

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated October 17, 2012

Petition No.341/2012

Qualcomm Incorporated USA & Anr

... Petitioners

Vs.

Department of Communication, New Delhi

... Respondent

BEFORE:

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

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

For Petitioner : Mr.C.S. Sundaram, Sr. Advocate
Mr.N. Ganpathy, Advocate
Ms.Bhavi Sanghvi, Advocate
Mr.Kartik Yadav, Advocate.

For Respondent : Ms.Maneesha Dhir, Advocate
Mr.K.P.S. Kohli, Advocate
Mr.Abhishek Kumar, Advocate
Ms.Debopama Roy, Advocate.

J U D G M E N T

S.B. Sinha

Introduction

1. A question of some importance which arises for consideration in this petition is as to whether the Union of India could reduce the period of use of spectrum as also the roll out obligations on the part of the licensee; the license having been granted in term of the proviso appended to section 4 of the Indian Telegraph Act, 1885.

Background Facts

2. The Petitioner no.1 is a company incorporated and registered in USA. The Petitioner no.2 is said to be a subsidiary company of the Petitioner no.1.

3. The Department of Telecommunication (DoT) issued a notice inviting applications for auction of 3G and BWA spectrum, pursuant where to and in furtherance where of the Petitioner no.1 submitted its offer in the 2.3 GHZ band.

4. It also prayed for approval before the Foreign Investment Promotion Board (FIPB) as regards necessary clearance required therefor on or about 20.4.2010.

5. The Petitioner no.1 became a successful bidder for the service areas of Delhi, Mumbai, Haryana and Kerala, as in evident from a communication dated 12.6.2010 issued by the Respondent herein.

6. The Petitioner no.1 deposited a sum of Rs.4912.54 crores towards the bid amount. A Letter of Intent (LOI) was issued on about 13th July, 2010 by the Respondent to Petitioner No.1 for the purpose of earmarking the BWA spectrum; the relevant paragraphs whereof read as under :-

"3. You are requested to approach Data Services (DS) Division of DOT to obtain an ISP-category "A" License to use the above spectrum for provisioning of BWA services as per the scope of that license and submit a copy of said license to this office for assignment of the aforesaid frequencies and for grant of Wireless Operating License.

6. This LOI is subject to the terms and conditions contained in the Notice inviting Applications No.P-11014/13/08-PP dated 25th February 2010 for auction of 3G and BWA spectrum."

7. The Petitioner no.2 herein as also three other companies filed applications for grant of ISP Category A license pursuant thereto and in furtherneance of the said LOI .

8. Additional informations were furnished by the Petitioner no.2 to the Respondent on or about 18.11.2010.

9. On or about 29.11.2010 the Respondent sought for certain clarifications from the Petitioner No.3 inter alia with regard to the question as to who is the nominee of the Petitioner no.1 and a certificate to the effect that the application was in terms of the NIA was sought for. Similar letters were addressed to the other nominees of the Petitioner no.1. By reason of a letter dated 20.12.2010, the Petitioner no.1 reiterated the names of the nominee companies for the purpose of grant of ISP License in response to a query made by Respondent.

10. Yet again on or about 22.12.2010 a letter was issued in response to some other queries made by the DoT.

The FIPB also granted its approval with regard to foreign investment.

11. The Petitioners as also the other nominees of the Petitioner No.1 issued various letters to the Respondent requesting it to expedite the process of issuance of ISP license.

12. Some clarifications were sought for by the DoT which were also supplied.

13. By reason of letters dated 5.9.2011, 9.9.2011 and 13.9.2011, a request was again made to grant one license in favour of the Petitioner no.2 in respect of all the service areas.

14. We may notice the letter dated 13.9.2011, issued by the Respondent no.1 to Mr.Kapil Sibal offering by way of a solution to the question of issuance of only one license in favour of the Petitioner no.2 in stead at the places of the four nominees and requesting a meeting therefor, which is in the following terms:-

"As you may know, Qualcomm participated in the BWA auctions conducted by DoT in lure 2010. Following the successful outcome of the auction, we paid DOT the sum of Rs 4912.54crore for our winning bids for licenses in the Delhi, Mumbai, Kerala and Haryana circles. In August 2010, Qualcomm nominated four entities with identical ownership to hold ISP Category A licenses, and the entities fled their applications with DoT. Each entity would hold a license in one of the four circles in which we won spectrum.

For the past *year*, we have been working with DoT to conclude this matter. Recently, after we learned that DoT believes that it may no: be able to grant the four licenses, Qualcomm and its four nominees sent the attached letters to DoT In which we offered a compromise—namely, that DoT would only grant one license, and the other three nominees would merge into the fourth, which would hold the licenses.

The failure to resolve this matter to date by providing us with the license for which we paid so much money is negatively impacting our plans for the spectrum. Moreover, we are concerned that this delay may also deter others from making investments in India relating to telecommunications.

I respectfully request the opportunity to meet with you to discuss this matter as soon as possible. I will travel from San Diego for this meeting and will be accompanied by Bill Bold (Sr VP, Government Affairs) and Parag Kar (Vice President, Government Affairs). Parag Kar can be reached on +91 92127040B9 for coordination and confirmation of this meeting."

15. On or about 9.9.2011, another letter was issued by the Petitioner no. 1, relevant portion whereof is as under:

As set forth in that letter ("the WBS Companies' Letter"), Qualcomm nominated the four companies to apply for and hold four Category A licenses, one for each circle for which we won BWA spectrum in the

auction, based on our Undertaking, which we believed permitted us to do so. We now appreciate, after a series of discussions and meetings with DoT, that DoT has a different understanding. If that is the case, we would respectfully join in the compromise proposed in the WBS Companies' Letter, namely, that DoT grant a Category A ISP license only to WBSPL, which we understand would be for pan-India, and that our other three nominees (the three other WBS companies) be merged into WBSPL. The ownership of our four nominees is identical, so there would be no underlying ownership change as a result of such a merger."

16. **Earlier Round of Litigation**

(i) By an order dated 7.9.2011 the Respondent rejected the request of the Petitioner No.1 for grant of ISP license in favour of the Petitioner No.2, inter alia on the premise that the application filed by it to the WPC Wing on 20.12.2010 was beyond the period of 3 months as provided for in Clause 3.7 of NIA; and

(ii) Only one company could be nominated for obtaining Category A ISP icense.

17. Aggrieved by and dissatisfied therewith, the Petitioners filed a petition before the Tribunal under Section 14 of the Telecom Regulatory Authority of India Act, 1997, on or about 26/27.9.2011

(marked as Petition No.393 of 2011), praying inter alia for the following reliefs :-

a) Declare that the grounds mentioned in paragraphs 3,4 and 5 of the Letter No.820-1109/10-LR dated 7th September 2011 issued by the Respondent to Petitioner No.1, based on which the applications for ISP Category `A` Licence by Petitioner Nos.2 – 5 have been rejected, as illegal and invalid and quash the same;

b) Declare that the decision of the Respondent to reject the applications for ISP Category `A` Licenses by the nominees of Petitioner No.1 as illegal and invalid;

c) Direct the Respondent to treat the applications of Petitioner Nos.2-5 for grant of an All India ISP Category `A` Licence as valid and consequently direct the Respondent to issue the ISP Category `A` Licences to Petitioner Nos.2-5 within a period stipulated by this Hon'ble Tribunal and direct the Respondent to allot the BWA Spectrum earmarked in favour of Petitioner No.1 by the LOI to Petitioner Nos. 2- 5;

d) In the alternate, if for any reason, this Hon'ble Tribunal holds that the stand of the Respondent is correct, direct that the bid amount of Rs.4912.54 crores be refunded by the Respondent to Petitioner No.1.

18. In the said petition a prayer for passing of an interim order was made. In the said proceedings, however, the Respondent made a statement that it was not taking an adversarial stand.

An interim order prayed for and was granted by this Tribunal by an order dated 28.9.2011 in the following terms :

Till further orders in view of the fact that the Petitioner has deposited a sum of Rs.4900 crores with the Respondent on or about 21.6.2010 and furthermore as in the event the Respondent grants licence to a third party and allots the spectrum to it, the Petitioner shall suffer irreparable injury, we pass an ad interim order in terms of prayers (c) and (d) of the Interim Reliefs prayed for by the Petitioner which read as under:-

“(c) Pending final determination, direct the Respondent not to grant or allot the BWA Spectrum earmarked in favour of Petitioner No.1 to any other person and not to create any right in any other person in relation to such BWA spectrum.

(d) Direct the Respondent not to forfeit or appropriate the bid amount of rs.4912.54 crores paid by Petitioner No.1 (through Petitioner No.2) by invoking any provisions of the NIA; ”

Keeping in view the facts and circumstances of this case, the hearing of the matter is expedited.

Let the matter appear on 20.10.2011 under the heading “for orders”.”

19. The Respondent during pendency of the said petition issued another LOI to the Petitioners for provisioning internet services on or about 10.10.2011, stating :-

"2. The License Agreement, in the prescribed format shall be signed only after compliance of the following, with a period of 30 days from the date of receipt of this LoI failing which the same shall stand cancelled without any further reference :-

(i) Payment of entry Fee of Rs.30 lakhs for the said service area.

(ii) Submission of Performance Bank Guarantee (PBG) of the value of Rs.2 crores in the prescribed format.

(iii) Submission of Financial Bank Guarantee (FBG) of the value of Rs.10 lakhs in the prescribed format.

(iv) In respect of all licenses granted under Section 4 of the Indian Telegraph Act, 1885, Indian Wireless Telegraphy Act, 1933 to you or any of your promoter (s)/ partner (s) or associate (s) sister concern, you are required to furnish a certificate/ declaration to the effect that all dues to the Department of Telecommunications (including WPC Wing) stand cleared upto the date of issue of this letter. The authority reserves the right to verify the same."

20. The Petitioner no.2 conveyed its unequivocal and unconditional acceptance thereof in terms of a letter dated 18.10.2011. It also confirmed on or about 9.11.2011 that it would comply with the other requirements as contained in paragraph 4 of the said LOI. By a letter dated 2.11.2011 the Respondent was informed that the conditions laid down in the said LOI dated 10.10.2011 have been complied with.

The Demand

21. The Respondent, however, raised a provisional assessment of license fee for the years 2009-10 and 2010-11 for a sum of Rs.146 crores purported to be payable by one Tulip Telecom Ltd., a company having 13% share in the Petitioner company.

A further demand of Rs.2,15,61,943/- was raised by the Respondent against the said Tulip Telecom in respect of its NLD license. A provisional assessment of license fee was also made and consequently a demand was made in respect of the financial years 2005-06 2006-07, 2007-08, and 2008-09 for a sum of Rs.264,09,90.050/-.

The Petitioner was asked to deposit the said amount.

22. By an order dated 24.2.2012 the said Petition No.393/2011 was disposed of in the following terms :-

“(i) The offer of the Petitioner to pay the aforementioned amount of Rs. 410.36 crores being in terms of the letter of intent dated 10.10.2011 and M/s. Tulip Telecom Limited being not a party herein, it is not necessary that M/s. Tulip Telecom Limited should accept this arrangement, as suggested by the Respondent. We cannot furthermore issue any direction on M/s. Tulip Telecom Limited.

(ii) As agreed to by Ms. Dhir, the ISP category A licence should be issued in favour of the Petitioner within one week from date of deposit of the aforementioned amount of Rs. 410.36 crores.

(iii) The Petitioner shall follow the procedures for

obtaining spectrum from the WPC wing of the DOT in terms of the aforementioned letter of intent read with Clause 4.6 of NIA.

(iv) We hope and trust that keeping in view the fact that DOT in this case has not adopted any adversarial approach, the application for allocation of spectrum filed by the Petitioner shall be considered and disposed of as expeditiously as possible.

(v) In the event, any amount is to be refunded to the Petitioner, the same shall not carry any interest subject to the condition such refund must be made within four weeks from the date of completion of assessment of M/s. Tulip Telecom Limited, in respect of the assessment years in question.”

The Impugned Order

23. Pursuant to or in furtherance of the said direction, a license agreement dated 15.3.2012 was entered into. The Petitioner no.2 thereafter filed an application for allocation of spectrum on 21.3.2012 which was purportedly allowed by reason of the impugned order dated 8.5.2012.

24. Whereby allocation of BWA spectrum was confined to the period of 18 years and 6 months in stead and in place of the usual terms of 20 years’.

25. The Petitioner No.2 was furthermore directed to comply with its 50% roll out obligation within a period of 3 years 5 months in stead of and in place of 5 years.

26. The Petitioner without prejudice to its rights and contentions applied to the WPC Wing on or about 11.4.2012 for allocation of BWA Spectrum for assignment, so as enable it to start its operation in the Delhi, Mumbai, Kerala and Haryana Service areas.

27. The Petitioner No.1 also issued a letter for assignment of BWA Spectrum on or about 23.4.2012.

28. The Respondent by reason of impugned letter allocated spectrum to the Petitioner in the following terms:

S. No	Type of Service Licensee	Telecom Service Areas	Spectrum earmarked in MHz	Centre Frequency in MHz
1	ISP – Cat "A"	Delhi	2327.5 – 2347.5	2337.5
2	ISP – Cat "A"	Mumbai	2327.5 – 2347.5	2337.5
3	ISP – Cat "A"	Kerala	2325.0 – 2345.0	2335.0
4	ISP – Cat "A"	Haryana	2362.5 – 2382.5	2372.5

The Present Proceedings

29. This petition has been filed questioning the aforementioned order dated 8.5.2012 in which the following reliefs have been prayed for :-

"a) Direct the Respondent to modify paragraph 3.1 of the Impugned Letter to correct the validity of the BWA Spectrum allotted to the Petitioner No.2 to 7th May, 2032, in accordance with the terms of the NIA.

b) Direct the Respondent to modify paragraph 3.2.1 of the Impugned Letter to correct the period by which at least 50% of the rural SDCAs have to be covered to 7th May; 2017, in accordance with the terms of NIA.”

30. The Respondent in its reply would contend :-

- (i) It at no point of time, had given up its right to impose other and further conditions in granted license to the petitioner.
- (ii) Delay in the matter of grant of license for a period of about 18 months was attributable to the Petitioner in as much as it filed four different applications in respect of four different service areas and that too without a certificate stating that the Petitioner no.1 had nominated the said companies including the Petitioner no.2 herein.
- (iii) The Petitioner no.1 did not issue any letter of nomination in favour of any of its so called nominees who filed the applications for grant of license.
- (iv) The Petitioner No.1 having filed an undertaking only on 7.3.2011, the same was rightly rejected by it in terms of an order dated 7.9.2011.

31. The Petitioner in its rejoinder inter alia alleged a discriminatory attitude on the part of the Respondent vis-à-vis one Augeree Broadband India Ltd.

The receipt of the said application was acknowledged in the following terms:

ACKNOWLEDGEMENT

The receipt of your Fresh Application is hereby acknowledged.

Item Description.

TELECOMMUNICATIONS - POSTAL, TELEGRAPHIC, WIRELESS AND SIGNAL, COMMUNICATION SERVICES

Item Code :99

M/s WIRELESS BROADBAND BUSINESS SERVICES (DELHI) PVT. LTD.

*

MR.AKASH GUPT, PRICEWATERHOUSECOOPERS PVT. LTD BUILDING NO. 10, TOWER -C, 17TH FLOOR, DLF CYBER CITY, GURGAON, HARYANA

Foreign Collaborator Located At

M/S QUALCOMM ASIA PACIFIC PTE LTD.
8, CROSS STREET, PWC BUILDING, # 11-00,
SINGAPORE 048424

Is hereby acknowledged, Your reference No. is 160/FC/2010 (FC COUNTER) dated 09-08-2010.

Sd/-"

The NIA

32. Before advertizing to the rival contentions of the parties as noticed heretobefore, it would be necessary to notice the following clauses of the NIA :-

3.1 – Eligibility criteria to participate in the Auctions

3.1.2 BWA Auction

Any entity :

- (i) That holds a UAS/CMTS licence; or
- (ii) That holds an Internet Service Provider (“ISP”) licence (category `A’ or `B’); or
- (iii) That gives an undertaking to obtain a UAS licence through a New Entrant Nominee UAS Licensee as per the DoT guidelines before starting telecom operations.

Can bid for BWA Spectrum (subject to other provisions of the Notice)

Successful Bidders in the BWA Auction that currently hold an ISP-category `B’ licence shall be required to migrate to an ISP-category `A’ licensce, by paying the applicable fees/charges for migration, before they are awareded the BWA Specturm.

3.3 Prospective New Entrants

Prospective Bidders who do not have a UAS/CMTS licence (for the 3G Auction) or a UAS/ISP-category `A’/ISP-category `B’ licence (for the BWA Auction) (the “Prospective New Entrants”) shall be permitted to enter either of these Auctions subject to the provisions of Section 3.1. For the avoidance of doubt, a Prospective New Entrant who is pre-qualified

or is declared a Successful Bidder shall not be automatically awarded a UAS licence or an ISP-category 'A' licence, as applicable. Prospective New Entrants are advised to ensure that they satisfy the conditions for the award of a UAS licence or an ISP-category 'A' licence, as applicable. This includes the relevant provisions for making an FDI into the telecom services sector in India.....

3.3.1 New entrants –foreign entities

Foreign entities are permitted to participate in the Auctions, subject to the provisions of Section 3.1. However, the UAS/ CMTS/ ISP-category 'A' licence conditions and the FDI provisions imply that such a foreign entity can operate a telecom service in India only through an Indian company with no more than 74% foreign shareholding (subject to the approval of the FIPB for the foreign shareholding in excess of 49%).

However interested foreign entities are allowed to participate in the Auctions directly, and obtain a licence subsequently, either through application for a new licence or through acquisition of an existing licensee (subject to the applicable M&A guidelines)

FIPB approval is contingent on security clearances and, under certain circumstances, could take considerable time. Accordingly, such Bidders are advised to initiate the process of getting approvals from the FIPB at the earliest opportunity, as such approvals are also available for entities with an intent to invest.

3.4.2 Roll-out obligations for BWA Spectrum

Metro Service Area

The licensee to whom the spectrum is assigned shall be required to provide required street level coverage using the BWA Spectrum in at least 90% of the

service area within five years of the Effective Date.

Category A, B and C service areas

The licensee to whom the spectrum is assigned shall ensure that at least 50% of the rural SDCAs are covered within five years of the Effective Date using the BWA Spectrum. Coverage of a rural SDCA would mean that at least 90% of the area bounded by the municipal/ local body limits should get the required street level coverage.

The Effective Date shall be the later of the date when the right to use awarded spectrum commercially commences and the date when the UAS licence or the ISP- category 'A' licence, if and as applicable, is granted to the operator.

If the licensee does not achieve its roll out obligations, its spectrum assignment shall be withdrawn.

3.7 Breach, revocation and surrender

The spectrum assignment may be revoked, withdrawn, varied or surrendered in accordance with applicable licence conditions or any other applicable laws, rules, regulations or other statutory provisions.

The spectrum assignment may also be revoked if the Government determines the user of the spectrum to be in serious breach of any, of the conditions of the award of the spectrum (including adherence to the Auction Rules) and the consequent obligations. In case of less serious breaches, the Government may impose penalties at its discretion. Seriousness of the breach shall be determined by the Government at its sole discretion.

In case neither the Successful Bidder nor any of its Associated Licensees has the relevant service licence for a service area where it has been declared a Successful Bidder, it must apply for, or otherwise acquire the relevant service licence in the service area in accordance with the terms of this Notice, within three (3) months of it being declared a Successful Bidder, failing which the Government shall have the right to revoke the spectrum.

The operator may surrender the spectrum, by giving notice of at least 60 calendar days in advance. In that case, it shall also notify all its customers of consequential withdrawal of service by giving 30

calendar days notice to each of them. The operator shall pay all fees payable by it until the date on which the surrender of the spectrum becomes effective. The effective date of surrender of the spectrum shall be the later of the dates of expiry of the two notices mentioned in this clause.

If at any stage, the spectrum allocation is revoked, withdrawn, varied or surrendered, no refund will be made.

4.6 Assignment of spectrum

Existing licensees

Upon receipt of the Successful Bid Amount, the DoT (WPC) shall issue a Letter of Intent allocating the frequencies to the Successful Bidder ("allocation of frequency");

Necessary amendments to enable use of frequency allocated by WPC for provision of services under applicable license (including migration to ISP-category 'A' licence, if applicable) shall be made to the existing UAS/ CMTS/ ISP licence ("assignment of frequency") of the Successful Bidder or its nominated entity (as applicable), within 15 days of DoT receiving an application for such amendments;

In case of Bidders that have existing UAS/CMTS licences in both Chennai and Tamil Nadu (excluding Chennai) service areas and in case the Group Bidding Entity is successful in the Auction for Tamil Nadu (including Chennai), then the Bidders have to provide Undertakings and Board Resolutions of both the licensee companies (as applicable) confirming that their UAS/ CMTS licences of Chennai and Tamil Nadu (excluding Chennai) service areas shall be merged as per DoT letter no. 842-S03/2005-VAS/5 dated 15th September, 2005 A copy of the letter is available on the DoT website;

It may be noted that after assignment of 3G Spectrum, the licensees shall be allowed to utilise the spectrum for commercial operations only from 1st September, 2010. However, in the mean time, they

can take steps to enable launch of commercial operations;

Successful Bidders in the BWA Auction can use the assigned frequency for commercial purposes immediately after assignment as per the terms of the applicable licence.

New entrants

- Upon receipt of the Successful Bid Amount, the DoT (WPC) shall issue a Letter of Intent allocating the frequencies to the Successful Bidder;
- Upon the Successful Bidder obtaining a UAS licence or an ISP-category 'A' licence, as applicable, the DoT shall assign the specified spectrum;
- In case the Successful Bidder acquires an existing licensee, necessary amendments to the licence of the acquired entity will need to be made prior to assignment of spectrum;
- It may be noted that after assignment of 3G Spectrum, the licensee shall be allowed to utilize the spectrum for commercial operations only from 1st September, 2010. However, in the mean time, they can take steps to enable launch of commercial operations;
- Successful Bidders in the BWA Auction can use the allocated frequency for commercial purposes immediately after assignment and obtaining the necessary licence, as per the terms of the applicable licence."

33. Clause 2.1 of NIA provided that BWA spectrum would be allocated for a period of 20 years. Clause 3.6 of the NIA also stated that the validity of the BWA spectrum would be for the same period.

Clause 3.4.2 provided that the period of completion of roll out obligations to be five years.

34. The question as to whether the delay in grant of license is attributable to the Petitioners or the Respondent, is a question which had specifically been raised in the said Petition No.393/2011. We have noticed heretobefore that despite the same not only a fresh LOI was granted, same conditions therefor were laid down therein, which admittedly have been complied with.

35. The Petitioner had also deposited a huge amount towards the provisional assessments made in respect of M/s Tulip Telecom Ltd. It also, as noticed heretobefore, waived its right of obtaining interest in the event; the demand at the time of final assessment of the said M/s Tulip Telecom is reduced.

Res Judicata Issue

36. We would assume that the Respondent did not give up its right to question the legality or otherwise of the applications filed by different companies which are in different service areas said to be the nominees of the petitioner No.1. The order of this Tribunal dated 24.2.2012, however, has attained finality. The Letter of Intent does not indicates that the Respondent would reduce the period of use of spectrum. If the Respondent was serious to seek determination of the said issue, it could have also imposed the said

condition in its letter of intent dated 10.10.2011. It is not the case of the Respondent that the conditions laid down in the said LOI have not been complied with.

37. We are, therefore, of the opinion that the order of this Tribunal dated 24.2.2012 having attained finality, the Respondent cannot be permitted to raise the question of the purported delay on the part of the Petitioners once over again.

Delay Issue and the Impugned Order

38. So far as, the question of delay purported to be attributable to the Respondent is concerned, we may notice that it merely stated that a letter of nomination was to be annexed with the application for grant of license. The license in favour of the successful bidder was to be granted also in favour of its nominee. If the Respondent had any doubt thereabout or in the event, it wanted any clarifications thereabout, it could have been sought for but by reason thereof. It cannot be said that the application for grant of license having not been filed within a period of three months as provided for in Clause 3.7 of the NIA. The allocation of BWA spectrum has been provided for in Clause 2.1 of the NIA, the impugned order is sustainable in law; as matter relating to allocation of the spectrum has been provided for in Clause 2.1 of the NIA.

Allocation of spectrum was a stand alone clause.

39. Clause 3.1.2 (4) provided for an undertaking to be furnished by the bidder to obtain an ISP Category A license through a new entrant nominee ISP license before starting telecom operations.

40. Clause 3.3 clearly provided for the prospective new entrants to submit their options to take part in auction subject to provisions of Clause 3.1. A clarification was made therein for avoidance of the doubt inter alia stating that a prospective new entrant who is otherwise qualified or is declared a successful bidder would not be automatically granted a ISP Category License or UAS license as the case may be. It must be eligible therefor. The successful bidder was required to satisfy the conditions for obtaining a license.

41. It is not the case of the Respondent that the Petitioner no.2 did not obtain the same or was not eligible therefor.

42. An undertaking by the prospective new entrants was to be furnished in respect of the specified areas as would appear from the following:-

"UNDERTAKING TO OBTAIN UAS LICENSE/ISP LICENSE"

We, and _____, the undersigned, as Directors and Authorised Representatives of _____ <Name of the Applicant> ("Applicant") hereby confirm, undertake, acknowledge and certify the following:

- (a) The Applicant desires to submit a proposal for participating in the Auction for spectrum in the 2.3GHz band in compliance with DoT File No. <XXX>;
- (b) That neither the Applicant, nor any entity sharing

more than 10% common ownership with the Applicant is a UAS/ CMTS/ ISP licensee in _____ <Name of the telecom service area> (as defined in the UAS guidelines) ("Specified Service Area");

(c) That in case the Applicant is declared a Successful Bidder in the Specified Service Area, it shall apply for a UAS licence/ ISP-category 'A' licence in the Specified Service Area either directly or through a company nominated by the Applicant where the Applicant has a minimum holding of at least 26% ("New Entrant Nominated UAS Applicant" or "New Entrant Nominated ISP Applicant");"

43. The NIA as also the license provide for grant of spectrum for a period of 20 years. The roll out obligation on the part of the successful bidder begins only when the spectrum is assigned and not prior thereto.

44. So far as allocation of spectrum is concerned, the license is to be granted in respect of the relevant service areas to a successful bidder or to a company nominated by the subsequent bidder which acquires an ISP Category A license for relevant service areas. It is, therefore, evident that what was to be auctioned was the spectrum and not the license.

45. Clause 3.6 clearly states that the right to use BWA spectrum was for a period of 20 years from the effective date.

The term `effective date' has been defined in the following terms :-

"Effective Date In the context of rollout obligation and duration of awarded spectrum, the later

of the date when the rights to commercially use the spectrum commences and the date when the relevant service license, if applicable, is granted to the operator.”

46. We may also notice the definition of ‘successful bidder’ which reads as under :-

“Successful Bidder A Bidder who at the end of the relevant Auctions is confirmed as a Winning Bidder for a particular service area by the Government.”

If the clause relating to grant of spectrum is a stand alone one, Clause 2.1 in no uncertain terms provided that it would be for a period of 20 years.

47. Clause 3.7 provided for revocation/withdrawal/surrender etc. separately.

48. The first sub-clause of Clause 3.7 applies only when breach is committed of conditions of license or the applicable statutory provisions and not otherwise.

Sub-Clause 2 thereof, however, is in two parts.

49. The first part speaks of revocation of the spectrum assignment in the case of serious breach of the conditions of the award of spectrum and the consequent obligations. The Second Part, however, states that in the event the alleged breach is not serious, the Government may impose penalty.

50. Sub-Clause 3 of the said clause provides for filing of an application within three months.

The application, on a plain reading of the said paragraph, was required to be filed either by the successful bidder or any of its associate's .

Construction of clause 3.7

51. A penal clause as contained in Clause 3.7, in the opinion of this Tribunal must receive strict construction.

52. Reduction of the period of holding spectrum or reduction in the period of roll out obligations (as provided for Clause 3.4.2) cannot be held to be a matter, which would attract penalty.

53. If the Respondent thought that such a power is vested in it or the same could be exercised, it was required to be stipulate same the same in the NIA explicitly and in no uncertain terms.

54. It is not in controversy that penalty is to be imposed by way of discretion. Such discretion on the part of a `State' within the meaning of Article 12 of Constitution of India cannot be founded on whim or caprice. Once a penalty is imposed involving civil consequences, the requisite procedures laid down therefor must be followed.

55. The conditions of license clearly stipulate different kinds of penalties including suspension/ revocation thereof in Clause 10 of the license. In that view of the matter the term `penalty' used in Clause 3.7, in our considered opinion, would mean `financial penalty'.

56. Penalty, moreover, could be imposed only in the event a breach of the conditions of license is committed. There is nothing on record to show, that any breach of conditions of the license on the part of the Petitioner, has been committed. In fact the said question did not arise.

57. The question of breach of conditions of a license would arise only when the license is granted or the licensee fails and/or neglects to satisfy the conditions thereof.

58. It is difficult to conceive as to how the period to enjoy the spectrum in respect whereof the Petitioner no.1 became the successful bidder could be directed to be reduced, although no

violation of the conditions of the license, assuming that the said order could be passed by way of penalty.

59. In any event having regard to the different provisions of the the NIA there might have been some confusion.

60. In the aforementioned situation, in the event, the four nominees of the Petitioner no.1 had applied for four grant of license in respect of four different service areas, no exception thereto can be taken.

61. Paragraph 6 of the reply upon which strong reliance has been placed must be considered in the aforementioned factual backdrop, namely, in the event it is held that the Petitioner No.1 upon declaration of being becoming the successful bidder on 12.6.2010 and the applications for grant of license having been filed on 9.8.2010, the same by itself cannot be, in our considered opinion, held to be an action on the part of the Petitioners to have caused delay.

Re Delay in filing application

62. Perusal of the letter dated 20.12.2010 it would be clearly evident that the same had been received by the Respondent on 22.12.2010 and not on 7.3.2011. It is, therefore, not correct to contend that for the first time only on 7.3.2011 only the

Respondent could come to know that the nominations had been issued by the Petitioner no.1 in favour of four different applicants.

63. The impugned order being is in the nature of penalty, as contended by Ms.Dhir, in the light of the order of this Tribunal in the earlier round of litigation. If the Respondent did not adopt an adversarial role in absence of any determination on the question of delay, the period both in respect of holding spectrum as also the roll out obligations in our opinion could not have been decreased.

Discrimination Issue

64. So far as the question of discrimination by and between the Petitioner and the Augere Broadband India Pvt. Ltd is concerned, we are of the opinion that the said issue could not have been raised in a rejoinder.

65. If the Petitioners intended to raise the said question, the same should have been done upon obtaining leave of this Tribunal in terms of the provisions of or analogous to Order VIII Rule 9 of the Code of Civil Procedure.

Conclusion

66. For the reasons aforementioned this petition is allowed and the impugned order dated 8.5.2012 in so far as the period of holding

spectrum and the role out obligation are set aside, with no order as to costs.

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

October 17, 2012
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