services thereof.

115 Moreover, the dictionary meaning of the said word clearly suggests that the frequency would be in a designated band assigned to the system user.

116 A customer may be a person or a legal entity but he must be able to communicate with others forming the group who would communicate amongst themselves having the designated frequency band.

117 The PMRTS license, therefore, is not an usual license where the licensee is required to comply with its roll out

obligations. If it has no roll out obligation, there cannot be any doubt or dispute that it has to install equipments not only keeping in view the requirements of its customer(s) and the area within which the customer intends to avail the services, but the same would also depend upon the frequency allotted to the licensee.

118 A license agreement being contractual in nature, in the event the terms and conditions are unduly harsh or otherwise unconstitutional and/or are vague, interpretation thereof must be made having regard to the text and context of the thereof.

119 The purpose for which such a license has been granted should be uppermost in the mind of the parties to the license.

120 If it is meant to be used by a close circuit group, the instruments are required to be imported keeping in view the requirements of the customer. If a customer requires the PMRTS for putting the same in use only in his factory, industrial area, mine etc, the QOS will have to be judged keeping in view the requirements of the customer.

121 There is another aspect of the mater which cannot also be lost sight of.

122 If the 1998 TSTP was sufficient and applicable to digital technology also, there was no reason as to why 2010 TSTP had to be brought in place.

123 It furthermore appears that even 2010 TSTP also was provisional in nature and not final.

It may, however, not be necessary for us to consider the same as at present advised.

124 The understanding of the Respondent in this regard is also relevant.

125 Before us, the Respondent with its reply has produced a letter of DoT addressed to the TEC on 14.9.2011 (Annexure R-4) from a perusal whereof it appears that finalization of TSTP was pending with it at least in respect of Karnataka (Bangalore), Maharashtra (Pune), Andhra Pradesh and Bihar.

126 So far as Hazira establishment of the Petitioner at Gujarat is concerned, it was stated that TSPT condition had been complied with.

127 Although, service approval certificate was yet to be issued by the TEC insofar as the Panipat establishment of the Petitioner is concerned, it was stated that only 20% of the area in the district is covered and the remaining area of Panipat is yet to be tested.

128 It is, therefore, evident that even according to the TEC the test schedule was issued only on 22.12.2010, which was considered to be the basis for registering the commissioning of the service.

129 It may furthermore be placed on record that by a letter dated 1.12.2010 the TEC asked the Petitioner to submit the application as per the revised version of digital PMRTs, issued from the office of DDG, N Group.

130 By reason of a letter dated 3.12.2010, the TEC asked the Petitioner as regards service approval of PMRTs site in Pune,

stating "latest revised version of digital PMRTS issued from DDG, N Group issued from TEC Headquarter is not attached".

131 In a letter dated 12.9.2011 the ADJ, NW of the Respondent stated as under :-

".. Kindly refer to your office letters mentioned above on the subject. You are requested to depute your Technical Team for offering all Service Approval Tests w.e.f. 25<sup>th</sup> September 2011 onwards as per the TEC Provisional TSTP No. TEC/TSTP/SR/PMRTS-001/01 DEC-10 of your offered Digital PMRTS System at Hazira in Surat (Gujarat) with two BTS sites. The waiving of parameters, if any, will be examined on site during the Inspection/Testing only. Please ensure that each and every Clause of the Provisional TSTP is Tested in advance and test results may be kept ready for confirmation by the testing team."

132 It is also pertinent to note the service report dated 23.3.2012 in respect of the Hazria site, the relevant portion whereof reads as under :-

1.1	Name & address of the Service Provider.	M/s Inative Networks Pvt. Ltd., Level 3, Charmwood Plaza, Eros Garden, Faridabad, Haryana-121009.
1.5	Test conducted by	RTEC, Mumbai with TEC HQ 'N' Group
1.6	Test Schedule No.	TEC/TSTP/SR/PMRTS-001/01 Dec-10

133 The 2010 TSTP being provisional in nature, the same was to be finalized by the TEC based on the first case of testing one of the sites of the Petitioner before decentralization of testing to the TERM Cells.

134 It is borne out from the record that the Petitioner had written to the Respondent commenting upon the said TSTP and asking for finalization thereof, in terms of the following communication:-

“

Dated: 3.1.2011

We are thankful for providing us the copy of the provisional Test Schedule for Service Testing of Digital PMRTS network No. TEC/TSTP/SR/PMRTS-001/01 DEC-10 during the meeting held at your HQs on 30.12.2010. On scrutiny, we observe that even this document needs further revision. Our observations/comments are enclosed herewith as Annexure-1 for due consideration at your end.

Further, as discussed, we are organizing demonstration for the log processing procedure at Faridabad for 6<sup>th</sup> Jan 2011. You are requested to kindly depute your officials for this demo so that the same procedure could be adopted for all future Drive Tests for a number of sites lying ready in various telecom circles.”

135 we have noticed before that the Petitioner in its letter dated 1.3.2011 that final request for extension shall be final after the final TSTP is put in place. It was inter alia stated :-

“We are now given to understand that since it is for the first time when TETRA based PMRTS Services are being rolled out in India, the TSTP is likely to be finalized only on completion of testing at Panipat in Haryana and Surat in Gujarat telecom circles. We look forward to TEC’s approval for the final TSTP document so that we may thereafter firm up our schedule for Service Approvals for a number of sites lying ready to be commissioned.

Therefore, once all the pending issues are resolved and clearance obtained from TEC, we shall render our formal request for extension. Notwithstanding above, kindly allow us to continue our progress in various activities involved in successfully rolling out our Network Services.”

The parties meet on 20<sup>th</sup> and 21<sup>st</sup> April, 2011.

136 Yet again by a letter dated 2.5.2011, it was brought to the notice of the Respondent by the Petitioner that some of the clause of TSPT were not suitable.

137 In terms of its letter dated 11.8.2011, the Petitioner called upon the Respondent to issue test certificate as the final approval TSTP.

138 We may also notice the letter dated 1.3.2011, which inter alia reads as under :-

“You will appreciate that the actual users for these services are large industries and Business Houses like Airports, Ports, Steel & Power Plants, Refineries and Mines etc. having bases mostly at remote and inaccessible locations. Incidentally, there had been worldwide recession, which adversely affected early adaption of this technology by these users despite our huge investment in Infrastructure, efforts and other resources. Thus, there had been delays in Delivery of Services for reasons well beyond our control and this aspect had also been deliberated at length during our meetings held at your HQs in the past.

Gradually, on reviewing our progress, you had very kindly agreed to grant extension initially for Six Telecom Circles till 09.12.2012 vide your letter dated 27.09.2010. We remained quite hopeful that we would be able to Commission Services in all the Six Telecom Circles after TEC testing is completed successfully and well within the extended time period.

On receipt of the desired extension, we applied all our resources to ensure timely completion of all the testing and starting to offer our sites one after another to TEC for their testing. While two of our cases were registered and taken up for testing, the other two were not even registered. The reasons offered by TEC(WR) was that we did not follow the revised TSTP meant for Digital PMRTS while TEC(SR) opted to seek further clarification from HQs. Copies of relevant letters issued by them are attached herewith as Annexure-I.”

139 The Petitioner also in its letter dated 4.11.2011, stated :-

“ It has been our endeavour to successfully launch our services in all the Licensed Service Areas within stipulated time frame. We have already incurred huge investment and made substantial progress in various related fields leading to the effective Delivery of Services. However, despite our sincere efforts, there had been delays for reasons well beyond our control and we would solicit additional time and support from your departments in fulfilling our licensed obligations.

We, therefore request for a brief meeting as per your earliest convenience to discuss and present our progress report for your kind appreciation. Our Managing Director would also be present.”

140 In its letter dated 6.12.2011, the Petitioner stated :-

“ This is in furtherance to your letter of even reference dated 2<sup>nd</sup> Nov 2011 and discussions undersigned held with you on 25<sup>th</sup> Nov 2011.

As intimated, we had offered our Bangalore Site for Service Approval to TEC(SR) vide our letter dated 8<sup>th</sup> Nov 2010. However, the case could not be pursued further pending certain clarifications from your HQs. Copy of letter dated 18<sup>th</sup> Feb 2011 received from TEC(SR) is enclosed herewith as ready reference.

Furthermore, we had also offered of Pune Site to TEC (WR) vide our letter dated 25<sup>th</sup> Oct 2011 along with DD and copy endorsed to you. However, our case was not registered for certain discrepancies w.r.t TSTP. Copies of relevant letters received from TEC (WR) are also enclosed herewith.

We now need to reoffer these sites after obtaining necessary approvals from DoT. You are therefore requested to kindly provide updated status of TSTP and revised schedule for conducting testing of various sites to enable us to obtain one time extension from DoT.”

141 By a letter dated 22.12.2011, the Petitioner re-offered its site for testing by the TEC:-

142 It does not appear that any one of the said letters had been responded to.

143 The Petitioner was to commission the services by 9.12.2010 in respect of six circles and by 13.8.2009 in respect of the rest 11.

144 The TSTP has concedingly been released only on or about 22.12.2010 i.e. after the expiry of the respective date(s) specified for commissioning of services. If the Petitioner was required to install the equipments which were to be tested on the basis of 2010 TSTP, the order of cancellation of the license cannot be sustained.

145 Moreover, the coverage test prescribed in 2010 TSTP provides for coverage criteria which is not to be found in the license agreement. The coverage test furthermore does not provide any norm like the area of coverage.

146 Thus, no basis has been laid down for the purpose of testing the quality of services required to be rendered by the Petitioner.

147 The coverage criteria, indisputably, has a great role to play in the matter to testing of the equipments installed by a licensee.

148 From the application filed by the Petitioner and the technology to be applied being `TETRA', it does not appear that any basis has been prescribed therefor.

149 Service quality criteria was not prescribed in the license or in the 1998 TSTP.

### **The applicability of 1998 TSTP**

150 Indisputably, the Panipat site of the Petitioner was inspected on the aforementioned basis. The said TSTP was not applicable with regard to the digital technology. A standard of quality was required to be prescribed; the parameters thereof were required to be laid down. The commissioning of services would be possible only when a criteria of QOS is met by the licensee.

151 We may notice that the show cause notice was based on TSTP 2010 and in the case of Maharashtra contending that the Petitioner did not get itself registered with the TEC.

### **Termination of licenses**

152 The cause of termination of license is said to be failure on the part of the Petitioner in commissioning of the sites.

153 What would be the commercial meaning of 'commissioning of services' has been noticed by us heretobefore.

154 It was dependent upon issuance of test certificate. The said test certificate indisputably would relate not only to the

quality of apparatus/ instruments installed by the Petitioner but also the quality of service including the coverage thereof.

155 There exists a distinction in the 1998 and 2010 TSTP, sofar as the coverage criteria is concerned. If a literal meaning is given to 1998 TSTP, not only the coverage must be the whole city but also 30 kms. beyond the same.

156 The coverage tests contained in 1998 TSTP and 2000 TSTP may be compared :-

<b><u>1998 TSTP</u></b>	<b><u>2010 TSTP</u></b>
<p data-bbox="470 1191 746 1227"><b><u>Coverage Test</u></b></p> <p data-bbox="322 1272 794 1982">The coverage test may be conducted as per guidelines enclosed in Annexure 'E' and the coverage in percentage be calculated below. Testing party shall check that the system installed be designed in such a way so as to cover the service area. The service area is defined as the geographical area covered under the radius of 30 km from the base station or the city whichever is bigger.</p> <p data-bbox="370 1989 794 2020">a) Licensed area =</p>	<p data-bbox="957 1191 1233 1227"><b><u>Coverage Test</u></b></p> <p data-bbox="821 1272 1308 1438">All data shall be collected using drive test tool (auto mode) in the mobile test van during drive test.</p> <p data-bbox="821 1482 1308 1944">The coverage test may be conducted as per guidelines enclosed at Annex-A and the coverage in percentage to be calculated as below. TEC shall take up tests only after necessary tests indicating coverage are completed by operator and results submitted to TEC</p> <p data-bbox="837 1989 1189 2020">I. Computation of</p>

<p>100%</p> <p>2</p> <p>b) Area under receive level (street level) below 12dB above the sensitivity of the mobile station = x%</p> <p>c) Coverage area = (100-x)%</p> <p>d) Max radial coverage distance (within the radius of 30 km or the city limits whichever is bigger)= km</p> <p>e) Check that there is no spill over of signal at Indian side of International border.</p>	<p>Coverage Area:</p> <p>a) Total Bin Counts RSSI &gt;= -93dBm = X</p> <p>b) Total Bin Counts RSSI &lt;= -93dBm = Y</p> <p>c) Total Percentage of Coverage Area = <math>\frac{X \times 100\%}{(X+Y)}</math></p>
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157 It may be reiterated that it is not a case where the Petitioner in terms of the license was required to cover the entirety of the town by installing requisite equipments/ BTS so as to comply with its roll out obligations.

158 The reasons now sought to be assigned by the Respondent in its reply were not mentioned in the order terminating the licenses.

159 In some cases e.g. Petition No.236/2012 the licenses has been terminated although, frequencies had not been allocated.

160 Sofar as the submission of Mr.Mishra to the effect that 1998 TSTP and 2010 TSTP cannot be a reason of the licensee not to keep itself in readiness for rendition of services to the public at large is concerned, the same cannot be accepted for more than one reason.

161 It is true that Clause 7.1 of the license provides for one year's time to provide the services but for that purpose the nature of services also must be borne in mind.

162 The Petitioner had kept on apprising the Respondent of the progress as also the investments made by it from time to time. Upon receipt of the reply from the Respondent, it imported equipments from aboard. It offered at least three sites for inspection. We have noticed heretobefore the standard of quality of service had not been prescribed.

163 So far as the 2010 TSTP vis-à-vis the conditions of license is concerned, it is evident that the license does not provide for any condition with regard to coverage.

The Petitioner has pleaded in clear terms that having regard to the coverage area as prescribed TSTP 2010 vis-à-vis the TETRA technology used therefor, it would not be possible to comply with the said coverage criteria. The necessary averments in this behalf have been made in paragraphs 2.3, 4, 15, 24, 26, 28, 29, 30, 34 and 37 of the Petitioner as also in the rejoinder to the license in paragraphs 3.0 to 3.7 and 3.21.

164 We may notice only some of them :-

26. On 7.12.2010 the Petitioner wrote to the TEC seeking urgent finalization of the TSTP and also clarifying that the provisional TSTP was not meant for TETRA based PMRTS. A copy of the letter dated 7.12.2010 is annexed herewith as ANNEXURE P-18. The Petitioner again wrote to the TEC on 16.12.2010 reiterating its request for finalizing the TSTP. A copy of the letter dated 16.12.2010 is annexed herewith as ANNEXURE P-19. Yet another request was made on 3.1.2011 a copy where is annexed herewith as ANNEXURE P-20.

37. The Petitioner was placed in a peculiar position. On the one hand, it had bonafide installed the equipment and taken irretrievable efforts to operationalize the licensed service, yet on the other hand, the Respondent and TEC

were acting at variance with the terms of the license. The TSTP had not been finalized and so there was no final testing criterion for testing the service. In the meantime, as a test case, the Petitioner had already operationalized the licensed service at Gujarat and Haryana sites and its customers were satisfied with the service. As a sample, a representative copy of an invoice dated 20.8.2010 raised by the Petitioner on one of its customer in Maharashtra circle is annexed herewith as ANNEXURE P-31.

165 The Respondent in its reply does not specifically deny or dispute the said contentions.

166 In fact some of the paragraphs have been travarsed in a general and vague manner.

167 We, therefore, have to proceed on the basis that the said averments have not been denied. They, in any event must receive our due consideration.

168 The coverage criteria is the centre point of the provisions of license. If the license does not contain any clause stipulating the coverage which are required to be made, by reason of TSTP the same cannot be laid down. All circular letters guidelines or clarifications, it is trite, must be subservient to the terms and

conditions of license. By reasons of such circulars etc, no new term can be laid down.

169 We, therefore, are of the opinion that there is mismatch between 1998 TSTP and 2010 TSTP vis-à-vis the conditions of license.

### **Is TSTP relevant ?**

170 Sofar as the contention of Mr.Mishra that the TSTP 1998 and TSTP 2010 are wholly irrelevant for the purpose of compliance of the obligations on the part of the licensee to commission of its services is concerned, we are of the opinion that the same does not have any force. It is moreover, not one of the grounds stated in the show cause notice.

171 Furthermore, Clause 7 of the license agreement specifically provides that the date of test certificate issued by the TEC of DoT be reckoned as the date of commissioning of service and no service could have, thus, been commissioned unless the test certificate was issued by the TEC. It is therefore axiomatic that no certificate could be issued unless the criteria therefor were laid down and consequently complied with.

172 Furthermore, Clause 27 provides for quality of performance. Clause 27.4 refers to 'specified standards of QOS'. Clause 27.5 also provides for QOS as prescribed. Clause 32 also specifically refers to inspection and testing of installations.

173 We are, however, not oblivious of the fact that even before obtaining a certificate of the TEC, commercial operation was permissible.

174 As subject to just exceptions, the licensee was not required to supply the connectivity to any customer whosoever approaches it therefor but it was supposed to cater to the need inter alia, of only a group of customers, who would have the requirements of communicating to each other, the same not accessible to the members of general public.

175 Even allocation of frequency in different districts could be different i.e. depending upon the availability thereof. There cannot be any doubt or dispute that instruments are required to be procured only after the frequencies are allocated.

176 If no frequency is allocated, the question of commissioning the services would not arise. However, it was for the licensee to apply for allocation of frequency.

177 To the Respondent's show cause notices dated 28.9.2011, 30.9.2011 and 4.10.2011, the Petitioner contended by its letter dated 10.10.2011 that it was provided with the TSTP after the date of commissioning of service in terms of the license although the said was yet to be finalized.

178 No reply was given to the said letter. No hearing also was provided.

179 The Petitioner sought for updated status of TSTP and revised schedule for testing of Pune and Bangalore sites, to which also the Respondent did not respond.

180 The Petitioner is said to her commercially launched its service in Bangalore, Maharashtra, Madhya Pradesh, Gujarat, and Haryana, (although, in this batch of petitions, this Tribunal is concerned with Maharashtra, Gujarat and Haryana). The Petitioner had also been communicating with regard to the progresses made by it.

181 It has not been demonstrated before us that apart from TSTP any other document contained the requirements of ascertaining the quality of service rendered by the licensee.

182 A commercial launch does not by itself would mean commissioning of services.

If a test certificate is not granted, the commercial activities of the licensees would come to an end. The licensee, therefore, must know where it stands.

183 The license provides for quality of service (QOS). Such QOS is required to be provided by the licensor/ TRAI in terms of Clause 25 of the license agreement. For the purpose of meeting the need of its customers, the Petitioner must satisfy the parameters of the QOS which was, thus, required to be specified by the appropriate authority. Only when norms are laid down and/or the parameters of QOS are specified, the question of the licensee's complying therewith would arise.

184 The 1998 TSTP did not prescribe the parameters of QOS. It also provides for close user group. In respect thereof the

satisfaction of the authority cannot be arbitrary. It must be based on an objective criteria as otherwise there would be no basis in terms whereof the test certificates would be issued and the requirements of the terms of the license agreement would be met.

185 Our attention has been drawn to the certificates issued by the appropriate authority in respect of the 'Panipat' refinery and the Hazira establishment of the Petitioner.

186 In the former case the Respondent stated that only 20% of the outer limits fixed by 1998 parameters have been satisfied i.e. requirement of coverage of the areas at a radius of 30 kms distance has been considered from the city limits, but in the case of Hazira 95% coverage is said to have been covered which took into consideration the limit to be 30 km. from the base station.

### **2010 TSTP**

187 Keeping the aforementioned backdrop in mind, we may notice the 2010 TSTP. The coverage criteria contained therein provides that the coverage TSTP conducted as per the

guidelines as contained in the Annexure A. Clause 8 of the 2010 TSTP reads as under :-

8.	Whether Vector Map showing the coverage based on RSSI as per the test conducted by the operator for each BTSs is enclosed. This map is obtained by superimposing the drive test results on the city map.	Yes/No
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Chapter II provides for the coverage tests.

It reads as under:-

## **Chapter – 2**

### **COVERAGE TEST:**

All data shall be collected using drive test tool (auto mode) in the mobile van during drive-test.

The coverage test may be conducted as per guidelines enclosed at Annex-A and the coverage in percentage to be calculated as below. TEC shall take up tests only after necessary tests indicating coverage are completed by operators and result submitted to TEC

#### **I. Computation of coverage Area:**

- a) Total Bin Counts for  $RSSI \geq -93dBm = X$
- b) Total Bin Counts for  $RSSI \geq -93dBm = Y$
- c) Total percentage of coverage Area =  $\frac{X \times 100\%}{(X+Y)}$

(Map showing the field strength at different localities and actual coverage based on the tests shall be attached).

188 Clause 3 under the heading guidelines for conducting coverage test, it is provided :-

### **“3.0 Data Collection**

#### **3.1 General**

All data shall be collected using drive test tool (auto mode) in the mobile test van during drive-test. Manual calls shall be done for conducting the service qualities tests and shall be recorded in Annexure.

#### **3.2 Setting and configuration**

The drive test shall be conducted using test mobile van fitted with external antenna on the van roof top. Before starting the test, following shall be checked:

- i. Make, Name and version number of the drive test tool.
- ii. Make and model number of the test mobile used.
- iii. Whether the test mobiles brochure is enclosed.
- iv. Whether GPS antenna is fitted on the roof top of the mobile test van.

Test calls would be conducted.

#### **3.5 Test using Drive Test Tool**

Data shall be collected by setting up calls while travelling across the mutually agreed test drive route as already mentioned in para 2.3.”

189 Form A1 attached to the application for service approval  
inter alia provide :-

“6. Model/Software Version No. of the equipment used in the service including the Terminal used for provision of service to customer.”

190 Paragraph 44 providing for capability of essential teleservices (switch to connect the emergency/important agencies like CBI, enquiry police control, fire, railways, ambulance, railways, air, road etc.)

191 It is stated that the Petitioner has not satisfied the said criteria.

192 We may in this connection notice Clause 28 of the license agreement. It reads as under :-

**“28 Emergency and Public Utility Services :**

28.1 Licensee shall independently provide all emergency and public utility services to its subscribers, including directory information services with names and address of subscribers.”

193 Chapter 1 of the said document provides for DTHS verification test. Coverage test has been provided in Chapter 2, Chapter 3 provides for service testing service quality. In the

column of service quality, the data is required for the entire city.

194 We may in this connection notice the relevant pleadings of the parties.

“29. ... The so called ‘provisional’ TSTP was not in relation to TETRA based PMRTS and hence had little relevance to the services being installed and commissioned by the Petitioner. Moreover, the various regional offices of the Respondent were clueless about this document. While Western Region took one position, the Southern Region took another. Suffice it to state that there was no clarity as to the parameters on which the Petitioner’s equipment and services would be tested.”

The Respondent in its reply stated :-

“19-33 Save and except what are the matter of record and what would appear therefrom each and every statement made in para 19 to 33 of the petition contrary thereto and inconsistency therewith is denied. The Respondent served a notice dated 30<sup>th</sup> September, 2011 asking the Petitioner to explain why their above mentioned license agreement for the service area of Maharashtra should not be terminated for non-compliance of para 7.1 of the terms and conditions of license agreement.”

195 In its rejoinder to the reply the Petitioner contended :-

“3.3 It is axiomatic that since the TSTP is to ‘test’ and ‘certify’ the services to be commissioned by the Petitioner under the license agreement, it (i.e. TSTP) must conform in all respects to the technical parameters provided under the license agreement. In other words, since TSTP is the testing procedure, it is meant only to test the services to be commissioned by the Petitioner as per the terms of the license agreement. The TSTP cannot go beyond the terms of the license and provide additional or independent technical parameters. However, this is precisely where the problem lay. Not only did the Respondent failed to provide the TSTP, but it also provided a provisional TSTP on 22.12.2010 which is facially at variance with the terms of the license agreement. The Petitioner is, thus, caught in a peculiar situation. On the one hand, its services cannot be said to have been commissioned until they are tested and certified by the TEC in accordance with the TSTP and on the other hand, the Respondent has failed to provide any TSTP conforming to the conditions of the license. Yet, for the fault of the Respondent, the Petitioner has been penalized by termination of its license.”

### **QOS vis-a-vs Application filed by the Petitioner**

196 The Petitioner furthermore in several letters inter alia being dated 13.7.2007, has specifically sought for the details of the standard of QOS.

197 If the contentions of Mr.Mishra are correct, there was no reason as to why the licensee would have mentioned with regard to the quality of services; the license having been issued subsequent to the filing of the application for grant thereof by the Petitioner.

Termination of licenses, therefore, was not justified.

### **Whether Time Was of the Essence of Contract**

198 So far as the applicability of the doctrine that 'time was of essence of the license agreement' Mr.Jayant Mehta urged that in a case of this nature, time was not the essence of the contract.

199 Learned counsel in this behalf relied upon the decisions of McDermott International Inc. vs. Burn Standard Co. Ltd. and Ors. reported in (2006) 11 SCC 181 Madhya Pradesh Housing Board vs. Progressive Writers and Publishers (2009) 5 SCC 678 and in , Man Kaur (Dead) by Lrs. Vs. Hartar Singh Sangha, (2010) 10 SCC 512

200 We are, however, of the opinion that the said decisions are not applicable in the facts and circumstances of this case.

201 In MPHB (supra) the Apex Court was dealing with an award made by an Arbitrator in regard to a dispute relating to construction of a building.

202 Therein it was stated:-

**"37.** It is further held in *Swarnam Ramachandran case* that: (SCC pp. 689g-690b)

"Whether time is of the essence is a question of fact and the real test is the intention of the parties. It depends upon the facts and circumstances of each case. In cases where notice is given making time of the essence, it is the duty of the court to examine the real intention of the party giving such notice by looking at the facts and circumstances of each case. The intention can be ascertained from:

(i) the express words used in the contract;

(ii) the nature of the property which forms the subject-matter of the contract;

(iii) the nature of the contract itself; and

(iv) the surrounding circumstances."

203 In Man Kaur (supra) the Supreme Court was dealing with a case relating to specific performance of a contract of immovable property.

204 The question as to whether the time is essence of contract has been considered only from that angle.

205 In *McDermott (supra)* the Supreme Court was again considering the validity of an arbitration award. The question was whether the second part of Section 55 of the Indian Contract Act or the Ist Part thereof could apply to the fact thereof. The Court opined that the second part of the Section 55 of the Act would be attracted and not the first one.

206 Grant of license by the Union of India stands on a different footing. Subject to the construction of document, the purpose thereof and the context in which the same had been executed would be the key factors for determination of the question.

207 It is one thing to say that keeping in view the requirements as laid down by the Respondent itself, commissioning of service within one year would not have been possible but it is another thing to say that in case of grant of license, Section 55 of the Contract Act *stricto sensu* would be applicable.

208 A default on the part of the Respondent in performing its contractual obligation would not attract the said provision. The licensee may become entitled to extension and/or in a given situation termination of the license may be held to be illegal, but that would be a separate issue. We, therefore, are of the opinion that the said provision of law is not attracted in the instant case.

### **Estoppel Issue**

209 Submission of Mr. Mishra that the Petitioner having submitted itself to the authorities of TEC to get the Panipat site inspected on the basis of 1998 TSTP and having failed to raise the said issue in its various communications and in particular its applications for grant of extension and it is, thus, estopped and precluded from doing so in this petition cannot be accepted.

210 We may in this regard notice that the Respondent in its letter dated 19.9.2011 specifically referred to the status of TSTP in the following terms :-

#### **" Status of TSTP**

Remarks of M/s Inative Networks Pvt. Ltd that Commissioning of services in 6 circles are pending mainly on account of delay in finalizing TEC TSTP (Test Schedule and Test Procedure) document are incorrect and misleading. The Test Schedule No. TEC/TSTP/SR/PMRTS-001701

DEC-10 was issued on 22.12.2010 and is the basis for registering the above cases by TEC. This is evident from all the correspondence done by the applicant with TEC as well as CS Cell. 'Provisional' status of this TSTP will be removed after completion of the First case Testing. This is an internal Procedure of TEC to find tune the TSTP based on the First Case Testing, before Decentralization of the testing by RTECs and hence finalization of TSTP is in no way related to commissioning by M/s Inative. The Status of Provisional TSTP has not changed since M/s Inactive has not completed the First Case Testing so far and no other service provider has offered the Digital PMRTS for Testing.

This has the approval of the Competent Authority."

211 It is, therefore, axiomatic that the Respondent has relied on the 2010 TSTP; its understanding being that the same was applicable. Moreover, the basis for commissioning of service was required to be laid down in terms of the conditions of license, the same being fundamental thereto as also being the contractual obligations on the part of the licensor, it cannot be permitted to take recourse to a procedural plea of 'estoppel'.

212 The matter might have been different, if keeping in view the interest of customer of a PMRTS service and in terms of the provisions of the license no criteria as regards the QOS was laid down.

213 It will bear repetition to state that in respect of Pune site, the application for registration of the Petitioner having been returned on the premise that the tests laid down under 2010 TSTP were not satisfied it does not lie in the mouth of the Respondent that TSTP 2010 was wholly irrelevant.

214 The Respondent, itself cannot be permitted to approbate and reprobate at the same time.

215 So far as the applicability vis-à-vis coverage criteria is concerned, the Respondent had asked for the municipal map of the DHQ and furthermore asked the Petitioner to indicate its BTS sites purported to be in terms of IOS 9001 2008.

216 Furthermore, the Respondent itself by a letter dated 1.12.2010 categorically informed the Petitioner that the check list as per approved test schedule had not been attached by it along with its application for testing by the TEC as per the latest revised version of digital PMRTS issued by the DDG (N Group) TEC Test Headquarter being the 2010 TSTP.

217 It goes without saying that there is no communication was made to the Petitioner so far as the said TSTP coming into effect from 22.12.2010 is concerned .

218 Sofar as the Panipat site of the Petitioner is concerned, it was registered on 26.10.2010 purported to be relying on or on the basis of the 1998 TSTP; whereas the representatives of the Respondent insisted on applicability of the revised TSTP while making inspection of the Hazira site of the Petitioner.

219 Mr.Mishra would contend that the coverage area was shown to be more than 93% by way of concession. It is difficult to accept the said plea as the licensor is not supposed to change its stand relying on or on the basis of a request made by a licensee which would be contrary to or in consistent with its own case.

220 From the discussions made heretobefore it is evident that the licensor was to provide the standard/norms of the quality of supply.

221 There exists some difference in the standard specified is and TSTP 1998 and TSTP 2010. In fact at the time, when TSTP

1998 was brought in, the Respondent could not conceive that the digital technology would be governed in the matter of PMRTS service, it having come in to being in 2001.

### **Natural Justice Issue**

222 The question which require consideration in as to whether in the aforementioned fact situation, the termination of the Petitioner's license can be sustained inter alia on the premise that it was not offered on opportunity of hearing.

223 In a case of this nature we are of the opinion inter alia having regard to the facts and circumstances of the case and furthermore the nature of technology used being a new one, the Respondent ought to have complied with the principles of natural justice.

224 Mere issuance of a notice to show cause is our opinion was not enough. The Petitioner filed its show cause. It was, thus, necessary for the Respondent to assign reasons as to why the explanation furnished by it were not acceptable.

225 It is a matter of some significance to notice that although licenses expired on 3.3.2011; a show cause notice was issued only in September 2011.

226 No reason has been assigned as regards delay in terminating the license. The Petitioner in the meantime is said to have made further investments. According to it, it was induced to do so. This aspect of the matter also was require to be taken with consideration.

227 In any event after 9.12.2009, keeping in view the stand taken by the Respondent, it can be assumed that no registration was granted.

228 The Petitioner by its letter dated 10.10.2011 submitted a detailed reply. Again by a letter dated 4.11.2011, it sought for an opportunity of hearing. It raised a connection that in the event of finalization of the TSTP, the sites would be offered for inspection. Neither any response to the Petitioner's

aforementioned letter dated 10.10.2011 was made nor its request for an opportunity of being heard was considered.

229 Yet again by a letter dated 6.12.2011 the Petitioner requested the Respondent to let it know as to when it would finalize its TSTP; whereto also no reply was given.

230 Similar letters were issued on 22.12.2011 whereto again the Respondent did not send a reply. We, therefor, are of the opinion, is the peculiar facts and circumstance of the case, the Petitioner was required to be given an opportunity of hearing.

### **Bank Guarantee Issue**

231 One of the contentions raised is as to whether in the aforementioned situation the bank guarantees furnished by the Petitioner could have been invoked.

232 There does not appear to be as provision therefor in the license but the Respondent did so by its letter dated 18.1.2012.

It must be held to be impermissible in law.

### **Spectrum-non-grant-Issue**

233 Sofar as the licensees in respect of Orissa and Rajasthan are concerned, the Petitioner could commence its operation only when the guidelines operating licenses for use of spectrum were to be issued. If no spectrum has been allocated, the question of rendering any service does not arise.

234 The Petitioner applied for allocation of frequencies. In some of the circles frequency had been allocated. Clause 11 of the license agreement provides that the licensee was to install 'wireless telegraph'. A specified band of frequency has been referred to in Clause 39.1 of the license agreement itself.

235 It is axiomatic that termination to License without allocation of frequencies was bad in law subject, however, to the licensee applying therefor.

236 We have noticed heretobefore that the only ground on which the impugned order of termination of the license was issued, was non-extension of the term of renewal. In the written submission however, it was contended that in respect of

Rajasthan and Orissa service areas, the Petitioner never applied to the WPC for allocation of the spectrum.

237 Mr.Mehta would, however, contend that factually the same is incorrect in as much as the license in respect of Rajasthan circle was granted on 14.8.2008 and the application for allocation of frequencies was filed on 23.3.2010 for Jaipur and on 7.6.2010 for Barmer. It must, however, be placed on record that the licensee itself applied for allocation of the frequency after one year.

238 Reminders therefor were sent on 8.2.2011 and 29.12.2011. However, there was no response from the Respondent to any of the letters.

239 Despite the same, show cause notice was issued on 15.9.2011 followed by the impugned order of termination dated 1.12.2011.

240 So far as the circle of Orissa is concerned, the Petitioner had applied for grant of frequency on 23.3.2010 for Angul and thereafter on 7.6.2010 for Paradeep and Keonjhar district in Orissa. Reminders were also sent of petitioner No. 226 of

2012, which on at pages 43 and 44 of the paper-book. Despite the same, however, no frequency was allocated and show cause notice was issued on 15.9.2011 followed by the order of termination.

241 We, therefore, are of the opinion that the Respondent should be asked to consider the said issue at the hearing.

### **Import License issue**

242 Contention of the Respondent is that the Petitioner had not obtained import license from the WPC.

243 It is difficult to appreciate the said contention in as much as the same as not been pleaded by the Respondent. It has been noticed heretobefore that the Petitioner at all stages had issued a large number of letters to which the Respondent did not reply/respond. The progress reports filed by the Petitioner from time to time also indicated circle wise import and installation of the equipments.

244 It may be noticed that one of the grounds which has been raised in this petition is that the Petitioner has made

investments and took a lot of initiative for installation of equipments and commissioning of the services as per the conditions of the license.

245 In fact, it has been contended that the Petitioner had already commercially launched its services in Bangalore, Pune, Madhya Pradesh, Gujarat and Haryana.

**Clause 7.1 of the Agreement- Application of**

246 It had further been contended by the Petitioner in Petition No.12 of 2012 that it had conducted in house test/commission the system within one year in terms of Clause 7.1.

247 The import of Clause 7.1, in the considered opinion, of this Tribunal must be read with Clause 29 of the license agreement.

Clause 29.1 of the license reads as under :-

"29.1 The LICENSEE shall register demand/request for Public Mobile Radio Trunking Service without any discrimination from any applicant, at any place in the licensed service area and provide the SERVICE, unless otherwise directed by the LICENSOR. The LICENSEE shall not in any manner discriminate between subscribers and provide service on the same commercial principle and shall be required to maintain a transparent, open to inspection, waiting list. The LICENSEE shall clearly define

the scope of Service to the Subscriber(s) at the time of entering into contract with such Subscriber(s). LICENSOR shall have right to impose suitable penalty, not limited to a financial penalty, apart from any other actions for breach of this condition. The LICENSEE shall launch the SERVICE on commercial basis only after commencement of registration in the manner prescribed. Before commencement of SERVICE in an area, the LICENSEE shall notify and publicize the address where any customer can register demand / request for Public Mobile Radio Trunking Service. Any change of this address shall be duly notified by the LICENSEE.

Provided that nothing contained herein will affect or prejudice the rights of the LICENSEE to carry out check on credit worthiness of its prospective subscribers.”

248 Both the provisions of Clauses 7.1 and 29.1 are to be read together. Reliance on a selective basis on a part of Clause 7.1, in complete disregard of Clause 29 thereof, cannot be appreciated.

249 The license agreement, it is trite, being a commercial document, should be given a commercial meaning. A combined reading of the said clauses would clearly go to show that the licensees to render services to the customers on the commercial principles, which in turn would mean that the customers will have to approach the licensee. It must also be borne in mind at the cost of repetition that the Petitioner was

not required to fulfill the purported requirement of any coverage criteria.

250 Moreover, the question of rendition of services would arise provided a customer is ready and willing to avail the services offered by the Petitioner.

251 It is also not the case of the Respondent that despite some members of the public having approached the Petitioner to render services to it, it has refused and/or not neglected to do so.

252 Clause 7.1, therefore, could not have been invoked for the purpose of termination of license.

253 Even in regard thereto a show cause notice has been issued.

**Petitioner's Obligation to Supply Engineering Details for TEC Test**

254 Submission of Mr.Ruchir Mishra is that the Petitioner was required to make an application to TEC in the prescribed format

as provided for in Condition No.24 of the license, whereby and whereunder an obligation has been cast on the licensee to supply the engineering details as also depositing the prescribed fee.

255 It has rightly been contended by Mr.Mehta that the impugned order of termination is not founded upon the said ground. If the Petitioner is correct in its contention that it has not been registered by the TEC for testing the equipments installed, the question of non-supplying engineering details of the sites appears to be a plausible plea.

256 We have noticed heretofore that the Respondent has not been able to put forth a convincing reply that the 1998 TSTP was not applicable in the case of digital technology and the provisional 2010 TSTP was at variance to the terms of the license agreement.

257 It was therefore, obligatory on the part of the Respondent to finalize the TSTP so as to enable it to finally determine the basis on which the testing certificates was necessary to be granted.

### **The procedure of testing the TSTP**

258 Mr.Mishra would contend that TSTP merely provides for a procedure. It is resorted to only for the purpose of ascertaining as to whether the licensee has failed to discharge its obligations under the license agreement.

259 We have noticed heretobefore that the said contention of the Respondent is not correct.

260 If it was obligatory on the part of the Respondent to finalize the testing parameters before the testing details were to be submitted including the tests to be carried out as regards coverage of the area, the matter might have been different.

261 It is, therefore, not correct to contend that TSTP had nothing to do on or the some was not relatable to the commissioning of the applicable system. We have held heretobefore that successful commissioning of the services would depend upon the grant of the certificate.

262 It was submitted on behalf of the Respondent that the TSTP 1998 being available with the Petitioner, revision thereof in December, 2010 did not come in the way of the Petitioner to obtain a testing certificate in terms thereof. It has been observed heretobefore that when TSTP 2010 was issued admittedly the period of validity of the agreement had come to an end. It is, therefore, idle to contend that the Petitioner could have commissioned the services relying on or on the basis of 1998 TSTP particularly having regard to the fact that admittedly in respect of one of its sites the Respondent itself raised a contention that the Petitioner had not complied with the revised guidelines, which has been held by as to be contrary to the condition of License.

263 Moreover, the testing guidelines could not have been contrary to or inconsistent with the license conditions and/or the text and context in which the said license has been issued.

We, therefore, cannot accept the aforementioned contention of the Respondent.

**Application for WOL license-Issue**

264 Apart from the fact that the impugned order does not speak of WOL license, there is nothing on record to show that the Petitioner was called upon to obtain any. Moreover, the said contention is based on some disputed question of fact.

265 According to the Petitioner, it had applied to the WPC Wing of the Respondent for allocation of the frequency for different circles from time to time as per its demand.

266 The Petitioner contended that requisite payments have also been made. What was necessary in terms of Clause of 39 of the license was to obtain an authorization from the WPC.

### **Violation of other conditions of the license**

267 The Respondent in its written submissions has raised a contention that no spectrum charges have been paid.

268 Mr.Mishra, in this regard drew our attention to certain document annexed to some petitions.

Without going into the said contention, suffice it to point out that the said contentions raised amongst others are not the

grounds on which the impugned order of termination had been issued.

269 It was confined only to the ground of violation of clause 7.1 of the license and no other.

270 It is only from that point of view, it was necessary for the Respondent to comply with the principles of natural justice to which we would refer to it a little later.

### **Natural Justice**

271 We have noticed heretofore that there are various disputed questions of fact.

272 Had the purported violation of conditions of license been brought to the notice of the Petitioner by way of a show cause notice, it could have replied thereto. It could bring to the notice of the Respondent that there are documentary evidences on record to show that the Petitioner is not guilty of violation of any condition of license as alleged by the Respondent or at all.

273 In a given case, even the Respondent having regard to the facts and circumstances of the case could have issued certain guidelines and/or instructions to the Petitioner indicating as to and in what manner the same is possible to be done.

*Stricto sensu*, in that view of the matter the Respondent should have disclosed all the grounds on which it wishes to terminate the license.

274 The matter might have been different if the reason for termination of license was not the subject matter of the impugned order preceded by the show cause notice. If the order of termination was based on one ground, ordinarily the Respondent should have stuck thereto.

### **Relief**

275 The question which survives is as to what relief can be granted to the Petitioner. Mr.Mehta would submit that if the licensor extends the licenses in respect of the circles involved in each of the cases by four months the Petitioner shall not seek any further extension.

276 We are, however, of the opinion that the Respondent having based on its order on the inspections basis in Panipat district in the State of Haryana and Hazira district in the State of Gujarat. The Respondent may give opportunity to the Petitioner as to why it could not comply with its obligations, the conditions of license having some sort of peculiarity, in the event the Respondent feels that in a case of this nature, inter alia taken into consideration the interest of public shall be served, apart from fulfilling the conditions of the license conditions having regard to the mutual obligations on the part of the parties hereto. It is expected that the Respondent shall grant another extension for such time as may be found necessary.

In the facts and circumstances of the case, this petition is allowed to the aforementioned extent.

277 The impugned orders are set aside with the aforementioned directions with no order as to costs.

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

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

**November 2, 2012  
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