

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 29th OCTOBER 2012

Petition No.291 of 2012

Videocon Telecommunications Ltd. ...Petitioner

Vs.

Union of India ...Respondent

Petition No.292 of 2012

Videocon Telecommunications Ltd. ...Petitioner

Vs.

Union of India ...Respondent

Petition No.293 of 2012

Videocon Telecommunications Ltd. ...Petitioner

Vs.

Union of India ...Respondent

Petition No.294 of 2012

Videocon Telecommunications Ltd. ...Petitioner

Vs.

Union of India ...Respondent

Petition No.295 of 2012

Videocon Telecommunications Ltd. ...Petitioner

Vs.

Union of India ...Respondent

BEFORE:

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

For Petitioner : Mr. Dayan Krishnan, Advocate
Mr. Kirtiman Singh, Advocate
Mr. T. Singhdev, Advocate
Mr. Zartab Anwar, Advocate

For Respondent : Mr.K.P.S. Kohli, Advocate
Mr. Tarveen Singh Nanda, Advocate
for Mrs. Maneesha Dhir, Advocate

ORDER

The Petitioner is a licensee in terms of the proviso appended to Section 4 of the Indian Telegraph Act, 1865. The Respondent granted licenses to the Petitioner in respect of fifteen circles, out of which we are at present concerned with Himachal Pradesh, Orissa, UP (West), Rajasthan and Karnataka circles.

2. The Petitioner has earlier filed Petition No. 450 of 2012 in respect of 15 circles, in which it had prayed for return of the performance bank guarantees in respect of six circles and reduction to the extent of 50 per cent therein in respect of 09 circles.

3. The Petitioner contends that in the meanwhile so far as the aforementioned 05 circles are concerned, the Petitioner also completed phase II of its roll out obligations.

In that view of the matter, in these petitions, the Petitioner has prayed for return of the performance bank guarantees also which it admittedly furnished in terms of Clause 21.1 of the License Agreement.

4. The Petitioner has supplied a chart to this Tribunal to show that it has completed 50% of the towns in the respective circles. It reads as under:-

S.No.	1.	2.	3.	4.	5.
Circle /Service Area	Himachal Pradesh	Orissa	UP (West)	Rajasthan	Karnataka
<i>Due Date of 1st Phase Roll Out as per DOT</i>	28.12.09	06.05.09	20.10.09	12.01.10	31.05.09
<i>Amount of LD Demanded and Paid (Rs.) (in crores)</i>	<i>Demanded – 0.65 Paid-0.65 Balance - 0.00</i>	<i>Demanded – 2.15 Paid-2.15 Balance -0.00</i>	<i>Demanded – 0.40 Paid-0.40 Balance - 0.00</i>	<i>Demanded – 0.25 Paid-0.25 Balance - 0.00</i>	<i>Demanded – 1.65 Paid-0.99 Balance - 0.66 Secured by</i>

					<i>way of BG in terms of order dated 10.1.2012.</i>
<i>Due Date of 2nd Phase Roll Out as per DOT</i>	28.12.11	06.05.11	20.10.11	12.01.12	31.05.11
<i>Total No. of DHQs</i>	DHQs :12 Test Certificates Obtained:6	DHQs :30 Test Certificate Obtained:15	DHQs :37 Test Certificate Obtained:18	DHQs :33 (Spectrum allocated only in 22 DHQs) Test Certificates Obtained:11	DHQs :29 Test Certificates Obtained:15
(i)DHQs	Details of DHQs TERM Cell Registration and TEST result				
	<i>a.Theog</i> <i>b.Rewalser</i> <i>c.Ghumarwin</i> <i>d.Nagrotabagwan</i> <i>e.Tira Sunjanpur</i> <i>f.Mehatpur</i>	<i>a.Khurda</i> <i>b.Jagat singhpur</i> <i>c.Choudwar Town</i> <i>d.Kamakhya Nagar</i> <i>e. Pipli</i> <i>f.Balasore</i> <i>g.Kendrapara</i> <i>h.Sundargar</i> <i>i.Nayagarh</i> <i>j.jajpur</i>	<i>a.Soron</i> <i>b.Sardhana</i> <i>c.Billari</i> <i>d.Khair</i> <i>e.Aonla</i> <i>f.Haldaur</i> <i>g.Muzaffar ngr</i> <i>h.Milak</i> <i>i. Vrindavan</i> <i>j. Firozabad</i> <i>k. Fatehpur Sikri</i> <i>l. Deoband</i>	<i>a.Takhatgar</i> <i>b.Reengus</i> <i>c.Parbatsar</i> <i>d.Tijara</i> <i>e.Bissau</i> <i>f. Ratan Ngr</i> <i>g.Gulabpura</i> <i>h.Sarwar</i> <i>i.Sagwara</i>	<i>a.Doddabala Pur</i> <i>b.Malur</i> <i>c.Channa Patna</i> <i>d.Shikari Pura</i> <i>e.Kadur</i> <i>f.ChannaRai Patna</i> <i>g.Malavalli</i>

		<i>k.Talcher</i> <i>l.Keonjhar</i> <i>m.Jharsugud</i> <i>a</i> <i>n.Basudevpur</i> <i>o.Sambhalpu</i>	<i>m. Pilkhuwa</i> <i>n. Gulaothi</i> <i>o. roorkee</i> <i>p. Vikas Ngr</i> <i>q. Jaswant</i> <i>nagar</i> <i>r. Bachhrao</i> <i>s. Sikandra</i> <i>Rao</i>	<i>j.Kishalgar</i> <i>k. Amet</i>	
<i>(ii)Date of Term Cell Registrati on</i>	<i>a. 22.3.10</i> <i>b. 24.11.11</i> <i>c. 24.11.11</i> <i>d. 24.11.11</i> <i>e. 24.11.11</i> <i>f. 24.11.11</i>	<i>a.06.11.09</i> <i>b. 06.11.09</i> <i>c. 06.11.09</i> <i>d.14.02.11</i> <i>e. 14.02.11</i> <i>f. 14.02.11</i> <i>g. 14.02.11</i> <i>h.09.3.11</i> <i>i.28.02.11</i> <i>j. 09.3.11</i> <i>k. 04.03.11</i> <i>l. 04.02.11</i> <i>m. 01.3.11</i> <i>n. 04.3.11</i> <i>o.14.02.11</i>	<i>a. 08.12.09</i> <i>b. 08.12.09</i> <i>c. 08.12.09</i> <i>d. 08.12.09</i> <i>e. 15.6.11</i> <i>f. 06.9.11</i> <i>g. 05.08.11</i> <i>h. 05.8.11</i> <i>i. 05.8.11</i> <i>j. 06.9.11</i> <i>k. 15.6.11</i> <i>l. 15.6.11</i> <i>m. 15.6.11</i> <i>n. 06.9.11</i> <i>o. 05.8.11</i> <i>p. 15.6.11</i> <i>q. 06.9.11</i> <i>r. 06.9.11</i> <i>s. 06.09.11</i>	<i>a.11.2.10</i> <i>b. 11.2.10</i> <i>c. 11.2.10</i> <i>d. 19.12.11</i> <i>e. 19.12.11</i> <i>f. 19.12.11</i> <i>g. 19.12.11</i> <i>h. 19.12.11</i> <i>i. 19.12.11</i> <i>j. 19.12.11</i> <i>k. 19.12.11</i>	<i>a. 06.11.09</i> <i>b. 06.11.09</i> <i>c. 06.11.09</i> <i>d. 10.3.11</i> <i>e. 10.3.11</i> <i>f. 10.3.11</i> <i>g. 10.3.11</i>
	<i>(iii)Date of TEST Certificate</i>	<i>a. 27.7.10</i> <i>b. 7.2.12</i> <i>c. 7.2.12</i> <i>d. 7.2.12</i> <i>e. 7.2.12</i> <i>f. 7.2.12</i>	<i>a. 09.9.10</i> <i>b. 27.9.10</i> <i>c. 04.11.10</i> <i>d. 30.8.11</i> <i>e. 30.8.11</i> <i>f. .7.9.11</i> <i>g. 12.9.11</i> <i>h. 13.10.11</i> <i>i. 13.10.11</i> <i>j. 13.10.11</i> <i>k. 13.10.11</i>	<i>a. 05.4.10</i> <i>b. 5.04.10</i> <i>c. 05.4.10</i> <i>d. 05.4.10</i> <i>e. 29.3.12</i> <i>f. 29.3.12</i> <i>g. 29.3.12</i> <i>h. 29.3.12</i> <i>i. 29.3.12</i> <i>j. 29.3.12</i> <i>k. 29.3.12</i>	<i>a.16.7.10</i> <i>b. 16.7.10</i> <i>c. 16.7.10</i> <i>d. 02.5.12</i> <i>e. 02.5.12</i> <i>f. 02.5.12</i> <i>g. 02.5.12</i> <i>h. 02.5.12</i> <i>i. 02.5.12</i> <i>j. 02.5.12</i>

		<i>l. 21.11.11</i> <i>m.21.11.11</i> <i>n.21.11.11</i> <i>o.23.11.11</i>	<i>l. 29.3.12</i> <i>m. 30.3.12</i> <i>n. 30.3.12</i> <i>o. 30.3.12</i> <i>p. 30.3.12</i> <i>q. 20.4.12</i> <i>r. 20.4.12</i> <i>s. 20.4.12</i>	<i>k. 02.5.12</i>	
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5. The corresponding petitions which had been filed by the Petitioner for reduction of the performance bank guarantees would appear from the aforementioned chart.

6. The Petitioner alongwith its petition has *inter-alia* filed the test certificates issued by the TERM Cell. The Respondent, however, in its reply contended as under:-

“It is submitted that against the claim of the Petitioner that it has completed 50% of the coverage criteria in terms of 2nd phase the said roll out obligation is yet to be verified with the respective TERM Cell. It has to be checked that the BTS declared by Petitioner for coverage under 50% of roll out has actually been completed. It is denied that Petitioner is entitled to release of PBG in respect of Himachal Pradesh Service Area. As stated above, the PBG submitted in term of the license conditions and terms of the PBGs, the same have to be kept alive for the entire life of the license. It is

further denied that the Respondent is causing financial prejudice to the Petitioner. Further, in respect of date of meeting the roll out obligation, it is to mention that the TRAI recommendation dated 14.7.2011 on roll out obligation wherein definition of roll out obligation is based on the number of subscribers reported, AGR filed and tariff plan filed with TRAI. Legal opinion on TRAI recommendations dated 14.7.2011 has been received from Ministry of Law & Justice and the same is submitted for decision of competent authority and accordingly date of meeting of roll out obligation shall be decided.”

7. The question as to whether the aforementioned defences raised by the Respondent are sustainable in law or not has been considered by this Tribunal in a judgment dated 28.9.2011 in *Siestema Shyam Teleservices Vs. Union of India* being Petition No. 314 of 2011, stating:-

“12. The matter was heard finally and by a judgement and order dated 28.9.2011, the petition was allowed, opining:-

For the purpose of disposal of this petition, I would assume that the Petitioner has failed to comply with its roll out obligations as envisaged in Clause 34.2. The consequences therefor have been laid down in Clause 35 as also

paragraph 13 (xiii) of the aforementioned circular letter dated 10.2.2009.

The act of the UOI must be kept confined within the purview of Clause 21 so far as the so called roll out obligation of the license as envisaged in Clause 34.1 is concerned, as it has explicitly been said therein that the liability of the licensee in terms thereof is absolute and he is solely responsible for the matters provided for therein.

The UOI has clearly absolved itself to pay any damages either to the licensee or to the consumers, even if any occasion arises therefor so far as the obligations on the part of the licensee are concerned. The provision of the performance bank guarantees clearly show that it could be invoked only when the licensor suffer any damages.

Even assuming for the sake of argument that a licensor incurs any liability in terms of Clause 31.4, the same has to be demanded.

A cause of action therefor must arise. A cause of action can arise both before and after the roll out obligations are met.

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

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

within the purview of the financial bank guarantee as contemplated under Clause 21.2 of the license and not 21.1.

For the purpose of construing the bank guarantees vis-à-vis the ground realities, this Tribunal may notice the submissions of Mr. Srinivasan that the Petitioner has furnished a total bank guarantee of Rs.256,266,000, although, its total liability for payment of revenue to be covered under the financial bank guarantee would be about Rs.25 crores.

On a harmonious reading of Clause 34.1 and 21.1, I am of the opinion that interest of justice shall be met if the Petitioner is directed to keep the bank guarantee of the 40% of the amount of liquidated damages imposed on it in respect of the aforementioned five circles, namely, Orissa, Kerala, Kolkata, Delhi and Mumbai i.e. for a sum of Rs.0.78 crores, 2.80 crores, 0.46 crores, 1.10 crores and 0.66 crores, respectively, in view of the fact that out of a total amount of Rs.65.3 crores, the Petitioner has already deposited a sum of Rs.59.54 crores in respect of all its licenses.

So far as the financial bank guarantees are concerned, the interim order dated 9.8.2011, is made absolute. The financial bank guarantees should be reviewed. Periodic review indisputably would not mean downward review but also upward review. In terms of the provisions of the license, the Petitioner is bound to furnish financial bank guarantees, strictly in terms of Clause 21.2 of the license. The Petitioner, thus, has seriously been prejudiced. It had to make arrangement for payment of a large amount to secure the Bank Guarantees.

The allegation that the Petitioner has been discriminated against also has not been denied or disputed.”

8. In the case of the Petitioner itself by an order dated 10th January, 2011 passed in Petition No. 450 of 2011 and other batch cases, this Tribunal has again considered the question of interpretation of clause 21.1, viz-a-viz, clauses 21.5 thereof.

9. In view of the aforementioned decisions of this Tribunal, there cannot be any doubt or dispute that the performance bank guarantees cannot be directed to be renewed for the entire period of license.

10. Mr. Kohli, would submit that the question of the bank guarantees being released automatically on completion of the roll out obligations as is required under Clauses 34 and 35 does not arise in as much as the Central Government is required to take a final decision in the matter.

11. It is not denied or disputed that the certificates by the TERM cell were issued from July, 2010 till May, 2012.

It is also not in dispute that the TERM cell while issuing the said certificate would send a copy thereof to the DOT. The DOT was to act thereupon. It has an obligation to act within a reasonable time.

Failure on its part to do so cannot be taken into consideration for opining that the Petitioner would not be rendered just relief to which it is entitled to.

12. Keeping in view the fact that it had an obligation under the license agreement, which is a contract within the meaning of the provisions of the Indian Contract Act, DOT was required to discharge its contractual liabilities, in absence of a time fixed within a reasonable period. What would constitute a reasonable time shall, however, depend on the factual matrix involved in each case. The reasonableness of the time, which the Respondent should take, would be governed by a circular letter issued by the Respondent itself on or about 29.10.2010 which has been noticed by this Tribunal in *Siestema Shyam Teleservices Ltd. (supra)*, paragraph 11 whereof reads, thus:-

“11. TERM Cell shall make comprehensive list and recommend the case for issue of Service Test Certificate for particular license area, after TERM Cell has tested, passed and issued requisite number of Service Test results. Service Test Certificate for roll out obligation shall be issued by Security Wing DoT after getting recommendation of TERM Cell. A copy of which will be sent to licensing Wing. DDG (TERM) cell shall send the draft Service Test Certificate to Security Wing along with other details.”

13. Ordinarily, the DOT is bound to raise any objection, if any, to the certificate granted by the TERM cell within a reasonable time. It is difficult to comprehend that why in certain cases, as indicated heretofore, it could not complete its verification as regards fulfillment of the roll out obligation process by the Petitioner for a period of more than two years or three years.

If, the Respondent is not in a position to perform its own obligation within a reasonable time, the Petitioner cannot suffer therefor.

14. Clause 21.2 is couched in mandatory term. It is not in dispute that keeping a bank guarantee alive for years after years, the operators have to incur certain expenditures. It is, thus, to meet civil consequences.

In that view of the matter, this Tribunal is of the opinion that the Respondent cannot take advantage of its own wrong.

15. Mr. Kohli would contend that the correctness or otherwise of the said certificates granted by the TERM cell require some sort of adjudication. We do not think so.

16. The Respondent, in the opinion of this Tribunal is bound to reduce and/or return the bank guarantees, particularly in view of the

fact that the benefit thereof would accrue to the licensees from the date of its registration.

17. Failure on the part of a contracting party to discharge its obligation within a time frame and/or within a reasonable time, in the opinion of this Tribunal should be sufficient to issue a direction upon the Respondent herein to release the performance bank guarantees.

18. In the event, however, the Respondent in future finds that any further sum is payable by the Petitioner, it can realize its dues from the financial bank guarantees and/or other assets of the Petitioner.

19. These petitions are, therefore, allowed. The Respondent is hereby directed to return the PBGs, in respect of the aforementioned circles. No order as to costs.

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(S.B. Sinha)
Chairperson

HKC/